

OFFICE OF THE SECRETARY

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2010 JUL 22 PM 3:48

OFFICE OF
ADMINISTRATIVE LAW

July 21, 2010

Susan Lapsley, Director
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Dear Ms Lapsley:

This letter is in response to a Petition for Determination that was recently received by your office. The petition was authored by Carter White of the University of California Davis Civil Rights Clinic dated May 24, 2010. The petition challenges a requirement found in our Department Operations Manual (DOM), Section 54020.12 for a current visa to accompany a valid government-issued passport with picture as identification when visiting at facilities operated by the California Department of Corrections and Rehabilitation (CDCR).

After reviewing the appropriate section in the DOM and Title 15, Division 3, Section 3173(c), the CDCR will no longer enforce the DOM requirement of this form of identification needing to have a visa. CDCR will follow the rule found in Title 15 which says an approved visitor can present a picture passport as sufficient proof of identity to visit.

I make this certification in accordance with Section 280 of Title 1, California Code of Regulations (CCR). A copy of this certification has been sent to Mr. White as required by Section 280 (a) of Title 1, CCR.

If you have any questions or concerns, please contact Brian Duffy, Special Assistant to the Undersecretary, at 323-6001, or Tim Lockwood, Chief, Regulation and Policy Management Branch (RPMB), at 255-5500.

Sincerely,



SCOTT KERNAN
Undersecretary, Operations

cc: Matthew L. Cate, Secretary, CDCR
Tim Lockwood, Chief, RPMB



2010 JUL 26 PM 1:35

ENDORSED FILED
IN THE OFFICE OF
DEBRA DOWEN
SECRETARY OF STATE

May 24, 2010

Attention: Chapter 2 Compliance Unit
Office of Administrative Law
300 Capital Mall, Suite 1250
Sacramento, CA 95814

2010 MAY 24 PM 1:59
OFFICE OF
ADMINISTRATIVE LAW

**Petition to the Office of Administrative Law
Re: Alleged Underground Regulation**

Identifying Information:

Petitioner:

Carter White
UC Davis Civil Rights Clinic
One Shields Avenue – TB 30
Davis, CA 95616
Tel: (530) 752-5440
Fax: (530) 752-5788
ccwhite@ucdavis.edu

Department Being Challenged

California Department of Corrections and Rehabilitation (“CDCR”)

Description of Underground Regulation

California Code of Regulations, Title 15, Section 3173(c)(3) lists “Picture passport” as an “[a]cceptable proof of picture identification for visitors” [see Exhibit A].¹ However, the CDCR Department Operations Manual (“DOM”), Chapter 5, Art. 42, Section 54020.12, significantly restricted this general requirement. Instead of listing just “picture passport” as the regulation states, the DOM includes a significantly more restrictive requirement. It replaces the phrase “picture passport” with “Valid government-issued passport with picture (must include a current unexpired visa issued by the United States Department of State, if applicable)” (the “Passport Limitation”) [see Exhibit B]. In accordance with 15 CCR § 3173(c)(3), CDCR officials should be accepting passports as valid forms of identification without any further conditions, including requiring visas.

The Passport Limitation substantially alters the scope of 15 CCR § 3173 – making it much more restrictive in practice. DOM 54020.12 was not passed through APA mandated procedures, and is an invalid underground regulation.

Description of Agency Actions Issuing, Utilizing, and Enforcing the Underground Regulation

As CDCR’s operations manual, DOM constitutes an official issuance of this underground regulation. In accordance with DOM, CDCR officials have continually utilized and enforced the Passport Limitation. Officials have refused to accept passports issued by the visitor’s country of

¹ This is also what is listed in the Inmate Visiting Guidelines posted on the CDCR website:
<http://www.cdcr.ca.gov/Visitors/docs/InmateVisitingGuidelines.pdf>.

origin. I have been made aware of numerous instances of such an enforcement of the Passport Limitation. This has been especially true of individuals with a passport issued by the Mexican government. CDCR officials have required a visa in addition to a passport – in direct contradiction of 15 CCR § 3173.

