



## **DEPARTMENT OF STATE**

### **22 CFR Part 41**

**[Public Notice: 10930]**

**RIN: 1400-AE96**

#### **Visas: Temporary Visitors for Business or Pleasure**

**AGENCY:** Department of State

**ACTION:** Final rule.

**SUMMARY:** The Department of State, Bureau of Consular Affairs (“Department”), is amending its regulation governing the issuance of visas in the “B” nonimmigrant classification for temporary visitors for pleasure. This rule establishes that travel to the United States with the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States is an impermissible basis for the issuance of a B nonimmigrant visa. Consequently, a consular officer shall deny a B nonimmigrant visa to an alien who he or she has reason to believe intends to travel for this primary purpose. The Department does not believe that visiting the United States for the primary purpose of obtaining U.S. citizenship for a child, by giving birth in the United States – an activity commonly referred to as “birth tourism” – is a legitimate activity for pleasure or of a recreational nature, for purposes of consular officers adjudicating applications for B nonimmigrant visas. The final rule addresses concerns about the attendant risks of this activity to national security and law enforcement, including criminal activity associated with the birth tourism industry, as reflected in federal prosecutions of individuals and entities involved in that industry. The final rule also codifies a requirement that B nonimmigrant visa applicants who seek medical treatment in the United States must demonstrate, to the

satisfaction of the consular officer, their arrangements for such treatment and establish their ability to pay all costs associated with such treatment. The rule establishes a rebuttable presumption that a B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is traveling for the primary purpose of obtaining U.S. citizenship for the child.

**DATES:** This rule is effective on [insert date of publication in *Federal Register*].

**FOR FURTHER INFORMATION CONTACT:** Megan Herndon, Deputy Director for Legal Affairs, Office of Visa Services, Bureau of Consular Affairs, Department of State, 600 19th St. NW, Washington, DC 20006, (202) 485-7586.

**SUPPLEMENTARY INFORMATION:**

***I. What changes to 22 CFR 41.31 does this rule make?***

This rule makes certain changes to the Department's regulation on B nonimmigrant visas, but does not change Department of Homeland Security regulations regarding the admissibility of aliens, including Visa Waiver Program travelers, or otherwise modify the standards enforced by officials of the Department of Homeland Security. The Department is revising the definition of "pleasure" and subdividing 22 CFR 41.31(b)(2) into three paragraph levels. The Department is retaining its existing, and longstanding, general rule that pleasure, as referred to in Immigration and Nationality Act (INA) section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B), for purposes of visa issuance, refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or services nature. The Department is also adding a provision that provides, for purposes of visa issuance, that the term pleasure, as used in INA 101(a)(15)(B), 8 U.S.C.

1101(a)(15)(B), does not include travel for the primary purpose of obtaining United States citizenship for a child by giving birth in the United States. The Department is renumbering this provision as paragraph (i).

The Department is adding a provision that provides that a nonimmigrant B visa applicant seeking medical treatment in the United States shall be denied a visa under INA section 214(b), 8 U.S.C. 1184, if unable to establish, to the satisfaction of a consular officer, a legitimate reason why he or she wishes to travel to the United States for medical treatment, and that a medical practitioner or facility in the United States has agreed to provide treatment. Additionally, the applicant must provide the projected duration and cost of treatment and any incidental expenses. The applicant must also establish to the satisfaction of the consular officer that he or she has the means and intent to pay for the medical treatment and all incidental expenses, including transportation and living expenses, either independently or with the pre-arranged assistance of others. If an applicant's responses to this line of questions are not credible, that may give consular officers reason to question whether the applicant qualifies for a visa in the B nonimmigrant classification, and could lead to additional questions as to whether the applicant intends to timely depart the United States, or intends to engage in other impermissible activity. The Department is renumbering this provision as paragraph (ii).

The Department is adding a new paragraph (iii), which establishes a rebuttable presumption that any B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is traveling for the primary purpose of obtaining U.S. citizenship for a child.

