

DEPARTMENT OF STATE**22 CFR Parts 40, 41, and 42****[Public Notice 3921]****Visas: Documentation of Nonimmigrants and Immigrants Under the Immigration and Nationality Act, As Amended: Fingerprinting; Access to Criminal History Records; Conditions for Use of Criminal History Records****ACTION:** Interim rule, with request for comments.

SUMMARY: Recent legislation, commonly known as the USA Patriot Act, requires the Federal Bureau of Investigation (FBI) to give the Department access to certain of its criminal history record and other databases, conditioned in certain instances upon the Department providing an applicant's fingerprints to the FBI. This rule amends the Department's regulations pertaining to the fingerprinting of nonimmigrants and immigrants. It also establishes new regulations that set forth the conditions for the use, protection, dissemination and destruction of any criminal history or other records provided to the Department by the FBI.

DATES: Effective date: This interim final rule is effective on February 25, 2002.

Comment date: Written comments must be submitted on or before April 26, 2002.

ADDRESSES: Submit comments in duplicate to the Chief, Legislation and Regulations Division, Visa Services, Department of State, 20520-0106. Comments may also be forwarded via e-mail at VisaRegs@state.gov or faxed at (202) 663-3898.

FOR FURTHER INFORMATION CONTACT: Nancy Altman, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20520-0106, (202) 261-8040.

SUPPLEMENTARY INFORMATION:**What Is the Authority for This Rule?**

On October 26, 2001, the President signed into law the "Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (USA Patriot Act), Pub. L. 107-56. [Section 403 of the USA Patriot Act, in relevant part, amended section 105 of the INA by inserting "(a)" after "Sec. 105 " and by adding the language of section 403 as subpart "(b)" in that section.]

Section 403 of the USA Patriot Act requires the FBI to provide the Department access to certain criminal history record and other databases contained in the National Crime

Information Center (NCIC) as mutually agreed upon by the Attorney General and the Department. The purpose of this provision is to give the Department access to an applicant's criminal history or other record indexed in a specified NCIC database and to place conditions on the Department's use of database information it receives from the FBI.

How Will the Department Access NCIC Criminal History Records?

Access to NCIC databases is to be provided by means of criminal history record extracts for placement in the Department's automated Lookout database. All visa applicants and applicants for admission to the United States will be subject to name-check queries against the extract information for the purpose of determining whether an applicant may have a criminal history or other record. The extracts of the records are to be provided without charge and are to be updated at intervals mutually agreed upon by the FBI and the Department. At the time of receipt of an updated criminal history extract, the Department will destroy previously provided extracts contained in its database. Access to an extract does not entitle the Department to obtain an applicant's corresponding automated full content criminal history record. The full content of a criminal history record can only be obtained by submitting the applicant's fingerprints to the FBI with the appropriate processing fee.

Which Applicants Must Be Fingerprinted?

When extract information indicates that an applicant may have a criminal history record indexed in an NCIC database, the Department will require the applicant to submit fingerprints and pay the specified fee fingerprint processing fee. The Department will forward the fingerprints and the fee to the FBI for the purpose of confirming whether or not the criminal history or other record in the NCIC database belongs to the applicant. If an applicant's fingerprints confirm an NCIC criminal history record, the FBI will forward the automated full content criminal history record to the Department.

Are Limitations Placed On the Department's Use of NCIC Criminal History Records?

NCIC criminal history record information (which includes the extract data associated with such information) received by the Department is considered law enforcement sensitive and is subject to conditions for its use and procedures for its destruction.

Section 403 requires the Department:

- To limit the re-dissemination of criminal history records received from the FBI;
- To use any criminal history information it receives solely to determine whether or not to issue a visa to an alien or to admit the alien to the United States;
- To ensure the security, confidentiality, and destruction of such information; and
- To protect any privacy rights of individuals who have NCIC criminal history records.

Because NCIC-III and other FBI criminal history records received by the Department are law enforcement sensitive, only authorized consular personnel with visa processing responsibilities may have access to an applicant's criminal history record. To protect applicants' privacy, the Department must secure all NCIC criminal history or other records, automated or otherwise, to prevent access by unauthorized persons. Unless otherwise mutually agreed upon by the Attorney General and the Secretary of State, NCIC-III and other FBI criminal history records may be used solely to determine whether or not to issue a visa to an alien or to admit an alien to the United States. At the time the Department receives updated NCIC criminal history extracts from the FBI, the Department will delete the outdated NCIC criminal history extracts from its database/s.

