

**Before the
OFFICE OF THE SECRETARY
DEPARTMENT OF HOMELAND SECURITY
Arlington, VA 22209**

United States Visitor and Immigrant
Status Indicator Technology Program
("US-VISIT");
Enrollment of Additional Aliens in US-VISIT

DHS 2005-0037

**COMMENTS OF
THE IDENTITY PROJECT (IDP)**

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 71 Federal Register 42605-42611 (July 27, 2006), docket number DHS 2005-0037.

The NPRM would require, as a condition of admission to or departure from the U.S., that certain categories of “aliens” (persons who are not U.S. citizens) including lawful permanent residents (LPR’s) of the U.S., refugees, asylum seekers, many Canadian visitors to the U.S., and some others, submit to fingerprinting and photographing each time they cross a U.S. border or enter, exit, or transit the U.S. – even if they do so twice daily throughout their working life, as many do.

The proposed rules would require these aliens to submit to lifetime retention by the DHS – even if they later become U.S. citizens – and sharing with other agencies, of these fingerprints and photographs, as well as the details of each entry, exit, or transit, as part of their dossier in a “biographic and biometric travel history database”.

The proposed rules would be inconsistent with the obligations of the United States embodied in the International Covenant on Civil and Political Rights. The proposed rules are unjustified, devoid of utility for any lawful purpose, unauthorized by statute, and contrary to the Privacy Act. The NPRM fails to include specific assessments required by the Privacy Act and the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety. If the NPRM is not withdrawn, we request that the NPRM be republished together with the additional assessments required by the Privacy Act and the Regulatory Flexibility Act, and that a new comment period be provided.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization dedicated to protecting and promoting First Amendment rights.

II. THE PROPOSED RULES ARE INCONSISTENT WITH THE U.S. OBLIGATIONS EMBODIED IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

Under Article VI, Section 2 of the U.S. Constitution, “treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land.”

One of these treaties is the International Covenant on Civil and Political Rights (ICCPR), <http://www.unhcr.ch/html/menu3/b/a_ccpr.htm>, which was ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782).

The ICCPR obligates the U.S. with respect to aliens as well as citizens, and contains provisions implicated by – and inconsistent with – the proposed rules. The proposed rules are inconsistent with Article 10 (respect for the inherent dignity of the human person), Article 12 (freedom of movement), and Article 21 (freedom of assembly) of the ICCPR, and must therefore be withdrawn.

A. The proposed rules would be inconsistent with the U.S. obligation to respect the inherent dignity of the human person under Article 10 of the ICCPR.

Article 10, Paragraph 1, of the ICCPR provides that, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

Once a person presents themselves at a port of entry or exit, they are not free to leave. Thus, during border crossing, entry, and exit inspections and processing, international travelers are “persons deprived of their liberty” within the meaning of, and subject to the protections of, this article of the ICCPR.

Unnecessary fingerprinting and photographing, especially when repeated without limitation and done in full view of others (including those who, as U.S. citizens, are not being subjected to the same requirement), is treatment inconsistent with “humanity and with respect for the inherent dignity of the human person”, as those terms are used in this article of the ICCPR.

Fingerprinting and photographing are widely-recognized international stigma of criminalization of the person. On stigmatization in general, see Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, 1963); on its specific relationship to criminal identity and the degrading character of the "booking" process including photographing and fingerprinting, see John Irwin, *The Felon*

(Prentice-Hall, 1970; Univ. of California Press 1987) and *Jail: Managing the Underclass in American Society* (Univ. of California Press, 1985).

Depiction of the acts of fingerprinting (traditionally with its literal dirtying and marking of the person with ink, and in symbolic meaning the same even when the fingerprinting is inkless) and photographing (again traditionally with its flash of light revealing and calling attention to the stigma, and again carrying the same symbolism even when the photograph is taken by ambient light) is sufficient, without words or the need for any language, to communicate that the subject is marked as criminal. In art, cartoons, graffiti, political propaganda, and elsewhere, the mere existence of images of a person in “mug shot” or “Wanted!” poster format effectively communicates the cross-cultural messages, “They are a criminal”, “They are a suspect”, and “They deserve to be locked up”.