***II. Why is the Department promulgating this rule?***

Section 101(a)(15)(B) of the INA, 8 U.S.C. 1101(a)(15)(B), is ambiguous as to the scope of activities covered by the phrase “visiting the United States...temporarily for pleasure.” Birth tourism is not explicitly mentioned in INA 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B). The Department is aware that many foreign nationals have sought B nonimmigrant visas for the purpose of obtaining U.S. citizenship for a child by giving birth in the United States. The Department has concluded that a more reasonable interpretation of the statutory provision and a better policy is that the statutory provision authorizing the issuance of visas to temporary visitors for pleasure does not extend to individuals whose primary purpose of travel is to obtain U.S. citizenship for a child by giving birth in the United States. The Department considers birth tourism an inappropriate basis for the issuance of temporary visitor visas for the policy reasons discussed herein.

As discussed below, this rule reflects a better policy, as birth tourism poses risks to national security. The birth tourism industry is also rife with criminal activity, including international criminal schemes, as reflected in federal prosecutions of individuals and entities involved in that industry.

The Department recognizes that some aliens may wish to rely on U.S. medical facilities for birth because of specialized medical needs that can be met in the United States. Thus, given the Department’s longstanding practice of considering receipt of medical treatment as legitimate activity for purposes of B nonimmigrant visa issuance, this rule seeks to balance the United States’ strong interest in curtailing birth tourism with its interests in facilitating legitimate medical travel and other legitimate travel on a B nonimmigrant visa. In order to clarify when visa issuance for the purpose of travel to the

United States for medical treatment while pregnant (and likely to give birth) might be acceptable, the Department is codifying in regulation the standards regarding B nonimmigrant visa issuance for travel for medical treatment. Nothing in this rule purports to affect the acquisition of U.S. citizenship by individuals born in the United States, under the Fourteenth Amendment to the U.S. Constitution or INA 301, 8 U.S.C. 1401.

#### **A. Primary Purpose**

This rule, which explicitly establishes that birth tourism is not a permissible purpose for issuance of a B visa, also reflects – for the first time in regulation – a longstanding Department doctrine of visa adjudication – namely, the primary purpose test. Under the primary purpose test, a consular officer must consider a visa applicant’s primary (or principal) purpose of travel to evaluate the applicant’s eligibility for the requested visa classification. All of a visa applicant’s intended activities in the United States are considered in determining the applicant’s eligibility for a visa under standards set out in INA 212 and 214(b), 8 U.S.C. 1182 and 1184, and other applicable visa eligibility standards. The Department’s FAM guidance to consular officers on this point – that an “alien desiring to come to the United States for one principal, and one or more incidental, purposes should be classified in accordance with the principal purpose” – has remained unchanged for well over 30 years. Compare 9 FAM 41.11 N3.1 (August 30, 1987) with current 9 FAM 402.1-3 (last revised May 21, 2018).<sup>1</sup> For B nonimmigrant

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<sup>1</sup> The Board of Immigration Appeals has also long evaluated an alien’s primary purpose in various contexts. *See, e.g., Matter of Hoefl*, 12 I&N Dec. 182 (BIA 1967) (alien whose primary purpose of entry was to engage in full-time employment and did not have a labor certification ineligible for Adjustment of Status); *Matter of M-*, 3 I&N Dec. 218 (BIA 1948) (alien not subject to Excludability under section 3 of

visa applicants, the primary purpose of travel must be for permissible B-1 or B-2 activity for business or pleasure. Under the primary purpose test, in the context of a B-1/B-2 visa application, a consular officer may not issue a visa to an applicant who: 1) primarily intends to engage in activity properly classified in another nonimmigrant visa classification; or 2) primarily intends to engage in any other activity not permissible in the B nonimmigrant visa classification. In addition, no visa may be issued to an alien who intends to engage in any unlawful activity. An alien's "primary purpose" of travel would be determined by the consular officer based on what the consular officer concludes is the alien's principal objective for traveling to the United States, following careful consideration of information submitted by the applicant and the consular officer's evaluation of the credibility of the applicant.