Legal Basis for Classifying Agency Action as a Regulation Pursuant to § 11342.600

The Agency Action is a Regulation

The Passport Limitation is a regulation as defined in California Government Code § 11342.600.

The Passport Limitation is a rule of general application state-wide. It was not promulgated to cover a single individual or case, but rather covers an entire class of individuals and a general procedural mechanism. It provides that in *every* circumstance, passports must include a visa if applicable. The DOM is meant to provide a guide to be used uniformly by CDCR officials.²

The Passport Limitation implements, interprets, and makes specific the laws that it administers and the procedures it operates under, particularly 15 CCR § 3173(c)(3). It is a specific rule and standard being used by CDCR. There is no existing, valid regulatory authority for requiring visas in addition to passports. The Passport Limitation expressly contradicts the valid regulations under 15 CCR § 3173(c)(3), passed pursuant to APA procedure, that make any “Picture passport” an acceptable proof of identification.

The Agency Action Does Not Meet a Statutory Exemption

The Passport Limitation does not meet a statutory exemption. It operates in direct contravention of a specific regulation under the California Code of Regulations.

Petition Raises an Issue of Considerable Public Importance

The underground regulation currently being employed by CDCR does harm to a substantial number of prospective visitors and inmates. The type of harm suffered by this group of individuals is also substantial. Associating with family, friends, and others is important to both those incarcerated and those wishing to visit³. Maintaining contact with individuals outside of the facility is essential to effective rehabilitation.⁴ CDCR has recognized the relationship between “family dissolution and dysfunction” and recidivism.⁵ Not recognizing passports, in the absence of a visa, as a valid form of identification prevents individuals from seeing their spouses (even when their spouses are U.S. citizens), and parents from seeing their children (even when the children are U.S. citizens). For many individuals, in practice this has entirely eliminated their ability to visit their family members.

² DOM Chapter 5, Art. 42, Section 54020.2 states that Art. 42 “establishes methods and procedures to administer the inmate visiting program and provides operational direction to staff, inmates, and visitors.”

³ According to a March 2006 research report conducted by the Pew Hispanic Center, as of 2005 there were 11.1 million migrants in the US that lacked US-based documentation. There were 6.6 million families nationwide in which either the head of the family or the spouse lacked US-based documentation. These families accounted for 14.6 million persons. Nearly two-thirds of children living in these families are U.S. citizens by birth – an estimated 3.1 million children. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. i (Mar. 2006), available at <http://pewhispanic.org/files/reports/61.pdf> [hereinafter Pew Center Report].

⁴ CDCR recognizes that “[t]he intent of CDCR’s Visiting Program is to develop and maintain healthy family and community relationships.” CDCR, Visitation Information, <http://www.cdcr.ca.gov/Visitors/index.html>

⁵ CALIFORNIA DEPARTMENT OF CORRECTIONS, INMATE POPULATION, REHABILITATION, AND HOUSING MANAGEMENT PLAN 15 (July 2006), available at <http://www.cdcr.ca.gov/News/docs/inmatePopRehabHMP.pdf>.

The Passport Limitation also places substantial burdens on particular groups of individuals, especially inmates of Latino nationality⁶ and their families and other potential visitors whose home countries are not the United States or a member of the Visa Waiver Program⁷. Roughly 370,000 foreign-born Latino non-citizens reside in California.⁸ According to 15 CCR § 3173(c)(3) these individuals could present their passport from their country of origin. However, in the absence of a U.S. visa, the Passport Limitation restricts their ability to visit family members and others in California prisons.

This effect is particularly profound among Mexican nationals and their families born outside of the United States. A large number of individuals incarcerated in California prisons were born in Mexico⁹, and the Passport Limitation significantly burdens them and their potential visitors¹⁰. This results in disparate treatment of Hispanic individuals, particularly Mexican nationals, relative to individuals from the United States and many other countries.

