and decisions based on "program and policy considerations." The prevailing judgment of federal courts is that a DOS waiver denial recommendation based on "program and policy considerations" is not reviewable because there is no legal standard against which the decision can be judged.[63] However, a USCIS decision that an exchange visitor is subject to the return requirement is subject to judicial review to the same extent as any other legal determination made under the INA.

If USCIS denies an exceptional hardship waiver application prior to forwarding the application to DOS for recommendation, the decision of USCIS (or legacy INS) has always been appealable to the Administrative Appeals Office and from there to federal court. However, the Immigration Reform Act of 1996 *may* eliminate the federal court appeal to the extent that the denial is a denial as a matter of discretion.[64]

ETHICS

***Myth** 37: As long as counsel has a good faith argument that an exchange visitor is not subject to the return requirement, counsel ethically can (a) advise his client to answer in the negative a question on a government form (such as I-485) that requests information regarding whether the exchange visitor is subject to the return requirement, or (b) fail to disclose information that is not requested on a government form but that USCIS might consider relevant in determining whether an exchange visitor has a return requirement.*

The author has long believed that an attorney may take a position on a government form that may be contrary to a position taken by a government agency as long as there is an arguable legal basis for the position.[65] Similarly, the author has advocated that counsel can fail to disclose information that is not requested on a government form as long as counsel has a legal basis for the belief that the client is eligible for the relief sought, even though the information that is not disclosed and not requested may be considered relevant by the adjudicating body. For example, if an alien's skill is clearly listed on the skills list of his country of nationality but the country where he last lived for a period of two years does not have a skills list, there would be no ethical obligation to raise the issue since Form 1-539 does not ask the question. On Form I-485 Application for Permanent Residence, which does ask a question regarding the return requirement, the question could be answered in the negative. By extension, if there is no ethical obligation to disclose the information, the disclosure of such information that is potentially adverse to the client may itself be an ethical violation.

This recitation of general ethical principles must now be subject to re-analysis based on a provision in the Immigration Reform Act of 1996 that subjects counsel to possible criminal penalties for failing to disclose information that USCIS might consider relevant in its adjudication process.[66] This provision apparently puts counsel in the untenable position of having to violate general ethical principles in order not to subject him- or herself to criminal penalties. The impact of this provision will have to await regulations, interpretations, and possible judicial challenges.

[63] *But see Chong v.* ...2d 171 (3d Cir. 1987) (USIA decision reviewable under abuse of discretion standard).

[64] INA §242(a)(2)(B)(ii).

[65] *See* ABA Committee on Ethics and Professional Responsibility Formal Opinion 85-352 (July 7, 1985). *See generally* Klasko and Stock, *supra* note 38.

[66] INA §274C(f).

TRAVEL ISSUES FOR STUDENTS AND RESEARCHERS

*by Atessa Chehrazi, Nadia Johnson, Karl W. Krooth, Gloria Law, Penny Rosser, and Harlan Smith**

The events of September 11, 2001, have led to heightened risks and increased constraints on the travel of foreign nationals to and from the United States. While these changes have affected U.S. citizens as well,[1] the brunt has fallen on foreign nationals. These changes are especially problematic for those subject to the competing demands of academic calendars and research project completion deadlines. The increase and changes in government agencies; the additional complexity of the visa application, admission, and departure process; and the increased prevalence of security checks and ultimately, unpredictable delays have created a number of new hurdles for foreign nationals.

The higher risks and additional constraints on travel to and from the United States have contributed to a decline in overall nonimmigrant visa applications[2] and U.S. academic enrollments.[3] It remains to be seen whether these risks and constraints will gradually gain acceptance as normal. Alternatively, these changes may continue to discourage foreign nationals from coming to study and conduct research in the United States, and interfere with the access of those who are already in the United States from attending conferences and collaborating on research abroad.

THE AGENCIES

U.S. consulates have historically operated under the U.S. Department of State (DOS). In March 2003,

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Gloria Law is the international scholar advisor at the University of California, Berkeley, and member of NAFSA. She is NAFSA's co-liaison with the DOS Waiver Office.

Penny Rosser is director of the International Office at the Massachusetts Institute of Technology (MIT).

Harlan Smith is director of the International Office at the University of Vermont.

[1] Restrictions or prohibitions on air travel of U.S. citizens ("no fly" and "selectee" lists) are the subject of federal litigation filed by the American Civil Liberties Union. *Green v. Transportation Security Administration*, No. C04-0763 (D. Wash. filed April 5, 2004).

[2] U.S. Department of Homeland Security, *Yearbook of Immigration Statistics, 2003* (2004) indicates that DHS's Nonimmigrant Information System registered record decreases of -15 percent from 2001–2002, and a continuing decrease of 58,000, or -.2 percent in 2002–2003. *See also* Congressional Research Service, "Visa Policy: Roles of the Departments of State and Homeland Security," CRS Report RL32256 (Mar. 4, 2004), which indicates that visa applications have dropped from 7.6 million (FY2001) to 5.8 million (FY2002), and provides a preliminary number of 4.9 million for FY2003. An Immigration Policy Center report states H-1B visas issued declined 33.7 percent, and F-1 visas issued declined 26.5 percent from 2001 to 2002. Rob Paral & Benjamin Johnson, "Maintaining a Competitive Edge: The Role of the Foreign-Born and U.S. Immigration Policies in Science and Engineering," *Immigration Policy Center* (Aug. 2004), and reproduced elsewhere in this volume.

[3] According to the *Yearbook of Immigration Statistics, supra* note 2, from 2001 to 2003, F-1 admissions dropped from 698,595 to 646,016 to 624,917, and J-1 admissions dropped from 339,848 to 325,580 to 321,660. A Chronicle of Higher Education article reports that nearly half of over 500 colleges surveyed reported a decline in international students. "Applications from Foreign Graduate Students Decline, Survey Finds," *The Chronicle of Higher Education*, Feb. 26, 2004. On September 8, 2004, the Council of Graduate Schools released a survey of 126 schools that showed an 18 percent drop in offers of admissions to international graduate students. *See also* Spencer Ante, "Keeping Out the Wrong People: Tightened Visa Rules are Slowing the Vital Flow of Professionals into the U.S.," *Business Week*, Oct. 4, 2004, stating that in 2003, student visas issued dropped 8 percent, to 215,694, after falling 20 percent in 2002—"the two largest drops since the U.S. began tracking student statistics in 1952." *Id.*

the legacy Immigration and Naturalization Service (INS) was eliminated and the Department of Homeland Security (DHS)[4] was established. The INS adjudications function was assumed by the U.S. Citizenship and Immigration Services (USCIS), the inspections function by U.S. Customs and Border Protection (CBP), and the investigations function by U.S. Immigration and Customs Enforcement (ICE).