For example, consider a minor applying for a B nonimmigrant visa to accompany his legal guardian, but not parent, in the United States on another nonimmigrant visa classification (e.g., H-1B). The minor would not qualify for a derivative visa (e.g., H-4), because he is not a child of the guardian. In that case, the minor's primary purpose of travel would be to accompany his guardian, which is permissible activity in the B visa classification. The Department's FAM guidance has long acknowledged a tension that arises with minors who are legally required under state or local law in the United States to attend school while residing, even if temporarily, in the United States, but whose primary purpose of travel is to accompany an adult to whose household they belong. The

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the Immigration Act of 1917, entry for immoral purpose, where her primary purpose of travel was to visit fiancée); *Matter of Healy and Goodchild*, 17 I. & N. Dec. 22, 26 (BIA 1979) (holding that an alien bound for the United States for the primary purpose of study is not admissible as a nonimmigrant visitor for pleasure).

Department's FAM guidance has long provided that "when a family member's primary purpose to come to the United States is to accompany the principal, the classification of the accompanying [minor] family member is either of a derivative of the principal, if the classification provides, or as a B-2, if not."

The burden is on the visa applicant to establish that he or she is entitled to nonimmigrant status under INA 101(a)(15) of the INA, 8 U.S.C. 1101(a)(15), based on his or her primary purpose of travel, to the satisfaction of the consular officer. See INA section 214(b), 291, 8 U.S.C. 1184(b), 1361.

#### **B. National Security and Law Enforcement Concerns with Birth Tourism**

The Department estimates that thousands of children are born in the United States to B-1/B-2 nonimmigrants annually. While the Department recognizes that precisely estimating the number of individuals who give birth in the United States, after traveling to the United States on a B1/B2 nonimmigrant visa, is challenging, reporting from U.S. embassies and consulates has documented trends showing an increasing number of B visa applicants whose stated primary purpose of travel is to give birth in the United States. Permitting short-term visitors with no demonstrable ties to the United States to obtain visas to travel to the United States primarily to obtain U.S. citizenship for a child creates a potential long-term vulnerability for national security. Foreign governments or entities, including entities of concern to the United States, may seek to benefit from birth tourism for purposes that would threaten the security of the United States. This rule would help close a potential vulnerability to national security that would be posed by any foreign government or entity that sought to exploit birth tourism to enhance access to the United States.

The Fourteenth Amendment to the U.S. Constitution provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Section 301(a) of the INA, 8 U.S.C. 1401(a) states that “a person born in the United States, and subject to the jurisdiction thereof” shall be a national and citizen of the United States at birth. The INA provides a clear method for those who do not acquire U.S. citizenship at birth to acquire it later: naturalization.

This is a stark difference between aliens using a temporary visitor visa for the purpose of obtaining U.S. citizenship for their children and the extensive requirements applicants must meet to naturalize to become U.S. citizens. To naturalize, an alien must establish attachment to the principles of the Constitution of the United States and favorable disposition toward the “good order and happiness” of the United States, including a depth of conviction that would lead to active support of the Constitution, and not be hostile to the basic form of government of the United States, or disbelieve in the principles of the Constitution. *See* 8 U.S.C. 1427(a); 8 CFR 316.11(a). Adult citizens are entitled to numerous rights and benefits of citizenship, including the right to vote in federal elections, the ability to run for public office, the ability to serve on a jury, and the option to petition immediate family members to immigrate to the United States when they reach the age of twenty-one. Citizens have a right to enter the United States even without a U.S. passport. *See Worthy v. United States*, 328 F. 2d 386, 394 (5th Cir. 1964). The previous regulation failed to address the national security vulnerability that could allow foreign governments or entities to recruit or groom U.S. citizens who were born as

the result of birth tourism and raised overseas, without attachment to the United States, in manners that threaten the security of the United States.