I certify that all of the above information is true and correct to the best of my knowledge.



Carter White

May 24, 2010
Date

⁶ According to CDCR, as of December 31, 2009, 66,375 Hispanic individuals were incarcerated in California prisons. This constitutes 39.3% of the overall inmate population. CALIFORNIA DEPARTMENT OF CORRECTIONS, OFFENDER INFORMATION SERVICES BRANCH, ESTIMATES AND STATISTICAL ANALYSIS SECTION, DATA ANALYSIS UNIT, PRISON CENSUS DATA (Feb. 2010),

http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd0912.pdf.

⁷ According to 2000 Census data, 32.4% of California's population is Latino. Roughly 14% of California's population is foreign-born Latino individuals. Roughly 10% of California's population is foreign-born Latino non-citizens. Dr. Lisa Catanzarite, *California's Growing Latino Population: Census 2000 Dismantles Stereotypes*, UCLA CHICANO STUDIES RESEARCH CENTER, LATINO POLICY AND ISSUES BRIEF, No. 5 (Mar. 2003).

⁸ As of July 1, 2009, the U.S. Census Bureau estimated that California has a population of 36,961,664. Using the percentages from the 2000 Census as described *supra*, note 7, this would equate to roughly 370,000 Latino nationals living in California that might have their visitation rights restricted by the Passport Limitation. U.S. CENSUS BUREAU, NATIONAL AND STATE POPULATION ESTIMATES, <http://www.census.gov/popest/states/NST-ann-est.html>.

⁹ According to CDCR, as of March 31, 2009, 15,019 Mexican non-citizens were incarcerated in California prisons. CALIFORNIA DEPARTMENT OF CORRECTIONS, OFFENDER INFORMATION SERVICES BRANCH, ESTIMATES AND STATISTICAL ANALYSIS SECTION, DATA ANALYSIS UNIT, NUMBER OF USICE HOLD OR POTENTIAL HOLD OFFENDERS BORN IN MEXICO (May 2010).

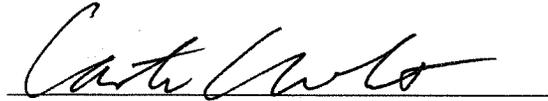
¹⁰ There were an estimated 6.2 Mexican immigrants nationwide lacking US-based documentation in 2005. Pew Center Report at ii.

Certificate of Service

I certify that I have submitted a copy of this petition and all attachments to the state agency which has issued, used, enforced, or attempted to enforce the purported underground regulation.

Sent To:

Regulations and Policy Management Branch
CDCR
P.O. Box 942883
Sacramento, CA 94283-0001



Carter White

May 24, 2010

Date

(B) If the applicant has falsified information no other request to visit shall be considered until six months after the date of disapproval.

(C) When positive identity cannot be established or clearing the criminal history of the prospective visitor is not possible due to inadequate or conflicting information, the visiting request will be reconsidered when positive identity is established.

(c) The documentation of the approval or disapproval of an application to visit shall be in writing.

(1) If the application is approved, the inmate shall be notified in writing and is responsible for informing their prospective visitor(s) of the institution/facility decision to approve the application.

(2) If disapproved, the prospective visitor and inmate shall both be notified in writing. The prospective visitor's notification shall include the specific reason(s) for disapproval and instructions regarding the process for reconsideration.

(d) The prospective visitor may appeal the disapproval by following the established visitor appeal process described in section 3179.

(e) Approval to visit an inmate is conditioned upon compliance with all laws, regulations, and procedures governing visitor conduct on institution/facility property.

(f) There are no restrictions on the number of inmates that a visitor may be approved to visit at one or more institution/facility.

(g) Any visitor approved for visiting at one institution/facility shall be approved to visit the same inmate upon transfer to another institution/facility provided the visitor's approval status remains unchanged.

NOTE: Authority cited: section 5058, Penal Code. Reference: section 5054, Penal Code.