Since September 2003, DHS has also been involved in the oversight of consular operations and policy pursuant to a Memorandum of Understanding with DOS.[5] DHS's Border and Transportation Security (BTS)[6] created an Office of International Enforcement (OIE) that may have a presence and involvement at U.S. consulates. In addition, other government agencies, for example the U.S. Department of Commerce's Bureau of Industry and Security (BIS), may be involved in the visa application review process.[7] While the overall effectiveness of DHS involvement in enhancing security at U.S. consulates remains unclear,[8] the presence of multiple governing agencies at some U.S. consulates does introduce an additional element of uncertainty in the process for visa applicants.

Since the elimination of INS in March 2003, CBP has handled primary and secondary inspections at the port of entry, parole, deferred inspections, and expedited removal. CBP incorporated the U.S. Customs Service, Border Patrol, as well as parts of INS and the U.S. Department of Agriculture.[9] While CBP has strived to present "One Face at the Border," a particular CBP officer may have only recently received "cross-training" in early 2004.[10] Also, the officer's predominant professional experience may have been with agencies other than legacy INS. Thus, the traveling foreign national may develop justifiable concerns not only about delays but also about mistakes at the port of entry and exit that can affect both admission and status while in the United States, and also future visa applications and readmissions.

The reorganization and division of INS functions has not always provided the most logical results. For example, while responsibility for the National Security Entry-Exit System (NSEERS) was transferred from INS to ICE, CBP handles the bulk of special registrations, through port of entry and exit special registration. Similarly, while ICE has responsibility for the Student and Exchange Visitor Information System (SEVIS), DOS consular officers handle F-1, J-1, and M-1 visa applications, CBP inspectors handle admissions, and USCIS handles status issues. The traveling foreign national who seeks to understand the system of new agency acronyms and their relation to each other may become overwhelmed. This is especially likely when a foreign national makes inquiries to one agency that are directed to another. While the DHS objective is that the agencies have a clear area of focus, it remains to be seen whether the various agencies will be able to work together to resolve problems that have resulted in delays and confusion for travelers of all kinds, including students and researchers.

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[4] Homeland Security Act of 2002, Pub. L. No. 107-296, §1502, 116 Stat. 2135, *posted on* AILA InfoNet at Doc. No. 02120240 (Dec. 2, 2002). *See also* 68 Fed. Reg. 9824 (Feb. 28, 2003); 68 Fed. Reg. 10922 (Mar. 6, 2003).

[5] The Homeland Security Act provides that the Secretary of State continues to administer the visa issuance function, but that the Secretary of Homeland Security provides oversight of policy issues. Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, 68 Fed. Reg. 56519 (2003), *posted on* AILA InfoNet at Doc No. 03092913 (Sept. 29, 2003).

[6] BTS is one of five DHS directorates, and oversees CBP, ICE, and the Transportation Security Administration (TSA). *www.dhs.gov/dhspublic/display?theme=13.*

[7] The Bureau of Industry and Security has had a Visa Application Review Program in place since 1990. *See www.bis.doc.gov/Enforcement/eeprogrm.htm.* There have been recent reports of BIS review of visa applications for export control, especially in U.S. consulates in China.

[8] Statement of Clark Kent Irvin, Inspector General, U.S. Department of Homeland Security, Before the Committee on Government Reform, U.S. House of Representatives, 108th Cong., 2d Sess. (Sept. 9, 2004), *available at www.dhs.gov/interweb/assetlibrary/Final_Statement_HGR_10-9-04.pdf;* Shaun Waterman, "DHS Visa Program Slammed by Inspector," *United Press International*, Sept. 8, 2004, *posted at www.upi.com/view.cfm?StoryID=20040908-072102-7146r* (the testimony and article both describe how DHS officials at U.S. consulates in Saudi Arabia have been spending time on data entry due to incompatibility of DOS and DHS databases, and how many are not trained on relevant issues such as embassy operations, or the visa application process).

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[10] CBP Liaison Minutes (11/13/03), *posted on* AILA InfoNet at Doc. No. 03123110 (Dec. 31, 2003).

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THE U.S. CONSULATE

Most foreign nationals must apply for a visa at a U.S. consulate to seek admission or readmission to the United States. The visa application process can be a stressful experience for the foreign national, as well as outcome determinative. Factual determinations by consular officers are largely nonreviewable, aside from supervisory review.[11] While a request for a DOS Advisory Opinion on legal issues is possible, there is no right to legal counsel at the consulate.[12]

Canadian citizens[13] are exempt from the visa requirement unless seeking entry in the E, K, or V categories. Visiting foreign nationals eligible for visa waivers (WB/WT)[14] do not have to apply for a visa at a U.S. consulate, but must have either a machine-readable passport, or apply for a visa.[15] For most foreign nationals however, exceptions to the visa requirement have been eliminated or restricted.

Visa Revalidation Eliminated

Unfortunately, visa revalidation, a DOS program that allowed foreign nationals in valid C, E, H, I, L, O, or P status in the United States to apply for a new visa in the same nonimmigrant category by mail without the need for travel to and application before a U.S. consulate abroad, is no longer a possibility. A DOS rule eliminated visa revalidation in July 2004 due to the lack of a DOS mechanism to collect biometric data (*e.g.*, fingerprints) from applicants. DOS eliminated this program despite suggestions that it access DHS's existing Application Support Center biometric collection system, which could have enabled in-person identification and fingerprinting of applicants.[16] With termination of the visa revalidation program, most traveling foreign nationals must either apply for visas at U.S. consulates, or be eligible for the "automatic revalidation" exception.