An entire “birth tourism” industry has evolved to assist pregnant women from other countries to come to the United States to obtain U.S. citizenship for their children by giving birth in the United States, and thereby entitle their children to the benefits of U.S. citizenship.<sup>2</sup> Birth tourism companies advertise their businesses abroad by promoting the citizenship-related benefits of giving birth in the United States. Companies tout a broad range of benefits for the U.S. citizen child and eventually its family, including, but not limited to, access to free education, less pollution, retirement benefits, the ability to compete for jobs in the U.S. government, and the ability for the whole family to eventually immigrate to the United States.<sup>3</sup>

By obtaining a child’s U.S. citizenship through birth tourism, foreign nationals are able to help that child avoid the scrutiny, standards, and procedures that he or she would normally undergo if he or she sought to become a U.S. citizen through naturalization. Under INA section 316, 8 U.S.C 1427, for example, such aliens generally are required to fulfill a residency requirement of at least five years, be a person of good moral character attached to the principles of the Constitution, and be well disposed to the “good order and happiness” of the United States. Additionally, they are required to take an Oath of Allegiance. *See* section 337(a) of the INA, 8 U.S.C. 1448(a). The steps for naturalization are rigorous and include national security-related inquiries, requiring

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<sup>2</sup> *United States v. Li*, 19-cr-00016 (S.D. Cal., filed Jan 30, 2019), *United States v. Liang*, 15-cr-00061 (C.D. Cal., filed May 18, 2015).

<sup>3</sup> *Id.*

applicants to meet stringent residency rules, complete multiple forms collecting detailed personal information, provide fingerprints, complete an in-person interview, and pass English and civics tests.

Foreign travelers have sought to gain the numerous benefits of U.S. citizenship for their children by obtaining visas to travel to the United States to give birth, while in some cases, passing along the costs to tax payers at the state and local level. Some of these benefits include ease of travel to countries that offer visa-free travel to U.S. citizens, the ability to study and work in the United States, and a legal path for the child's parents to immigrate to the United States once the child turns twenty-one. U.S. embassies and consulates have reported that visa applicants intending to give birth in the United States provide numerous reasons for their choice, including, but not limited to, obtaining a second citizenship for their child, the perceived low-cost medical services available to women in the United States, the lower cost of obtaining U.S. citizenship through birth tourism than through a U.S. investor visa, and the perceived guarantee of a better socioeconomic future for their child.

While this rule will not preclude visa issuance to all aliens who may give birth in the United States, it recognizes the risks posed by allowing the previous visa policy to continue; and addresses some of those national security threats that exist when aliens, who may have no ties to, or constructive interest in, the United States, easily are able to obtain U.S. citizenship for their children, through birth in the United States.

The birth tourism industry in the United States also is a source of fraud and other criminal activity, including international criminal schemes. A recent federal indictment of 19 individuals on immigration fraud charges shows that businesses in the lucrative

birth tourism industry committed “widespread immigration fraud and engaged in international money laundering,” as well as defrauding “property owners when leasing the apartments and houses used in their birth tourism schemes.”<sup>4</sup> According to the recent federal indictment, in exchange for their services, birth tourism operators charged as much as \$100,000 and one of the largest operators is alleged to have used “14 different bank accounts to receive more than \$3.4 million in international wire transfers” in a two year period alone.<sup>5</sup>

This rule explicitly establishes that birth tourism is not a permissible purpose of travel for issuance of a B visa. This rule will help eliminate the criminal activity associated with the birth tourism industry. The recent federal indictments describe birth tourism schemes in which foreign nationals applied for visitor visas to come to the United States and lied to consular officers about the duration of their trips, where they would stay, and their purpose of travel. According to the indictments that charge the operators of the birth tourism schemes, foreign women were coached on how to pass their U.S. visa interviews by lying on their visa application forms and providing false statements to consular officers. The applicants also provided false statements on their visa applications and in their interviews about the funds available to them to cover the costs of their proposed treatment and stay in the United States.<sup>6</sup> When foreign travelers lie about their true purpose of travel to the United States during their visa interviews, consular officers