HISTORY:

1. New section filed 2-18-2003; operative 3-20-2003 (Register 2003, No. 8).

3172.2. Minimum Visiting Days and Hours.

(a) Each institution/facility shall provide visiting for no less than 12 hours per week. Any reduction of an institution/facility visiting schedule below 12 hours shall require the prior approval of the director or designee. Regular visiting days shall be consecutive and include Saturday and Sunday.

(b) Each institution head shall develop an operational supplement that includes the respective visiting schedules as follows:

(1) Regular Visiting Days: Four days (Thursday through Sunday); or Three days (Friday through Sunday); or Two days (Saturday and Sunday); and

(2) Holiday Visiting Days: New Year's Day; Independence Day; Labor Day; Thanksgiving Day; Christmas Day.

(3) Visiting Appointments: The institution/facility shall specify procedures and criteria for scheduling visiting appointments for non-contact visits in accordance with the provisions of this article.

(c) When a holiday listed in (b)(2) occurs on a day not regularly scheduled for visiting, each institution/facility shall provide the same number of hours of visiting on that holiday as for any single regularly scheduled visiting day.

NOTE: Authority cited: section 5058, Penal Code. Reference: Sections 2600 and 5054, penal code. *In re French*, 164 Cal.Rptr. 800 (1980).

HISTORY:

1. New section filed 2-18-2003; operative 3-20-2003 (Register 2003, No. 8).

3173. Processing of Approved Visitors.

(a) Approved visitors shall complete a visitor pass upon their arrival at the institution/facility visitor processing center and their approval to visit shall be verified.

(b) All adult visitors shall present picture identification before being permitted to visit. For each minor, a certified record of birth (official birth certificate, or county embossed abstract of birth) shall be presented during each visit.

(c) Acceptable proof of picture identification for visitors may be, but is not restricted to, the following valid documents:

(1) Driver's license with picture,

(2) Department of Motor Vehicles identification card with picture,

(3) Picture passport.

(4) Armed forces identification card with picture,

(5) Picture identification cards issued by the United States Department of Justice—Immigration and Naturalization Service, or

(6) Picture identification issued by the Mexican Consulate.

(d) Minors may be allowed to visit an inmate subject to the restrictions of section 3173.1. If the accompanying adult is not the parent or legal guardian of the minor, a notarized written consent shall be required from a person with legal custody of the minor, authorizing the minor to visit while accompanied by a designated adult.

NOTE: Authority cited: section 5058, Penal Code. Reference: Sections 4570.5 and 5054, Penal Code.

HISTORY:

1. Amendment of subsections (h) and (p) filed 8-22-79; effective thirtieth day thereafter (Register 79, No. 34). For prior history, see 78, No. 33; 78, No. 30; 78, No. 12; 77, No. 40; 77, No. 20, and 77, No. 9.

2. Amendment of subsection (m) filed 9-24-81; effective thirtieth day thereafter (Register 81, No. 39).

3. Amendment of subsections (b), (g) and (k) filed 8-23-82; effective thirtieth day thereafter (Register 82, No. 35).

4. Amendment of subsection (f) filed 8-27-82; effective thirtieth day thereafter (Register 82, No. 35).

5. Change without regulatory effect amending section filed 10-29-90 pursuant to section 100, Title 1, California Code of Regulations (Register 91, No. 6).

6. Editorial correction of printing errors in subsections (f), (g) and (h) (Register 92, No. 5).

7. New subsections (p) and (q) filed 2-11-98 as an emergency; operative 2-11-98 (Register 98, No. 7). A Certificate of Compliance must be transmitted to OAL by 6-11-98 or emergency language will be repealed by operation of law on the following day.

8. Certificate of Compliance as to 2-11-98 order transmitted to OAL 5-4-98 and filed 6-16-98 (Register 98, No. 25).

9. Change without regulatory effect amending subsection (f) filed 12-18-98 pursuant to section 100, Title 1, California Code of Regulations (Register 98, No. 51).

