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February 26, 2015

**Via overnight mail and email to portellsd@state.gov**

Mr. Sherman D. Portell, Director
United States Department of State
Colorado Passport Agency
44132 Mercure Cir.
P.O. Box 1045
Sterling, VA 20166-1045

**RE: Dana Alix Zzyym, Passport Applicant – Request for Reconsideration or Hearing**
**U.S. Department of State, File No. 172460355**

Dear Mr. Portell:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and the Law Office of Jessica Kunevicius, LLC jointly represent Dana Alix Zzyym, an intersex American citizen and veteran who applied for a passport through the Colorado Passport Agency. We write to request that the United States Department of State ("DOS") reconsider its decision to deny Dana a passport that accurately designates Dana's sex as 'X.' Alternatively, we request a hearing pursuant to 22 CFR § 51.70(a) for final decision by the Deputy Assistant Secretary for Passport Services.

In Dana's case, as is true for numerous other intersex people, a passport with the designation of male or female is inaccurate, inappropriate, and dangerous to Dana's security and well-being. Many Americans do not and cannot identify as male or female because their sex chromosomes, gonads, and/or internal or external sexual anatomy do not fit clearly into binary categories. Dana was identified as intersex at birth, which is reflected on Dana's birth certificate. However, for others, an inability to identify as male or female becomes evident later in life. In any event, a passport that mischaracterizes the holder as male or female can subject the holder to discrimination in numerous contexts and prevents the holder from traveling safely. Accordingly, we request the use of 'X' on Dana's passport in accordance with international travel standards for designating people who are neither male nor female.

In early September 2014, Dana visited the Colorado Passport Agency in Aurora, Colorado to obtain a U.S. passport. Dana submitted an Application for a U.S. Passport, Form DS-11 (09-2013) ("Form") with the requisite identity and citizenship documentation, photograph, and fee payment. Dana accurately listed "intersex" in the sex field on the Form and, by separate letter, clarified that "[a]s an intersex person, I'm not male or female." Dana requested 'X' as the marker in the sex field on Dana's passport, noting that such designation conforms to

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the International Civil Aviation Organization (ICAO) standards for machine-readable travel documents. *See* ICAO Doc 9303, Part 1, Volume 1 Sixth Ed. (2006).

By letter dated September 24, 2014 ("September 24 Letter"), CPA acknowledged receipt of Dana's application, but asserted that DOS "currently requires the sex field on U.S. passports to be listed as 'M' or 'F.'" Although Dana clearly and unequivocally informed DOS that Dana is neither male nor female, but intersex, DOS directed Dana to select either a male or female sex designation if Dana wanted to receive a passport for international travel. Alternatively, DOS invited Dana to withdraw Dana's passport application.

Dana timely responded to DOS's September 24 Letter, reiterating that neither male nor female applies "because I am intersex." Indeed, as part of the original application, Dana had previously submitted a certified Michigan Certificate of Live Birth showing "unknown" in the sex field. Nevertheless, Dana provided CPA with additional documentation, including sworn statements from licensed physicians at the U.S. Department of Veterans Affairs attesting to the fact that Dana is intersex. Despite submitting supplemental information and complying with the relevant provisions of Part 51, Title 22 of the Code of Federal Regulations ("Passport Regulations"), DOS denied Dana a U.S. passport by letter dated December 29, 2014 ("Notification of Denial"). *See* Enclosed Application Materials and DOS Responses.

The Notification of Denial did not set forth any explanation, specific reason, or legal basis for the assertion that DOS "*requires* the sex field on United States passports to be listed as 'M' or 'F.'" (emphasis added). Nor did the Notification of Denial set forth the procedures for review available under 22 CFR § 51.70 through 51.74. At minimum, DOS must articulate the reasoning behind its conclusion that Dana is not entitled to a U.S. passport for international travel with an accurate sex marker, 'X'. In the absence of statute, regulation, or other referenced authority "requiring" use of the 'M'/'F' sex binary in DOS's issuance of U.S. passports, the Foreign Affairs Manual specifically allows for Dana's request insofar as the applicant's "birth documentation will determine the gender to be listed on the passport." 7 FAM 1350, Appendix M §(c), Intersex Conditions. Given that Dana's birth certificate lists "unknown" as Dana's sex, 'X' would be the only accurate and appropriate designation for the sex field on Dana's passport.

In light of the foregoing, we respectfully request that DOS reconsider its decision to deprive Dana of a passport for international travel or, alternatively, provide Dana a hearing in accordance with Subpart F of the Passport Regulations for final decision by the Deputy Assistant Secretary for Passport Services. If such a hearing is granted, our client waives the requirement that the hearing occur within 60 days after DOS receives this request and recommends a mutually convenient time and place to be determined by the parties through counsel.

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Please submit your response to this letter at your earliest convenience. Also, do not hesitate to contact us if we can be of further assistance in providing additional information in support of our client's request.

Very truly yours,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.



Paul D. Castillo
Staff Attorney

Encl.

cc: Director, Colorado Passport Agency
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