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<sup>4</sup> <https://www.justice.gov/usao-cdca/pr/federal-prosecutors-unseal-indictments-naming-19-people-linked-chinese-birth-tourism>

<sup>5</sup> <https://www.justice.gov/usao-cdca/pr/federal-prosecutors-unseal-indictments-naming-19-people-linked-chinese-birth-tourism>

<sup>6</sup> *United States v. Li*, 19-cr-00016 (S.D. Cal., filed Jan 30, 2019). See also <https://www.justice.gov/usao-cdca/pr/chinese-national-pleads-guilty-running-birth-tourism-scheme-helped-aliens-give-birth-us>.

may not identify a true basis for visa ineligibility, including, for example, lack of intent or ability to pay for the costs of their stay. This rule, by limiting the circumstances in which an alien will be in a position to give birth in the United States on a “tourist” visa, will potentially decrease the number of birth tourism providers in the United States, thus discouraging aliens from applying for visas to travel to the United States for this purpose. By explicitly establishing that birth tourism is not a permissible purpose for issuance of a B visa, this rule will reduce the number of visa applicants who apply for B visas for the purpose of birth tourism.

This rule will help prevent operators in the birth tourism industry from profiting off treating U.S. citizenship as a commodity, sometimes through potentially criminal acts, as described above. The investigation into birth tourism operators in California uncovered a scheme where birth tourism operators enriched themselves “using cash, fabricated financial documents, and nominee names for the transfer of money”<sup>7</sup> from overseas to the United States. In some cases, birth tourism operators leased apartments by providing false information about the true occupants of the residences, making false statements about occupants’ monthly income, and furnishing altered bank statements in order to be approved for leases.<sup>8</sup> The federal indictments highlight accounts of birth tourism customers failing to pay all the costs of giving birth in the United States,

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<sup>7</sup> <https://www.justice.gov/usao-cdca/pr/federal-prosecutors-unseal-indictments-naming-19-people-linked-chinese-birth-tourism>.

<sup>8</sup> *United States v. USA Happy Baby Inc.*, 19-cr-00027 (C.D. Cal., filed January 20, 2019); *United States v. Li*, 19-cr-00016 (S.D. Cal., filed Jan 30, 2019).

including hospital, doctor, and other bills, which would then be referred to collection.<sup>9</sup> In one example, a couple “paid only \$4,600 of the \$32,291 in hospital charges related to the birth of their baby.”<sup>10</sup> In another example, a couple paid a hospital the indigent rate of \$4,080 for hospital bills that exceeded \$28,000, despite having more than \$225,000 in a U.S. bank account and making purchases at Rolex and Louis Vuitton stores during their time in the United States.<sup>11</sup> Meanwhile, birth tourism operators are earning millions of dollars through the scheme, evading taxes, money laundering, and engaging in fraud to enhance their profits.

### **C. Medical Treatment**

Under previous Department guidance and under this rule, medical treatment, whether medically necessary or elective, generally continues to be permissible activity in the B nonimmigrant classification, subject to certain restrictions.

Under guidance to consular officers in the Department’s Foreign Affairs Manual (FAM)<sup>12</sup> and this rule, an applicant who seeks a B nonimmigrant visa for medical treatment in the United States shall be denied a visa under INA section 214(b), 8 U.S.C. 1184(b), if unable to establish, to the satisfaction of a consular officer, a legitimate reason why he or she wishes to travel to the United States for medical treatment. Additionally, the applicant must satisfy the consular officer that a medical practitioner or facility in the

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<sup>9</sup> *United States v. Li*, 19-cr-00016 (S.D. Cal., filed Jan 30, 2019).

<sup>10</sup> <https://www.justice.gov/usao-cdca/pr/federal-prosecutors-unseal-indictments-naming-19-people-linked-chinese-birth-tourism>

<sup>11</sup> *United States v. Li*, 19-cr-00016 (S.D. Cal., filed Jan 30, 2019).