10. Repealer and new section filed 2-18-2003; operative 3-20-2003 (Register 2003, No. 8).

11. Change without regulatory effect amending Note filed 5-22-2003 pursuant to section 100, Title 1, California Code of Regulations (Register 2003, No. 21).

3173.1. Visiting Restrictions with Minors.

(a) For inmates convicted of Penal Code (PC) Section(s) 261, 264.1, 266c, 269, 285, 286, 288, 288a, 288.5, or 289 when the victim is a minor, visitation with the minor victim shall be prohibited, except as authorized by an order of the juvenile court pursuant to Welfare and Institutions Code Section 362.6. Visitation pursuant to such an order shall be limited to non-contact status.

(b) For inmates convicted of PC Section(s) 261, 264.1, 266c, 285, 286, 288, 288a, 288.5, or 289 when the victim is a minor, visitation with any minor who is not the victim of the crime shall be limited to non-contact status except as authorized by the Institution Classification Committee.

(c) For inmates convicted of PC Section(s) 273a, or 273d, visitation with the minor victim shall be limited to non-contact status.

(d) For inmates convicted of violating PC Section(s) 187, 269, 273a, 273ab, or 273d, when the victim is a minor, visitation with any other minor shall be limited to non-contact status except as authorized by the Institution Classification Committee.

- Search/Inspect all visitors in accordance with CCR Section 3173.2. Staff shall identify visitors prior to their exit from the institution/facility by positive physical identification, inspection of their identification card, CDC Form 1000, and wrist stamp.

54020.11.1 Visiting Program Reasonable Accommodation

Disabled inmates and/or visitors shall have effective access to visiting facilities. Mobility and auxiliary aids shall be provided as needed. Disabled inmates or visitors who are approved for visits must notify the visiting supervisor of assistance needs at least 72 hours prior to a visit. Reasonable effort shall be made to provide modifications for the assistance needs of disabled inmates on a case-by-case basis.

54020.11.2 Processing Visitors With Medical Implants, Prosthetic, or Assistive Devices

Visitors with medically implanted or prosthetic devices, wheelchairs, or other assistive devices who cannot clear contraband/metal detection devices shall be required to present a signed letter which includes the address, telephone number, and the California Medical License number (if applicable) of their physician, physiatrist, prosthetist, or orthotist.

The verification letter shall:

- Be renewed at least every two years or coinciding with the requirement for updating visitor information.
- Detail the specific location of the medical implant or prosthetic device in or on the body.
- Detail the specific type of mobility impairment and verify the need for a wheelchair or assistive device.

Processing Visitors with Medical Implants or Prosthetic Devices

Staff shall conduct an inspection of the prosthetic device to the extent possible without the removal of clothing. A hand-held contraband/metal detection device shall be utilized to process visitors with medical implants.

Any required removal of prosthetic and medical implants for inspection will be done in private setting or area.

If reasonable suspicion exists to believe that a visitor is attempting to introduce contraband or substances into or remove contraband out of the institution and the visitor has a medical implant, prosthetic device, or uses a wheelchair or assistive device(s), a search will be initiated in accordance with this Section. A licensed physician, nurse, and/or medical technical assistant of the same sex shall be present to assist with the unclothed body search consistent with the duties of their classification.

Processing Visitors with Wheelchairs or Mobility Assistive Devices

The visitor shall be asked to temporarily transfer from his/her personal wheelchair to an institutional wheelchair while an inspection of the visitor's wheelchair is conducted.

Institution/facility staff are not authorized to physically assist the visitor with the wheelchair transfer.

Hand-held contraband/metal detection devices shall be used to process the visitor during the transfer from his/her personal wheelchair to the designated wheelchair.

If the visitor provides no written verification of impairment and/or need for assistive device and/or refuses to comply with the transfer, the visit shall be denied by the appropriate staff.

Visitors who present letters signed by their physician, etc., which details a specific type of mobility impairment which precludes the wheelchair transfer or verifies the need for using battery-powered or custom designed wheelchairs, shall be exempt from the wheelchair transfer requirement.