This is the message effectively delivered by the DHS when it separates people into two groups, one of which – aliens – is systematically photographed and fingerprinted in the manner of criminals, while the other – U.S. citizens – is allowed to proceed, literally, untouched. This treatment is degrading and disrespectful to the inherent dignity of the person, and is perceived as such, both by those so stigmatized and by U.S. citizens. See e.g. Mark Morford, “Scenes From A Sad Airport: Welcome to America. Please give us the finger. Smile for the camera. Now get the hell out”, *SF Gate*, January 9, 2004, <<http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/01/09/notes010904.DTL>>: “Bring us your tired, your poor, your huddled masses yearning to have their spirits snapped like chicken bones and to be made to feel as if they are all, by default, criminals and thieves.”

B. The proposed rules would be inconsistent with the U.S. obligation to respect freedom of movement under Article 12 of the ICCPR.

As applied to any person subject to the proposed rules and wishing to leave the USA, the proposed rules are inconsistent with Sections 2 and 3 of Article 12 of the ICCPR, which provide:

“2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

As used in Section 3 of Article 12 of the ICCPR, the phrase “any restrictions” does not refer solely to outright prohibitions on departure, but includes all types of laws and administrative regulations that burden the exercise of the right of departure:

“The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3.” U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12, issued under Article 40(4) of the ICCPR*, Paragraph 10 (CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999), available at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument)>

To be “necessary”, as is required by Section 3 of Article 12, requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. “Necessity” requires a showing that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of “necessity” is supported by the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, which provides in Paragraph 14:

“Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”

Since there is no such showing of necessity in the NPRM, and in fact the DHS has not even attempted to make any such showing or asserted such a claim of necessity, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

C. The proposed rules would be inconsistent with the U.S. obligation to respect freedom of assembly under Article 21 of the ICCPR.

The proposed rules are inconsistent with Article 21 of the ICCPR, which provides that:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

“To assemble” means not merely or primarily to *be* together in an assembly. “To assemble” is to gather or come together, that is, to *move* into an assembly. Movement of people – in other words, travel – is an essential element of the act of assembly. “To travel” is, in most cases, “to assemble”.

The right to assemble in one’s own home or premises, or in a public building, would be empty if the government could bar the door to prevent people from walking in. The right to assemble in a public commons would be empty if the government could encircle the area of the planned assembly with barricades to prevent entry, or create a checkpoint to prevent access by travel along a public right of way.

In the same way, and for the same reasons, the right to assemble internationally would be meaningless if governments could prevent people from traveling across borders.

The same analysis of the phrase “no restrictions”, and of the DHS’s failure to make a showing of necessity, applies with respect to this Article 21 as with respect to Article 12, as discussed above. The proposed rules thus are inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

D. U.S. obligations embodied in the ICCPR are applicable to the rights of aliens.

Justice Murphy, concurring in *Bridges v. Wixon*, 326 U.S. 135 (1945), enunciated the Constitutional protections afforded LPR’s, including those implicated by international travel:

“[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority. Indeed, this Court has previously and expressly recognized that Harry Bridges, the alien, possesses the right to free speech and free

press and that the Constitution will defend him in the exercise of that right. *Bridges v. California*, 314 U.S. 252 , 62 S.Ct. 190.”

The U.S. government has specifically represented in its most recent reports to the U.N. Human Rights Committee that LPR’s are protected by the First Amendment, the Constitution, and international treaties such as the ICCPR to which the U.S. is a party:

“42. Under United States immigration law, an alien is ‘any person not a citizen or national of the United States.’ 8 U.S.C. § 1101(a)(3). Aliens who are admitted and legally residing in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant [ICCPR] rights and protections of citizens, including ... freedom from ... degrading treatment ... ; freedom of movement; ...recognition as a person under the law; freedom from arbitrary interference with privacy ... ; freedom of assembly; and freedom of association.”

(Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights, 28 November 2005, CCPR/C/USA/3, available at

[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/\\$FILE/G0545268.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf))

In the same reports, this analysis has been specifically applied by the U.S. government to freedom of movement and travel by LPR’s:

“203. As reported in the Initial Report, in the United States, the right to travel - both domestically and internationally - is constitutionally protected. The U.S. Supreme Court has held that it is ‘a part of the “liberty” of which a citizen cannot be deprived without due process of law under the Fifth Amendment’. See *Zemel v. Rusk*, 381 U.S. 1 (1965). As a consequence, governmental actions affecting travel are subject to the mechanisms for judicial review of constitutional questions described elsewhere in this report. Moreover, the United States Supreme Court has emphasized that it “will construe narrowly all delegated powers that curtail or dilute citizens’ ability to travel’. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

204. Alien travel outside the United States. Non-citizen residents are generally free to travel outside the United States.... A refugee travel document allows people who are refugees or asylees to return to the United States after travel abroad.”

(Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights, 28 November 2005, CCPR/C/USA/3, referring to the Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights, Article 12, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html>).

This is consistent with *General Comment No. 15 of the U.N. Human Rights Committee on the Rights of Aliens under the International Covenant on Civil and Political Rights* (1986), available at <<http://www.hrw.org/campaigns/migrants/docs/comment86.htm>>:

“In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens....

[O]nce aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.... If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens ... have the right to liberty of movement and free choice of residence; they shall be free to leave the country.

Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3.”

Refugees and asylum seekers are especially likely to have fears of possible persecution, and in many cases post-traumatic stress from past persecution from which they have fled, such that they will be chilled by the imposition of conditions or restrictions on the exercise of their rights. Regulations potentially exerting a chilling effect on the exercise of protected rights should therefore be subjected to particularly careful review where, as here, they will be applied against refugees and asylum seekers.

As has been noted, these standards of justification are not met in the NPRM, and the proposed regulations must therefore be withdrawn as inconsistent with U.S. obligations to the rights of aliens – including LPR’s, refugees, and asylum seekers – as embodied in the ICCPR.

III. THE PROPOSED RULES ARE NOT JUSTIFIED.

According to the NPRM, the fingerprints and photographs recorded for LPR's on each entry to, exit from, or transit via the U.S. have no additional informational content beyond what is already available to the DHS from permanent residency (green card) or other status applications: "DHS is not proposing that LPR's submit any additional information beyond that which is currently required."

If the purpose of the repetitive fingerprinting and photographing is not, according to the NPRM itself, the obtaining by the DHS of information, what purpose does retaining additional fingerprint impressions or photographs serve (other than, as discussed above, humiliation and stigmatization)?

According to the NPRM, fingerprints and photographs will be used will be used "to verify that the person at the port of entry is the same person who received the visa". 71 Fed. Reg. 42606.

The purported justification for the proposed rules in the NPRM is concerned exclusively with this *verification* function:

"DHS has determined that expanding US-VISIT to additional aliens will improve public safety, national security, and the integrity of the immigration process. Establishing and verifying the identity of an alien and whether that alien is admissible to the United States based on all relevant information is critical to the security of the United States and the enforcement of the United States immigration laws." (71 Fed. Reg. 42606)

But it is possible to verify whether the appearance of the person in front of the inspector matches that of the already stored photograph as accurately, and probably more accurately, by direct visual inspection than by recording another photograph to compare with the original. And nothing about this verification function – the sole declared purpose of the proposed requirement – requires, or is any material way furthered by, retaining additional photographs or fingerprints, particularly after repeated entries and exits when the DHS may already have hundreds on file for the same person.

Although it isn't mentioned in the NPRM, the requirements of the US-VISIT schema, to be applied to additional aliens by the proposed rules, would require these aliens to submit to 100 year (i.e. lifetime) retention by the DHS – even if the subject alien later become a U.S. citizen – of these fingerprints and photographs, as well as the details of each entry, exit, or transit of U.S. territory.

Each of the US-VISIT Privacy Impact Assessments and updates describes US-VISIT as including a “biographic and biometric travel history database” (see most recently *Privacy Impact Assessment Update for the US-VISIT Program*, July 1, 2005, <www.dhs.gov/interweb/assetlibrary/privacy_pia_usvisitupd1.pdf>) to be included in the Arrival Departure Information System (ADIS). The most recent System Of Records Notice (SORN) for the ADIS indicates that, “Records will be retained for 100 years.” (DHS/ICE-CBP-001, 68 Fed. Reg. 69412-69414, December 12, 2003).

The NPRM does not purport to offer any justification for this repetitive recording of new photographs and fingerprints on each entry, exit, and transit, or for 100 year – or any other duration of – retention of each new impression of a photograph and fingerprint of the same person.