<sup>12</sup> See 9 FAM 402.2-4(A)(2).

United States has agreed to provide treatment. The applicant must also establish to the satisfaction of the consular officer that he or she has reasonably estimated the duration of the visit and has the means, derived from lawful sources, and intent to pay for the medical treatment and all incidental expenses. If an applicant's responses to this line of inquiry are not credible, that may give consular officers reason to question whether the applicant intends to timely depart the United States or intends to engage in other impermissible activity.

The two new sentences in § 41.31(b)(2)(ii) added by this rule track language about medical treatment and the B-2 nonimmigrant classification on the Department's public facing website. *See* <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html>.<sup>13</sup> The identified information often helps inform a consular officer's determination whether the applicant qualifies for a B visa, including whether the applicant overcomes the presumption in INA 214(b), 8 U.S.C. 1184(b), that he or she is an intending immigrant, and whether the applicant is "entitled to a nonimmigrant status under section 101(a)(15)." INA 214(b), 8 U.S.C. 1184(b).

The Department is adding this provision to § 41.31(b) now because application of these factors will have a direct bearing on implementation of this new policy that a primary purpose of obtaining United States citizenship for a child by giving birth in the United States (as opposed to travel for the primary purpose of obtaining medical treatment for reasons related to childbirth for maternal or infant health) is an impermissible basis for B visa issuance. For a B nonimmigrant visa applicant who seeks

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<sup>13</sup> *Id.*

to travel to the United States to give birth, consular officers will evaluate whether the applicant has credibly articulated a permissible purpose of travel on a B visa, or whether the applicant's primary purpose of travel is birth tourism, *i.e.*, to obtain U.S. citizenship for the child.

The Department believes including the new provisions in § 41.31 clarify the requirements for all B nonimmigrant applicants who seek medical treatment in the United States, by including the factors that a consular officer will weigh when determining whether the applicant qualifies for a B nonimmigrant visa. These regulatory refinements should be particularly helpful for applicants who are likely to give birth in the United States, to help them determine whether they are eligible to apply for a B nonimmigrant visa.

#### **D. Presumption of Intent**

Under this rule, if a consular officer has reason to believe a B nonimmigrant visa applicant will give birth in the United States, the applicant is presumed to be seeking a visa for the primary purpose of obtaining U.S. citizenship for the child. To rebut this presumption, the visa applicant must establish, to the satisfaction of a consular officer, a legitimate primary purpose other than obtaining U.S. citizenship for a child by giving birth in the United States. The fact that an applicant has arranged an elective medical birth plan (as opposed to a birth requiring specialized medical treatment) in the United States is not, by itself, sufficient to establish that the primary purpose is not obtaining U.S. citizenship for the child. Take, for example, a visa applicant who identified several potential options in multiple countries that would satisfy her medical birth plan. If that visa applicant arranged a birth plan in the United States, instead of in another country,

because the child would acquire U.S. citizenship, the presumption would likely not be rebutted, especially if she had ties to a geographically closer country that would meet her needs. But, for another example, consider an otherwise qualified B nonimmigrant visa applicant from a part of Mexico lacking appropriate medical facilities who arranged a birth plan in the United States based on proximity to her residence in Mexico. In that case, the presumption could be rebutted. A visa applicant who identified a birth plan in the United States based on specialized medical care for a complicated pregnancy could also potentially rebut the presumption. Medical care is not the only way the presumption can be rebutted. For example, if a consular officer determined an individual's primary purpose for travel to the United States is to visit her dying mother, and that during the visit she may give birth in the United States because her due date overlapped with her mother's last expected months of life, she could rebut the presumption. For another example, if a B nonimmigrant visa applicant satisfied the consular officer that her child would acquire U.S. citizenship if born outside the United States under section 301(g) of the INA, 8 U.S.C. 1401(g), based on the visa applicant's husband's U.S. citizenship and prior physical presence in the United States, the visa applicant would rebut the presumption that her primary purpose was to obtain U.S. citizenship for the child.