THE APPOINTMENT

As a general rule, almost all applications for nonimmigrant and immigrant visas at U.S. consulates now require an in-person interview at a consulate outside the United States. While waivers of the personal interview requirement were not uncommon, and in fact some U.S. consulates had established mail-in systems prior to 9/11, waivers have become increasingly difficult to obtain since that time. DOS issued a directive mandating personal interviews of most visa applicants, with limited exceptions, in

[11] INA §104(a) provides that "The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, *except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas. . . .*" (emphasis added).

[12] DOS has stated its position is that "(a) the chief of a consular section may prohibit the presence of attorneys at visa interviews conducted by officers of the section, provided the prohibition is general . . . (b) in the absence of a general prohibition . . . the matter is within the discretion of the individual case officer conducting the interview, and (c) no supervisory officer may require a case officer to permit attorneys to be present at visa interviews conducted by that officer . . . a case officer who elects to permit attorneys to be present at interviews conducted by him or her must do so in all cases in which an attorney so requests. . . ." *See* Angelo A. Paparelli et al., "Consular Processing of Nonimmigrant Visas: A Roundtable Discussion," 90-09 *Immigration Briefings*, 5 (Sept. 1990) (citing U.S. Dep't of State, unclassified cable no. 323769 from Cornelius D. Scully, III, Director, Office of Legislation, Regulation and Advisory Assistance, Visa Office, to U.S. Consulate, Taipei (Nov. 1983) (copy on file with *Immigration Briefings*)).

[13] Canadian landed immigrants were also exempt, but DOS restricted the waiver of the visa requirement to Canadian citizens in January 2003. "Visa and Passport Waiver Revoked for Certain Permanent Residents of Canada and Bermuda (INS Notice)," 68 Fed. Reg. 5190 (Jan. 31, 2003), *posted on* AILA InfoNet at Doc. No. 03020443 (Feb. 4, 2003).

[14] Currently, citizens of the following 27 countries are eligible for visa waivers: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

[15] INA §217. Visa waiver applicants must have a machine-readable passport effective Oct. 26, 2004, to comply with biometric requirements. Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act) Pub. L. No. 107-173, §§303(c)(1), 306, 116 Stat. 543. They are also subject to US-VISIT effective Sept. 30, 2004. 69 Fed. Reg. 53317 (Aug. 31, 2004), *posted on* AILA InfoNet at Doc. No. 04090162 (Aug. 31, 2004). The deadline for visa waiver applicants have a biometric passport was extended to October 26, 2005. Pub. Law No. 108-299, 118 Stat. 1100.

[16] "DOS to End Revalidations in U.S., Except for Certain Diplomatic and Official Visas," 69 Fed. Reg. 35121 (Jun. 23, 2004), *posted on* AILA InfoNet at Doc. No. 04062362 (June 23, 2004); "DOS Answers to AILA Questions (3/4/04)," *posted on* AILA InfoNet at Doc. No. 04042164 (Apr. 21, 2004).

May 2003.[17] As a result, delays in access to some U.S. consulates have increased, and more consulates have instituted appointment systems. In August 2004, DOS introduced a link on its Web site that estimates how long it takes to obtain an interview appointment at particular U.S. consulates—they can vary from a few days to several weeks.[18] While the link also provides visa processing time, this estimate does not account for security checks. The possibility of such security checks varies dramatically, depending on the U.S. consulate and the applicant.

Third Country National Visa Applications

Typically, foreign nationals apply for visas at the U.S. consulate in their home country. Due to the dramatic variations in U.S. consulate treatment and processing of visa applicants, some foreign nationals fear and avoid their home country U.S. consulates. Rather, if eligible,[19] they prefer to make an appointment to apply for a visa stamp as a "Third Country National" (TCN) at another U.S. consulate. DOS regulations permit a foreign national to apply for a visa at a U.S. consulate with jurisdiction over the area where the applicant is physically present.[20] Such a U.S. consulate accepts a TCN visa application in its discretion, and may refer an applicant to his or her home country consulate.

In part due to proximity to the United States, TCN applications at U.S. consulates in Canada or Mexico are especially popular. In the past, one major reason for a preference in favor of border U.S. consulates was automatic revalidation. Unfortunately, the benefit of automatic revalidation to visa applicants has been practically eliminated.

Automatic Revalidation Restricted

Under the automatic revalidation exception to the visa requirement, foreign nationals may be eligible to avoid the visa application process if they have previously been issued a visa, have been admitted to the United States, and are traveling for 30 days or less to contiguous territory. Their expired visas[21] are automatically revalidated up to the date of their application for admission. Further, their original nonimmigrant classification can be converted to another nonimmigrant classification.[22] H-1B, L-1, or O-1s must possess a Form I-94, while F-1s must have a Form I-20 endorsed for travel, and J-1 exchange visitors must have a DS 2019 endorsed for travel.[23] Thus, a former F-1 student with an expired F-1 visa and current H-1B Form I-797 Approval Notice with a Form I-94 attached could travel to Canada for one week, and be readmitted in H-1B status without having to apply for a new H-1B visa stamp.

Foreign nationals in H-1B, L-1, or O-1 status are eligible for automatic revalidation only if they limit their travel solely to contiguous territory (Canada or Mexico), while F-1 students and J-1 exchange visitors are eligible for automatic revalidation if they travel to either contiguous territory, or adjacent islands (other than Cuba).[24] The F-1 student or J-1 researcher who has changed status to H-1B, L-1, or O-1 must be aware that the automatic revalidation rule for these nonimmigrant categories does not extend to adjacent islands.

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[17] *See* DOS Cable, "Border Security—Waiver Of Personal Appearance For Nonimmigrant Visa Applicants—Revision to the Regulations," 03 State 211636 (May 2003), *posted on* AILA InfoNet at Doc. No. 03052210 (May 22, 2003) (advising of revisions to 22 CFR §41.102 and 9 U.S. Dep't of State, *Foreign Affairs Manual* (FAM) §41.102, and requiring personal appearances for visa applicants and restricting waivers of the requirement); *see also* 68 Fed. Reg. 40127 (July 7, 2003); L. Schwartz, "Restricting the Personal Appearance Waiver: Are Consulates Equipped to Handle the Onslaught?" 22 *AILA's Immigration Law Today* 24 (Sept./Oct. 2003).