How Is the Department Amending Its Regulations?

The Department is amending its regulations by adding a new section at 22 CFR 40.5 "Limitations on the use of NCIC criminal history record information." The new section establishes the conditions for the use of applicants' criminal history record information by the Department.

The Department is also amending its regulations at section 22 CFR 41.105(b) by adding a new paragraph (2) "NCIC name check response." Paragraph (2) of subsection (b) states the requirement for the fingerprinting of any nonimmigrant applicant whose name check response indicates the possibility of a criminal history record indexed in the NCIC databases.

The Department is further amending its regulations at section 22 CFR 42.67(c) "Fingerprinting" by adding a new paragraph (2) "NCIC name check response." Paragraph (2) of subsection (c) states the requirement for fingerprinting any immigrant applicant

whose name check response indicates the possibility of a criminal history record indexed in the NCIC databases.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department's implementation of this regulation as an interim rule is based upon the "good cause" exceptions found at 5 U.S.C. 553(b)(B) and (d)(3). The USA Patriot Act, signed into law on October 26, 2001, requires that final regulations be promulgated prior to the Department's receipt of NCIC data but no later than four months after the date of enactment. The Department has determined there to be insufficient time to issue a proposed rule with a request for comments.

Regulatory Flexibility Act

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

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 year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

The Department does not consider this rule to be a "significant regulatory action" under Executive Order 12866, section (3)(f), Regulatory planning and Review. Therefore, in accordance with the letter to the Department of State of February 4, 1994, from the Director of the Office of Management and Budget,

it does not require review by the Office of Management and Budget.

Executive Order 13132

This 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, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements.

List of Subjects

22 CFR Part 40

Aliens, Nonimmigrants and Immigrants, Passports and visas.

22 CFR Part 41

Aliens, Nonimmigrants, Passports and visas.

22 CFR Part 42

Aliens, Immigrants, Passports and visas.

Accordingly, the Department amends 22 CFR Parts 40, 41, and 42 to read as follows:

PART 40—[AMENDED]

1. The authority citation for Part 40 shall continue to read:

Authority: 8 U.S.C. 1104.

2. Amend Part 40 by adding a new § 40.5 to read as follows:

§ 40.5 Limitations on the use of National Crime Information Center (NCIC) criminal history information.

(a) *Authorized access.* The FBI's National Crime Information Center (NCIC) criminal history records are law enforcement sensitive and can only be accessed by authorized consular personnel with visa processing responsibilities.

(b) *Use of information.* NCIC criminal history record information shall be used solely to determine whether or not to issue a visa to an alien or to admit an alien to the United States. All third party requests for access to NCIC criminal history record information shall be referred to the FBI.

(c) *Confidentiality and protection of records.* To protect applicants' privacy,

authorized Department personnel must secure all NCIC criminal history records, automated or otherwise, to prevent access by unauthorized persons. Such criminal history records must be destroyed, deleted or overwritten upon receipt of updated versions.

PART 41—[AMENDED]

3. The authority citation for Part 41 shall continue to read as follows:

Authority: 8 U.S.C. 1104; Pub. L. 105-277, 112 Stat. 2681 *et seq.*

4. Amend § 41.105 by redesignating paragraph (b) as (b)(1) and adding a new paragraph (b)(2) to read as follows:

§ 41.105 Supporting documents and fingerprinting.

* * * * *

(b) * * *

(2) *NCIC name check response.* When an automated database name check query indicates that a nonimmigrant applicant may have a criminal history record indexed in an NCIC database, the applicant shall be required to have a set of fingerprints taken in order for the Department to obtain such record. The applicant must pay the fingerprint-processing fee as indicated in the schedule of fees found at 22 CFR part 22.1.

PART 42—[AMENDED]

5. The authority citation for Part 42 shall continue to read:

Authority: 8 U.S.C. 1104

6. Amend § 42.67 by redesignating paragraph (c) as (c)(1) and adding a new paragraph (c)(2) to read as follows:

§ 42.67 Execution of application, registration, and fingerprinting.

* * * * *

(c) * * *

(2) *NCIC name check response.* When an automated database name check query indicates that an immigrant applicant may have a criminal history record indexed in an NCIC database, the applicant shall be required to have a set of fingerprints taken in order for the Department to obtain such record. The applicant must pay the fingerprint processing fee as indicated in the schedule of fees found at 22 CFR 22.1.

Dated: February 15, 2002.

Mary A. Ryan,

Assistant Secretary for Consular Affairs, U.S. Department of State.

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