### **III. Regulatory Findings**

#### **A. Administrative Procedure Act**

This rule is exempt from notice and comment under the foreign affairs exemption of the Administrative Procedure Act (APA), 5 U.S.C. 553(a).

Opening this pronouncement of foreign policy to public comment, including comment from foreign government entities themselves, and requiring the Department to

respond publicly to pointed questions regarding foreign policy decisions would have definitely undesirable international consequences. *See Yassini v. Crosland*, 618 F.2d 1356, n.4 (9th Cir. 1980). The Department recognizes specifically that foreign governments or parts thereof may have interests in this rule as a matter of their foreign policy goals. The Department has concerns that birth tourism, and the birth tourism industry, pose a significant vulnerability for the security of the United States. Various public sources have identified specific countries that are the primary sources of birth tourists, some of which countries have very sensitive relationships with the United States. Some governments may support their citizens' desire to use U.S. temporary visitor visas as a mechanism to obtain U.S. citizenship for their children. Foreign governments or entities, including entities of concern to the United States, may seek to benefit directly or indirectly from birth tourism, including for purposes that would threaten the security of the United States. As a DOJ representative stated during hearings on the Administrative Procedure Act, “[a] requirement of public participation in . . . promulgation of rules to govern our relationships with other nations . . . would encourage public demonstrations by extremist factions which might embarrass foreign officials and seriously prejudice our conduct of foreign affairs.” *Administrative Procedure Act: Hearings on S.1663 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 88th Cong. at 363 (1964).

Recognizing that certain countries have been publicly identified as being principal sources of foreign nationals pursuing birth tourism, and certain of those countries raise particular national security concerns, this rule clearly and directly impacts foreign affairs functions of the United States and “implicat[es] matters of diplomacy directly.” *City of*

*N.Y. v. Permanent Mission of India to the U.N.*, 618 F.3d 172, 202 (2d Cir. 2010). This regulatory change reflects changes to U.S. foreign policy, specifically in the context of U.S. visas, that significantly narrow the ability of foreign nationals residing abroad to easily obtain U.S. citizenship for their children without complying with any of the rigorous requirements for permanent residence or naturalization. Publicly identifying birth tourism as a threat to the security of the United States, in a context where specific countries have been identified as the primary source of birth tourists, inherently affects U.S. bilateral relations with those countries, and signals a significant shift in U.S. policy towards those foreign governments and their populations. This modification of U.S. visa policy may also lead to reciprocal actions on the part of foreign governments, including some countries in which there are a significant number of U.S. citizens residing.

B. Regulatory Flexibility Act / Executive Order 13272 (Small Business)

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory Flexibility Act (5 U.S.C. 603 and 604).

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by

the private sector. This rule governs B nonimmigrant visa classification and does not mandate any direct expenditure by State, local, or tribal governments.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804(2), for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996.

E. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

The Office of Information and Regulatory Affairs (OIRA) has determined that this rule is significant under Executive Order 12866, though not economically significant. Thus, it has been reviewed by OIRA. Executive Orders 12866 and 13563 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). The Department has reviewed this rule to ensure consistency with those requirements.

The Department has also considered this rule in light of Executive Order 13563 and affirms that this regulation is consistent with the guidance therein.

In crafting this rule, the Department considered alternate ways to address the national security concerns associated with birth tourism. The Department seeks to balance the United States' strong interest in curtailing birth tourism, based on national

security and law enforcement concerns, with its commitment to facilitating legitimate medical travel and other legitimate bases for issuing B nonimmigrant visas.

The Department recognizes this rule may result in indirect costs to state and local entities and the private sector associated with loss of business from foreign national customers who seek to travel to the United States for the primary purpose of obtaining United States citizenship for a child by giving birth in the United States.