[18] "DOS Website Includes NIV Processing Times for Individual Posts," *posted on* AILA InfoNet at Doc. No. 04082470 (Aug. 24, 2004); *http://travel.state.gov/visa/tempvisitors_wait.php.*

[19] To be eligible for TCN processing, applicants cannot have remained in the United States beyond the period of stay authorized by the Attorney General, unless they qualify for an extraordinary circumstances exception. INA §222(g); 22 CFR §41.101(b)–(d). Notably, while DOS has stated that foreign nationals may not apply for visas at U.S. consulates in Canada or Mexico if they are nationals of the "state sponsors of terrorism" (Cuba, Iran, Syria, Sudan, North Korea, and Libya) or subject to any other Special Processing Requirements, consulates have accepted such applications on a case-by-case basis. *See* "DOS Answers to AILA Questions (3/27/03)," *posted on* AILA InfoNet at Doc. No. 03040340 (Apr. 3, 2003).

[20] 22 CFR §41.101(a)(1)(ii).

[21] Note that the foreign national must have an expired visa to be eligible; therefore, formerly visa exempt Canadian landed immigrants who have not yet applied for a visa are ineligible. "Canadian Permanent Residents Without Visas Cannot Use Automatic Revalidation," *posted on* AILA InfoNet at Doc. No. 03102944 (Oct. 29, 2003).

[22] 22 CFR §41.112(d).

[23] 22 CFR §41.112(d)(2)(i).

[24] 22 CFR §41.112(d)(2)(ii).

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[19] To be eligible for TCN processing, applicants cannot have remained in the United States beyond the period of stay authorized by the Attorney General, unless they qualify for an extraordinary circumstances exception. INA §222(g); 22 CFR §41.101(b)–(d). Notably, while DOS has stated that foreign nationals may not apply for visas at U.S. consulates in Canada or Mexico if they are nationals of the "state sponsors of terrorism" (Cuba, Iran, Syria, Sudan, North Korea, and Libya) or subject to any other Special Processing Requirements, consulates have accepted such applications on a case-by-case basis. *See* "DOS Answers to AILA Questions (3/27/03)," *posted on* AILA InfoNet at Doc. No. 03040340 (Apr. 3, 2003).

[20] 22 CFR §41.101(a)(1)(ii).

[21] Note that the foreign national must have an expired visa to be eligible; therefore, formerly visa exempt Canadian landed immigrants who have not yet applied for a visa are ineligible. "Canadian Permanent Residents Without Visas Cannot Use Automatic Revalidation," *posted on* AILA InfoNet at Doc. No. 03102944 (Oct. 29, 2003).

[22] 22 CFR §41.112(d).

[23] 22 CFR §41.112(d)(2)(i).

[24] 22 CFR §41.112(d)(2)(ii).

Fortunately, while DOS suggested the possibility that automatic revalidation might be eliminated for a period after 9/11,[25] this exception to the visa requirement remains somewhat intact. DOS did significantly restrict this benefit in March 2002, however, and created two exceptions to automatic revalidation: citizens of state sponsors of terrorism (Iran, Libya, Sudan, Syria, Cuba and North Korea), and foreign nationals who have applied for a visa at a U.S. consulate are not eligible for automatic revalidation.[26] Thus, students and researchers who travel to contiguous territory, then apply for a visa at a U.S. consulate, and have not yet received the visa, are not to be readmitted to the United States. As a practical matter, the rule has not been uniformly enforced, either due to a consul's generous rationalization that the foreign national has another valid basis for admission (*e.g.*, a valid B-1 visitor visa), or due to the CBP border inspector's ignorance of the limitation to the automatic revalidation rule. However, the foreign national who has made a TCN visa application should not expect to be readmitted to the United States under the automatic revalidation exception. Many institutions now warn foreign nationals making such applications that they should be prepared to return to their home countries in the event of visa denial or extended processing time due to security checks. Notably, most TCN visa denials are more likely to occur when the foreign national applies for a visa in a new nonimmigrant category, as opposed to a visa renewal in the same category.

Prudent TCN visa applicants will contact the consulate where they intend to apply before making travel plans to ascertain, to the extent possible, whether that consulate will accept their application. Many institutions warn visitors who have been absent from their home country for a long period of time, or who are from countries targeted for more intense scrutiny, (*e.g.*, China, Korea, Russia) that a consular officer reviewing a TCN application may determine that the home country consulate is in a better position to evaluate the applicant's ties to his or her home country.

The Forms

The complexity of the consular visa application itself has also increased over the past several years. Form DS-156 was revised in March 2003 to request additional information,[27] and some consulates have been phasing in an electronic bar-coded version of the form. The bar-coded version assists with consular workload, but does not currently transmit data to a centralized database.[28]

To implement the Border Security Act of 2002,[29] DOS instituted a new Form DS-157[30] in January 2002. While Form DS-157 initially applied only to males from "state sponsors of terrorism," DOS has since extended its application to all males (and in some cases, females) between ages 16 and 45. Form DS-157 demands information about any specialized skill or training including "biological or chemical experience," and thus has a disproportionate impact on visa applicants who are students and researchers with scientific training.

Depending on the information provided on the DS-157, the visa applicant may become subject to a "Visas Condor" (Technology Alert List) security check. As a result, students and researchers with scientific training are likely to wait longer. DOS has

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[25] "AILA/DOS Liaison Update on Border Post Processing," *posted on* AILA InfoNet, Doc. No. 01120633 (Dec. 06, 2001).

[26] 67 Fed. Reg. 10322 (Mar. 7, 2002), *posted on* AILA InfoNet at Doc. No. 02031172 (Mar. 11, 2002); *see also* DOS Cable, "Further Instruction on Change to 41.112(D) Regarding Automatic Extensions of Visa," 02 State 50158 (Mar. 14, 2002), *posted on* AILA InfoNet at Doc. No. 02061947 (June 19, 2002), and "DOS Liaison Committee Discusses Amended 22 CFR §41.112(d)," *posted on* AILA InfoNet at Doc. No. 02031174 (Mar. 11, 2002).

[27] DOS Cable, "State Department Implements New Form DS-156," *posted on* AILA InfoNet at Doc. No. 03030442 (Mar. 4, 2003).

[28] "Tips for Using Electronic DS-156," *posted on* AILA InfoNet at Doc. No. 04042861 (Apr. 28, 2004). Use of the electronic version is currently preferred but not mandatory. "Update from DOS Liaison, Electronic DS-156 Is NOT Required," *posted on* AILA InfoNet at Doc. No. 04032512 (Mar. 25, 2004); "DOS Answers to AILA Questions (3/4/04)," *supra* note 16.