When an institutional wheelchair is not available or the visitor is unable to transfer to another wheelchair, the visitor is exempt from the transfer requirement.

Visiting staff shall conduct a visual inspection of the wheelchair and hand-held contraband/metal detection devices shall be used to process visitors deemed exempt from the wheelchair transfer requirement.

54020.12 Proof of Identity

All Adult visitors shall present picture identification before being permitted to visit. The following are acceptable forms of identification for visitors:

- Valid driver's license with picture.
- Valid Department of Motor Vehicles identification card with picture.
- Valid government-issued passport with picture (must include a current unexpired visa issued by the United States Department of State, if applicable).
- Armed Forces' identification card with picture.

- Identification cards issued by the United States Department of Justice or United States Immigration and Naturalization Service.
- Picture identification Matricula Consular De Alta Seguridad (MCAS) issued by the Mexican Consulate.

54020.13 Inspection/Search of Visitors

All persons, their property or possessions, and/or vehicles when on institution/facility property are subject to inspection/search to the degree necessary to ensure institution/facility security and prevent the introduction of contraband.

Visitors shall not be forcibly searched unless institution/facility officials possess a court-issued warrant to conduct the search or the visitor is being detained for unlawful actions or activities in accordance with CCR Section 3292.

The type of search to be conducted shall be based on probable cause.

54020.13.1 Contraband /Metal Detection Devices

All visitors shall be processed into the security area through a contraband/metal detection device and shall have property in their possession searched prior to being allowed entry into the institution/facility. Visitors shall remove all items from their pockets and remove jackets, belts, shoes, etc. These items shall be placed in a designated area for inspection by the visitor processing center staff.

A visitor who fails to clear any contraband/metal detection device may be required to submit to a clothed or unclothed body search prior to beginning a visit.

Before the clothed or unclothed search is conducted, authorization and visitor consent shall be obtained in accordance with this Article.

54020.13.2 Clothed Searches of Visitors

Staff may conduct a clothed body search and use a variety of detection devices when the visitor fails to clear any contraband/metal detection device, or information has been obtained indicating that a visitor is in possession of contraband as described in DOM Chapter 5, Article 20.

Visiting staff of the same sex as the visitor shall conduct authorized clothed body searches.

In emergency situations, custody staff of either sex may conduct a clothed body search.

Removal of outer garments, heavy clothing, and possibly shoes may be requested to complete the security search.

Discretion shall be exercised when issuing instructions to persons being searched.

54020.13.3 Unclothed Searches of Visitors

Staff may conduct an unclothed visual body search and use a variety of detection devices to conduct a more intensive security search of the visitor's person when the visitor fails to clear any contraband/metal detection device, or information is obtained that a visitor is in possession of contraband as described in DOM Chapter 5, Article 20.

Unclothed searches are especially appropriate when clothed searches prove inconclusive and the presence of contraband remains a reasonable suspicion.

Unclothed body searches shall be accomplished in accordance with the following provisions and recorded on a CDC Form 888, Notice of Request to Search.

Visiting staff of the same sex as the visitor shall conduct authorized unclothed body searches. The search shall be conducted in a private setting, in a dignified manner, and by at least two staff members.

Consistent with their duties or classification, a licensed physician, nurse, and/or medical technical assistant of the same gender shall be present to observe and assist in searches when an unclothed body search is required of visitors having a medical implant, prosthetic device, wheelchair, or assistive device(s).

Discretion shall be exercised when issuing instructions to persons being searched.

If staff identifies what appears to be contraband in a body cavity and the visitor refuses to remove the suspected contraband from the body cavity, the visitor shall be detained and referred to the local law enforcement agency.

When probable cause exists that a visitor has concealed contraband in a body cavity; local law enforcement shall be summoned. CDCR staff shall not perform any body cavity searches of visitors.

A copy of the CDC Form 888 excluding confidential information shall be given to the visitor.