As detailed above, the rule aims to end a threat to national security and to mitigate criminal activity associated with the birth tourism industry. Birth tourism companies highlight the benefits of eligibility and priority for jobs in U.S. government, public companies and large corporations.

This rule represents the most narrowly tailored regulation to mitigate the threat. The Department considered whether *all* B-1/B-2 visa applicants, and applicants for visas in other nonimmigrant classifications, might be denied, in accordance with the INA, in any case where a consular officer reasonably expects the applicant will give birth in the United States to a child who would become a U.S. citizen solely because of the place of birth. The Department decided not to adopt such an interpretation, instead limiting this policy to B-1/B-2 nonimmigrant visa applicants and limiting it to applicants who have a primary purpose of obtaining U.S. citizenship for a child expected to be born in the United States. Notably, the B visa classification constitutes the vast majority of nonimmigrant visa applications and the one that is typically used for birth tourism.

With the understanding that some foreign nationals have historically applied for and obtained B nonimmigrant visas for the primary purpose of giving birth in the United

States to obtain U.S. citizenship for the child, the Department crafted this rule narrowly to address core national security-related concerns.

F. Executive Orders 12372 and 13132 (Federalism)

The objective of E.O 13132 is to guarantee the Constitution's division of governmental responsibilities between the federal government and the states. It furthers the policies of the Unfunded Mandates Reform Act. This rule does not have federalism implications within the meaning of E.O. 13132, because it does not impose any substantial direct compliance costs on State, local, or tribal governments or preempt State, local, or tribal law. Furthermore, this rule does not involve grants, other forms of financial assistance, and direct development that implicate concerns under E.O. 12372.

G. Executive Order 12988 (Civil Justice Reform)

The Department has reviewed the regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

H. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

The Department has determined that this rulemaking will not have a substantial direct effect on one or more Indian tribes, will not impose substantial direct compliance costs on Indian tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, and will not pre-empt tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

I. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017), because it is expected to be *de minimis* under EO 13771.

J. Paperwork Reduction Act

This rule does not impose any new information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35. The Online Nonimmigrant Visa Application, DS-160, already allows visa applicants to identify medical treatment as a subset of B visa travel purpose. Consular officers would evaluate the application using existing forms and would not need new approved information collections.

**List of Subjects in 22 CFR Part 41**

Administrative practice and procedure, Foreign Relations, Visas, Aliens, Foreign official, Employment, Students, Cultural Exchange Programs.

**Text of the Rule**

Accordingly, for the reasons stated in the preamble, the Department is amending 22 CFR Part 41 as follows:

**PART 41—VISAS: DOCUMENTATION OF IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED**

1. The authority citation for Part 41 is revised to read as follows:

Authority: 8 U.S.C. 1101; 1102; 1104; 1182; 1184; 1185 note (section 7209 of Pub. L. 108-458, as amended by section 546 of Pub. L. 109-295); 1323; 1361; 2651a.

2. In § 41.31, revise paragraph (b)(2) to read as follows:

**§ 41.31 Temporary visitors for business or pleasure.**

(b)\*\*\*

(2)(i)The term pleasure, as used in INA 101(a)(15)(B) for the purpose of visa issuance, refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature, and does not include obtaining a visa for the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States.

(ii) Any visa applicant who seeks medical treatment in the United States under this provision shall be denied a visa under INA section 214(b) if unable to establish, to the satisfaction of a consular officer, a legitimate reason why he or she wishes to travel to the United States for medical treatment, that a medical practitioner or facility in the United States has agreed to provide treatment, and that the applicant has reasonably estimated the duration of the visit and all associated costs. The applicant also shall be denied a visa under INA section 214(b) if unable to establish to the satisfaction of the consular officer that he or she has the means derived from lawful sources and intent to pay for the medical treatment and all incidental expenses, including transportation and living expenses, either independently or with the pre-arranged assistance of others.

(iii) Any B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is presumed to be traveling for the primary purpose of obtaining U.S. citizenship for the child. \* \* \*

\* \*

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