[29] Border Security Act, *supra* note 15, §306 (requiring special processing procedures for foreign nationals from "state sponsors of terrorism"—Cuba, Iran, Libya, North Korea, Sudan, Syria); *see also* "DOS Notice on Special Visa Processing Procedures under §306 of the Border Security Act," *posted on* AILA InfoNet at Doc. No. 02111970 (Nov. 19, 2002).

[30] 9 FAM §41.103, Note 2; DOS Cable, "DOS Announces New Form for Applicants Between 16 and 45," *posted on* AILA InfoNet at Doc. No. 02011134 (Jan. 11, 2002); *see also* "Jerusalem Requiring All NIV Applicants to File DS-157," *posted on* AILA InfoNet at Doc. No. 02020434 (Feb. 4, 2002); "Notice Re: Supplemental Nonimmigrant Visa Application DS-157," *posted on* AILA InfoNet at Doc. No. 02010190 (Jan. 1, 2002) (notice from the London, U.K. consulate).

suggested that visa applicants provide completed biographic data, detailed information regarding plans in the United States, and U.S. contact details to assist in processing.[31]

Foreign nationals applying for F-1 or M-1 student or J-1 exchange visitor visas must also complete Form DS-158.[32] In addition, they must present SEVIS-generated Forms I-20 or DS-2019,[33] and must comply with additional SEVIS requirements that consulates verify in the Consolidated Consular Database (CCD), such as payment of user fees.[34]

THE INTERVIEW

Interview Basics: Nonimmigrant Intent

Most foreign nationals applying for a visa must be able to establish not only that they are admissible and qualify under the proposed visa category, but also that they have a residence in a foreign country that they have no intention of abandoning.[35] Demonstrating these facts to a U.S. consul's satisfaction is most challenging for scholars at an early point in their careers, and those who have stayed in the United States for extensive periods with attenuated home country ties. Most academic designated school officials (DSO) or J-1 program responsible officers (RO) suggest that the F-1 or J-1 student or scholar focus on how they will use the completed academic or research objective upon return to the home country. While documentation of foreign employment and family, financial, property, and social ties to the home country is helpful, the application also typically benefits by more extensive proof of the applicant's plan of action upon return.

Visitor/Change of Status Issues

In addition to establishing nonimmigrant intent, foreign nationals seeking B-1/B-2 visitor visas may be subject to additional scrutiny as to their intentions in traveling to the United States. Visitors may have problems if they intend to engage in academic activity or possibly enroll in an academic or vocational program or accept a research position.

B-1/B-2 visa applicants are not permitted to enroll in school. A limited exception exists for those B-1/B-2 applicants who indicate their intent to pursue a short-term course of part-time English language study incidental to their visit. In such cases, the visa should be annotated to indicate "study incidental to visit, Form I-20 not required."[36]

B-1/B-2 visitors must establish that they have sufficient funds for the duration of their visit and are not allowed to engage in any form of employment.[37] Despite this rule, reimbursement of "reasonable" business expenses of the WB/B-1 business visitor, such as travel and per diems, is permissible. WT/B-2s are also permitted travel reimbursement and per diems while engaging in academic activities (such as lectures) at an academic institution or nonprofit or governmental research institution. Such academic activities cannot last longer than nine days at any single institution, and the visitor may not have accepted similar payments from more than five institutions during the previous six months. This same limitation (nine days at any single institution, no more than five institutions during the previous six months) applies to any honoraria payment made to the visitor while in WT, WB, B-1, and B-2 status.[38] Some academic institutions

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[32] 9 FAM §41.103, Note 3; *see also* "New Form DS-158 Required of all F, M & J Nonimmigrants," *posted on* AILA InfoNet at Doc. No. 02073072 (July 30, 2002).

[33] The Student and Exchange Visitor Information System (SEVIS) is an Internet-based tracking system for F-1/M-1 students and J-1 exchange visitors that is mandated by §641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009. SEVIS is administered by ICE and DOS. 67 Fed. Reg. 76256 (Dec. 11, 2002).

[34] 68 Fed. Reg. 28129 (May 23, 2003), *posted on* AILA InfoNet at Doc. No. 03052341 (May 23, 2003). Effective September 1, 2004, F, M, and J visa applicants must file the I-901 SEVIS Fee Application. *See* DOS Cable, "DOS Advises Posts on Implementation of SEVIS Fee," *posted on* AILA InfoNet at Doc. No. 04092160 (Sept. 21, 2004).

[35] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §214(b), 66 Stat. 163 (INA); 8 USC §214(b) states that a nonimmigrant, other than H-1 (except for H-1B1), L or V nonimmigrant, "shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status." *See generally* 9 FAM §41.11, Notes 1, 3.

[36] 9 FAM §41.31, Note 10.6.

[37] 9 FAM §41.31, Note 4.

[38] The American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (div. C, title IV) (ACWIA) amended the INA to provide for a new section §212(q). Legacy INS issued a memorandum and a proposed rule providing guidance on its interpretation of the change in law. INS Memorandum, "Academic Honorarium

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have developed policies to ensure compliance with these requirements.[39]

Prospective students who are not certain of which school they will attend may seek admission as a B-1/B-2 visitor and apply for change of status in the United States. It is advisable but not required that such applicants obtain a "prospective student" notation on their visa.[40] However, they cannot begin study until an application for change of status to F-1 or M-1 is approved.[41] Given variable processing times for Form I-539 change of status applications, and the unavailability of premium processing,[42] prospective students are faced with two unenviable options. They must wait for I-539 approval or leave the United States and go through the visa application process again, to re-enter the United States in the desired nonimmigrant category. In either case they risk missing the beginning of the academic year.

There is no analogous regulatory requirement that change of status to J-1 be approved prior to initiation of the exchange program. However, many DSOs/ROs warn the potential exchange visitor against seeking B-1 admission with plans to change status in the United States, due to disapproval of this practice at ports of entry, consulates, and service centers as potentially involving misrepresentation.[43] Potential J-1 scholars using the B-1 have been detained in secondary inspection and denied admission. While there are provisions for B-1 "in lieu of" J-1 admission, academic and research institutions should consult with their international offices or immigration counsel to assess when the use of the B-1 instead of the J-1 is appropriate.