Recording and retention is independent of, severable from, and not required for, comparison or verification. Recording and retention of new photographs and fingerprints on each entry must be independently justified, but has not been, in this or any other rulemaking.

Recording and retention are especially significant in light of DHS plans to share this data with Federal, state, and local law enforcement agencies, as described this month by the acting director of the US-VISIT program:

“The U.S. Department of Homeland Security plans to unveil an information-sharing program next month to give local law enforcement access to federal immigration data.

Robert Mocny, acting director of the U.S. Visitor and Immigrant Status Indicator Technology program, said Homeland Security and the FBI are working to electronically combine their records on criminal and immigration offenders.

‘Come September, we will be announcing the first initiative of the interoperability program where more and more of state and local law enforcement agencies will have more and more access to (immigration) information,’ Mocny said on a panel discussing immigration issues at the annual meeting of the National Conference of State Legislatures last week....

‘What we hope this program will do is provide that one-stop shop, where you'll see that person's criminal and immigration history,’ he said.”

(Erik Schelzig, "Homeland Security to share immigration data", Associated Press, August 19, 2006, <<http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--bordersecurity-st0819aug19,0,2345695.story?coll=ny-region-apnewyork>>

(Acting Director Moczynski's statements also exemplify the unjustified equation of by the DHS of the travel history of an LPR or other person's lawful movements with that person's criminal history, if any. Travel is not a crime. Travel records are not, and should not be treated as, criminal records.)

Since the DHS has submitted that it will not obtain any new information from the aspects of the proposed changes in regulations requiring repetitive recording of new photographs and fingerprints on each entry, exit, or transit of the U.S., or their retention for 100 years, and has claimed no prospective benefit from these portions of the proposed regulations, they should be withdrawn.

The DHS asserts in the NPRM that "Since US-VISIT biometric processing was initiated on January 5, 2004, the program has successfully identified a number of aliens with criminal or immigration violations that would not otherwise have been known. Between January 5, 2004, and May 25, 2006, DHS took adverse action against more than 1160 individuals based on information obtained through the US-VISIT biometric screening process." (71 Fed. Reg. 42606) But since there is no indication as to how many of these "adverse actions" proved to be justified, and how many were infringements of liberty on the basis of US-VISIT "false positives", or whether the DHS even has made any effort or has any means to determine this, it's impossible to tell whether this is evidence for or against the program.

Whether true positives or false positives, these events related to previous categories of US-VISIT enrollees. The DHS claims in the NPRM that, "Adding additional aliens to the US-VISIT program will likely result in DHS identifying additional aliens who are inadmissible or who otherwise present security and criminal threats." (71 Fed. Reg. 42606) This claim is entirely conclusionary, unsupported by any evidence or argumentation in the NPRM, and unlikely to be correct.

Since US-VISIT is, in significant part, a suspicion-generation system, it is indeed likely that it will result in the identification of suspects. But the more significant questions, neither asked nor answered in the NPRM, are (1) what proportion of those suspects will be justifiably deserving of suspicion and "adverse action" and what proportion will be false positives, and (2) how the costs of those

unwarranted adverse actions against false positives compare with the benefits, if any, from those against true positives.

LPR's are the aliens who already have been most carefully vetted, and all of them have received individualized scrutiny and have been individually determined, in advance, to be qualified for entry. LPR's are therefore the aliens least likely in fact to be inadmissible or deserving of adverse action, and those for whom the new US-VISIT requirements would be of the least incremental value, if any, in identification. The lower the percentage of true positives, the higher the likely ratio of false positives to true positives, and the lower the likelihood of net benefit – if, as it has not yet even begun to do, the DHS were to attempt a cost-benefit analysis of the proposed changes in regulations.

Since the proposed rules changes are unjustified, they should be withdrawn. If they are not withdrawn entirely, the portions requiring repetitive fingerprinting and photographing of the same persons, providing for retention of multiple photograph and fingerprint impressions for the same person, and requiring retention of photographs and fingerprints for 100 years should be withdrawn.

IV. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO INCLUDE STATUTORILY REQUIRED IMPACT ASSESSMENTS.

A. Privacy Act

For purposes of the Privacy Act of 1974, 5 U.S.C. § 552a(a)(2), “the term ‘individual’ means a citizen of the United States or an alien lawfully admitted for permanent residence.”