Similarly, academic researchers who are coming to the United States as B-1 visitors to conduct independent research, participate in conferences or seminars, or negotiate contracts,[44] take risks in accepting a research or training position. A U.S. consul may perceive these new circumstances as proof of misrepresentation, especially if the change of status application is filed soon after admission.[45] While foreign nationals filing a petition requesting change of status to H-1B or O-1 status have the benefit of premium processing, they are still faced with the choice of filing a change of status application and risking future complications, or leaving the United States to apply for the desired visa but not being able to return to the United States within the desired timeframe.

SEVIS Issues

The Student and Exchange Visitor Information System (SEVIS)[46] database collects information on the issuance of F-1/M-1 student Form I-20s and J-1 exchange visitor Form DS-2019s, and the admission of F-1s, M-1s, and J-1s. SEVIS is accessible and updated by DOS at U.S. consulates, CBP at the ports of entry, schools and program sponsors, and is administered by ICE. F visas may be issued no more than 90 days before the program start date, although J visas can be issued at any time. Neither F nor J visa-holders can enter the United States more than 30 days in advance of the stated program start date.[47] In addition to proving their nonimmigrant intent, foreign nationals applying for F-1, M-1, or J-1 visas must carry proof of sufficient funding that corresponds to the amount reported on their documents. Although such funding has been reviewed by DSOs or ROs, consuls may also review the proof of funds.

While students and researchers may have legitimate bases for extensive absences from the United States, such absences are inadvisable. F-1 regulations provide that students are considered to have

for Visiting B Nonimmigrant Aliens" (Nov. 30, 1999), *posted on* AILA InfoNet at Doc. No. 99121778 (Dec. 17, 1999); 67 Fed. Reg. 37727 (May 30, 2002).

[39] *See, e.g., www.ucop.edu/ucophome/cao/paycoord/honorpay.html.*

[40] 67 Fed. Reg. 18065 (Apr. 12, 2002) (proposed rule; legacy INS did not issue a final rule that would have made this practice mandatory).

[41] 67 Fed. Reg. 18062 (Apr. 12, 2002); 8 CFR §248.1(c)(3); *see also* INS Memorandum, "Requiring Change of Status from B to F-1 or M-1 Prior to Pursuing a Course of Study" (Apr. 12, 2002), *posted on* AILA InfoNet at Doc. No. 02041532 (Apr. 15, 2002).

[42] Premium Processing is available only if Forms I-539 and I-129 are filed concurrently, and is not available if Form I-539 is filed separately. *See* "Report of Immigration Services Division (ISD) Teleconference," *posted on* AILA InfoNet at Doc. No. 02032034 (Mar. 14, 2002).

[43] INA §212(a)(6)(C). DOS Cable, "B-1 in Lieu of J-1 Visas for USG-Funded Travel, *posted on* AILA InfoNet at Doc. No. 04022564 (Feb. 25, 2004).

[44] 9 FAM §41.31, Note 5.

[45] 9 FAM §40.63, Note 4.

[46] 68 Fed. Reg. 28129 (May 23, 2003). For a more in-depth review of SEVIS, see the article in this handbook, D. Fosnocht, "Quo Status? SEVIS and Nonimmigrant Status," and Elizabeth J. Bedient, "SEVIS a Year Later", 1 *Immigration & Nationality Law Handbook* 404, 426, (2004–05 ed.).

[47] DOS Cable, "DOS Instructs Posts on Timing of Issuance of F and J Visas," *posted on* AILA InfoNet at Doc. No. 04080965 (Aug. 9, 2004).

maintained status when they apply for a visa or readmission after annual vacations, as long as they intend to resume full-time studies in the next academic term. Under SEVIS however, if students have been outside the United States for over five months, even if engaging in a study abroad program, they are treated as new students, unless the U.S. institution's records indicate the student is registered while abroad.[48] Also, if there have been any changes—not limited to change of institution, but also including changes in program level or major—students must obtain a new Form I-20.[49] By contrast, the J-1 student and scholar regulations do not define the length of time allowed outside the country during an ongoing academic objective. Different programs tolerate different lengths of absence as long as the academic objective is being maintained. However, many schools use the F-1 five-month rule as a guideline for J-1 visa holders as well.

It is important for J-1 research scholars to make travel plans with J-1 program limitations in mind however, as a break in the program could cause difficulties in returning in J-1 status.[50] The J-1 exchange visitor is not allowed to begin a new exchange program in the professor or research scholar category if he or she was in J status for all or part of the 12-month period immediately preceding the start date of the new Form DS-2019. For this reason it is important that J-1 exchange visitors consult their RO to ensure that they are admissible, and to determine whether an extension or transfer is required, before leaving the United States.

F-1 students may be eligible for post-graduation optional practical training work authorization and J-1 students may be eligible for post-graduation academic training work authorization. While DOS regulations provide for travel authorization during this period,[51] travel may be inadvisable if the foreign national must apply for a visa at a U.S. consulate, as it will be more difficult to demonstrate nonimmigrant intent. On the other hand, many F-1s with valid visa stamps who have obtained their EAD cards are readmitted by CBP without problems.[52] Notably, the SEVIS-DOS interface does not include OPT information, and the Form I-20 is the only place where the consular officer can see the OPT information.[53] A compounding factor for F and J students is that some CBP officers both at airports and at land border ports of entry are not familiar with the intricacies of F and J regulations.

F-1 students maintaining status are accorded a 60-day grace period upon completion of studies,[54] and M-1 students and J-1 exchange visitors are accorded a 30-day grace period.[55] As these grace periods are accorded for the purpose of preparing for departure, readmission to the United States is not permitted during the grace period.

There is a strong possibility of complications for foreign nationals who are transitioning from F, M, or J to a visa classification not controlled by SEVIS. Despite interagency attempts to resolve this problem, approval of a change of status, even for a future effective date, terminates the foreign national's SEVIS record. SEVIS does not recognize a future change of status and terminates a record when "COS approved" has posted to a record.[56] This is especially a problem for students and researchers who, due to the cap on H-1B visa numbers,[57] are beneficiaries of H-1B petitions effective in a future fiscal year. Until SEVIS can account for a future change of status effective date, foreign nationals who have obtained approval of a petition requesting future change of status should avoid travel. Legacy INS and USCIS only consider travel during the period while the change of status

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[48] 8 CFR §214.2(f)(4).

[49] 8 CFR §214.2(f)(4)(i).

[50] 22 CFR §62.20(d)(ii).

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[52] Several schools have noted problems with December graduates who want to travel for the holidays. They are still in valid F-1 status, but often have not received their OPT cards yet. The University of Vermont reports that at least one student last year was sent back to Europe, while another in this situation was questioned for hours at Kennedy Airport.

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[53] DOS Cable, "DOS Standard Operating Procedures on OPT and the I-20," (REF: 9 FAM 41.161, Note 12) (Jan. 2004), *posted on* AILA InfoNet at Doc. No. 04022565 (Feb. 25, 2004).

[54] Under F-1 regulations at 8 CFR §214.2(f)(5)(iv), the 60-day grace period is accorded "to prepare for departure" and a F-1 who "fails to maintain status is not eligible for an additional period for departure."

[55] Under J-1 regulations at 8 CFR §214.2(j)(1)(ii), the 30-day grace period is accorded "for the purposes of travel." Under M-1 regulations at 8 CFR §214.2(m)(5), the additional 30-day grace period is given "to depart the United States, but not to exceed a total period of one year."

[56] "NSC Addresses Employment-Based Issues (7/27/04)," *posted on* AILA InfoNet at Doc. No. 04082471 (Aug. 24, 2004).

[57] INA §214(g)(1)(A).

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[57] INA §214(g)(1)(A).

petition is pending to cause "abandonment"[58] of the change of status application. Even though USCIS and legacy INS have indicated that travel during the period between the change of status approval date and the future approval effective date does not cause abandonment, travel during this period is still inadvisable until SEVIS can account for a future start date, and also until CBP concurs with USCIS.[59]

SEVIS has only been operational since February 2003, and has various other unresolved technical deficiencies. For example, the information on the Forms I-20 or DS-2019 may not be consistent with the information in SEVIS due to system problems.[60] Thus, a traveling foreign national may appear to be in status on paper, but not in the system. Similarly, system updates may not be reflected on the status documents. Such inconsistencies have the potential to complicate and delay foreign nationals' applications for visas and admission.

THE WAIT

Increasingly prevalent use of security checks at U.S. consulates has made the visa application process longer and more unpredictable. Students and researchers subject to academic calendars and project timelines want to know how long it will take to go through the visa application process. Unfortunately, the answers that DSOs, ROs, and immigration attorneys can provide are typically less than satisfactory.

If a foreign national is subject to additional security checks either due to an existing "hit" in any of the various agency databases or due to information provided at the interview, it may take days, weeks, months, or in some cases over a year[61] after the interview to resolve the issue. Security checks and advisory opinions are routed through various agencies with imperfectly integrated databases, and must be completed prior to visa issuance.[62] While a DOS Security Advisory Opinion Improvement Project upgraded U.S. consulate Security Advisory Opinions (SAOs) from cable to e-mail in late 2004,[63] the length of processing remains unpredictable. Depending on an applicant's nationality and field of study or research, the visa application process may be daunting. Unfortunately, some foreign nationals have decided to complete their education or take their research skills to other countries.[64]

While the Border Security Act[65] required improved capabilities and increased interoperability of the various U.S. government databases, interoperability continues to be problematic. A Government Accountability Office (GAO) report that analyzed 12 distinct security databases drew the following conclusion: while data sharing is occurring to some extent, the database systems have different architectures (specifically, different operating systems, software applications, data fields, and connectivity) such that data sharing is inefficient and potentially ineffective.[66] Another GAO report found that consolidating

[58] Letter of Jacquelyn Bednarz, Chief, Nonimmigrant Branch, INS, addressed to Frances Chin (Oct. 12, 1993), *reprinted in* 70 *Interpreter Releases* 1604 (Dec. 6, 1993); *see also* INS Memorandum by Thomas Cook, Acting Assistant Commissioner, Office of Programs, "Travel After Filing an Application for Change of Nonimmigrant Status" (June 18, 2001), *reprinted in* 78 *Interpreter Releases* 1378 (Aug. 27, 2001), *posted on* AILA InfoNet at Doc. No. 01081635 (Aug. 16, 2001).

[59] Letter of Jacquelyn Bednarz, Chief, Nonimmigrant Branch, INS, addressed to Naomi Schorr and Mark D. Koestler (April 6, 1995), *reprinted in* 14 *AILA Monthly Mailing* 5 (May 1995). The letter confirmed that travel after approval of a change of status application with a future approval date and return before the approval effective date did not cause abandonment of the change of status. Letter of Efren Hernandez, Chief, Business and Trade Branch, USCIS, addressed to Susan J. Cohen (Aug. 18, 2004), (on file with author).

[60] DOS consular offices do not have the ability to correct SEVIS errors. DHS has set up an e-mail alias, *sevishelpdesk@eds.com* for DSOs/ROs to notify ICE of such problems. *See* "When the Student/Exchange Visitor is not in SEVIS," *posted on* AILA InfoNet at Doc. No. 03042940 (Apr. 29, 2003).

[61] "Border Net Has Become A Noose," *Los Angeles Times* (Oct. 16, 2004). The article cites the president of the University of Maryland's testimony that "scholars from Iran, Russia and China had waited as long as 18 months for visas."

[62] 9 FAM Appendix G §501.

[63] "DOS Answers AILA Questions (3/4/04)," *supra* note 16.

[64] "Reverse Brain Drain Threatens US Economy," *USA Today*, Feb. 23, 2004, at *www.usatoday.com/news/opinion/editorials/2004-02-23-economy-edit_x.htm* (citing a study that states that the formerly unchallenged competitive advantage of the United States to attract the best and the brightest may be imperiled, due in part to policies that restrict scientific information and complicate travel).

[65] Border Security Act, *supra* note 15.