This NPRM proposes, for the first time, to include data on “alien[s] lawfully admitted for permanent residence” in US-VISIT records systems. With this NPRM, the DHS crosses the threshold of the Privacy Act with the US-VISIT program, and is required to conduct and publish for comment a Privacy Impact Assessment (PIA) and a new or revised System of Records Notice (SORN) to disclose and evaluate the impact of the proposed new regulations on persons protected by the Privacy Act.

The previous phases of implementation of US-VISIT did not require the collection of personal information from persons protected by the Privacy Act or concerning the exercise by persons protected by the Privacy Act of their First Amendment rights, and US-VISIT data was not to be used to decide whether to permit persons protected by the Privacy Act to exercise their rights to travel, assembly, and

movement. Consequently, the provisions of the Privacy Act applicable to the collection of data “when the information may be result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs” (5 U.S.C. § 552a(e)(2)) and to records “describing how any individual exercises rights guaranteed by the First Amendment” (5 U.S.C. § 552a(e)(7)) were not addressed by any of the previous Privacy Impact Assessments (PIA’s) or System Of Records Notices (SORN’s) for the present US-VISIT rules.

Clearly entry to, exit from, and transit of the U.S. and processing by the DHS at borders and ports of entry are a “right, benefit, or privilege under a Federal program”. And clearly data required by the proposed rule describes how individual travelers exercise the right to assemble, and other rights guaranteed by the First Amendment, when they cross U.S. borders to do so: when they assemble, where they assemble, by what means of transport they assemble, with whom they assemble, and so forth.

For these reasons, the existing SORN’s and PIA’s do not cover the expansion of US-VISIT requirements to lawful permanent resident aliens under the proposed rules. Both a new SORN (or SORN’s, if records concerning LPR’s will be maintained in more than one system of records) and a new PIA must be completed and published for comment before the proposed new rules are finalized.

B. Regulatory Flexibility Act

The DHS claims in the NPRM that “DHS has considered the impact of this rule on small entities and has determined that this will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 606(6).” 71 Fed. Reg. at 42608.

This claim is both unsupported and plainly in error. Nothing in the applicable statutory definition of “small entities” excludes aliens, or excludes self-employed independent contractors or sole proprietors from its purview. It is self-evident to any international traveler, or to anyone who observes the flow of cross-border traffic, that lawful permanent residents of the U.S. and other categories of aliens subject to the proposed regulations include substantial numbers of self-employed business travelers and sole proprietors, as well as employees of other “small entities” as defined in the applicable statutes.

Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small businesses among international travelers and specifically among those categories of aliens subject to the proposed rule changes, as well as the impact on them of having to choose either to waive their First Amendment right to assemble or to waive their Fourth Amendment right to be free of suspicionless warrantless searches and seizures of photographs and fingerprints each time they cross a U.S. border or pass through a port of entry to or from the U.S. But the number of such small business entities impacted is clearly “substantial”, and the impact on them “significant”, within the meaning of the Regulatory Flexibility Act. An assessment of the impact of the proposed rules on small entities among travelers and their employers must be completed and published, and an opportunity provided for comment, before any new rules are finalized.

Small businesses including the self-employed would not only be impacted, but disproportionately and negatively impacted by the proposed rule. Larger businesses would be more likely to have alternate staff able to travel, or already on site or at least on the other side of the U.S. border, and able to fulfill a contract, if one employee was unable or unwilling to travel internationally under the new conditions of the proposed regulations. The assessment under the Regulatory Flexibility Act should include, inter alia, an assessment of the degree to which the proposed regulations would disadvantage small entities in bidding on consulting, service, maintenance, or other contracts that might require international travel.

V. CONCLUSION AND RECOMMENDATIONS

The proposed regulations implicate internationally recognized human rights to dignified and humane treatment and to travel, assemble, and move about the world, including to and from the USA. The proposed regulations are inconsistent with U.S. obligations under the ICCPR, to which the U.S. is a party. The proposed rules are unjustified, and the NPRM fails to include required assessments. The proposed rules should be withdrawn in its entirety. If the NPRM is not withdrawn, the additional assessments required by the Privacy Act and the Regulatory Flexibility Act should be completed and published, and a new comment period should be provided, before any new rules are finalized.

Respectfully submitted,

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

_____/s/_____

Edward Hasbrouck

James P. Harrison

John Gilmore

August 28, 2006