[66] U.S. General Accountability Office, *Information Technology: Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322 (Apr. 2003), *posted on* AILA InfoNet at Doc. No. 03043010 (Apr. 30, 2003). For a comprehensive review of interagency security check issues, see T.L. Loke Walsh and B. P. Wolfsdorf, "Navigating Through the Maze of Security Checks: Issues Affecting Consular Processing in

continued

"hundreds of redundant systems" into an "interoperable, and integrated infrastructure" remains a major challenge for DHS.[67] This finding was more recently echoed in a report issued by the Office of the Inspector General.[68]

Security Checks at the U.S. Consulate

Security checks can roughly be categorized as name-based, nationality-based, field-based, and increasingly, also biometric (*e.g.*, photographs and fingerprints). While there is little to be done at the U.S. consulate if the foreign national's name, biometric data, or nationality subjects him or her to additional scrutiny, it is sometimes possible to prepare for or avert a security check based on the student or researcher's field of specialization.

Name-Based

Consular officers access and update the Consular Consolidated Database (CCD) that contains records of prior visa applications, and more recently, biometric information of foreign nationals.[69] Consular officers also use SEVIS data to verify Forms I-20 and DS-2019 in the CCD, and to report the associated F, M, and J visa issuances.[70]

In reviewing a visa application, consular officers consult DOS's Consular Lookout and Support System (CLASS),[71] which checks the applicant's name, date of birth, and place of birth against a database.[72] CLASS receives "lookout" information from the DHS National Automated Immigration Lookout System (NAILS) through the Interagency Border Inspection System (IBIS). Since 2002, CLASS has linked to the Federal Bureau of Investigation's (FBI) National Crime Information Center database (NCIC).[73] If a foreign national's name, date of birth, and place of birth matches information on NCIC, the applicant must be fingerprinted and the FBI analysis must be forwarded to the DOS National Visa Center (NVC)[74] and then the consulate.

DOS also maintains a TIPOFF database that incorporates "Visas Viper," a mechanism for adding names of suspected terrorists into CLASS and IBIS.[75] If a foreign national with a name, date of birth, and place of birth matching information on the Visas Viper list applies for a visa, an SAO is triggered,[76] and a visa cannot be issued until DOS issues a favorable response.[77] As CLASS and TIPOFF are name checks, delays and NCIC fingerprint checks are more likely for nationals of countries where certain names are commonly used.[78] While delays are incurred in part due to processing of biometrics such as fingerprints, this data may ultimately assist in clarifying a case of mistaken identity. Unfortunately, as the initial checks are based on minimal data, (*e.g.*, name, country of birth) and more in-depth checks involve cross-agency collaboration and data-sharing, processing delays are highly likely.

Nationality-Based

Applicants from one of the six state sponsors of terrorism[79] and other applicants on a case-by-case

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2004," *The Visa Processing Guide: Process and Procedure at U.S. Consulates and Embassies* 3 (2004–05 ed.).

[67] U.S. General Accountability Office, *Major Management Challenges Facing the Department of Homeland Security*, GAO-03-322 (Dec. 2003), *posted on* AILA InfoNet at Doc. No. 04021369 (Feb. 13, 2004).

[68] Office of the Inspector General, *DHS Challenges in Consolidating Terrorist Watchlist Information*, OIG 04-31, *available at www.dhs.gov/interweb/assetlibrary/OIG-04-31_Watch_List.pdf* (Aug. 2004).

[69] Information Sharing: Hearing before the Subcomm. on Immigration of the Senate Comm. on the Judiciary, 108th Cong., 1st Sess., July 15, 2003 (testimony of Janice L. Jacobs, Deputy Assistant Secretary for Visa Services, DOS).

[70] 68 Fed. Reg. 28129 (May 23, 2003), *posted on* AILA InfoNet at Doc. No. 03052341 (May 23, 2003).

[71] 9 FAM Appendix D, §200. CLASS replaced the Automated Visa Lookout System (AVLOS) in 1991.

[72] 9 FAM Appendix D, §202.1. INS *Inspector's Field Manual* §31.4(e)(3). *See also*, L. Eskandari, C. Kuck, and S. Yale-Loehr, "Understanding the New Paradigm—Dealing with the 'Visa Lookout' List," *The Visa Processing Guide: Process and Procedure at U.S. Consulates and Embassies* 69 (2004–05 ed.).

[73] Integration of CLASS and NCIC was mandated by the USA PATRIOT Act. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 1115 Stat. 272, §403 (USA PATRIOT Act). *See also* 67 Fed. Reg. 8477 (Feb. 25, 2002), *posted on* AILA InfoNet at Doc. No. 02030535 (Mar. 5, 2002); 22 CFR §§41.105(b) and 42.67(c).

[74] 22 CFR §41.105(b)(2). *See also* "DOS Answers AILA Questions (3/27/03)," *supra* note 19.

[75] 9 FAM §40.32, Note 11.1. Visas Viper was initiated after the 1993 World Trade Center bombing.

[76] 9 FAM §502.

[77] 9 FAM §40.32, Note 11.10.

[78] DOS indicates that Latin and Asian names have been especially problematic. "DOS Answers to AILA Questions (3/4/04)," *supra* note 16.

[79] Cuba, Iran, Libya, North Korea, Sudan, and Syria; 9 FAM Part IV, Appendix C.

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Nationality-Based

Applicants from one of the six state sponsors of terrorism[79] and other applicants on a case-by-case basis[80] are also subject to special, lengthier processing requirements. The "Visas Condor" check was initiated in January 2002 as an in-depth check of these applicants, requiring request for and return of an SAO from DOS.[81] The Visas Condor is now handled by the National Visa Center and is valid for no more than one year. Notably, while DOS has estimated that most Visas Condor checks should be responded to in 7–10 days,[82] total processing time can extend to months.

In addition, applicants subject to the National Security Entry-Exit Registration System (NSEERS) who failed to comply with all requirements (*e.g.*, port of exit re-registration) may be subject to greater scrutiny, including a finding of inadmissibility.[83] In May 2003, DOS issued a cable guiding consular officers on how a visa stamp applicant might overcome the presumption of inadmissibility by showing good cause and by establishing that the nonimmigrant does not intend to enter the United States to engage in unlawful activity.[84]

Field-Based

Consulates must also analyze the applicant's field of study or research against the Technology Alert List (TAL). The TAL was initially created to maintain technological superiority over Communist bloc countries, but was expanded beginning in 1996,[85] and is currently an extremely broad list of over 200 "Critical Fields."[86] A TAL "Visas Mantis" SAO is mandatory for nationals of the state sponsors of terrorism and is applicable on a case-by-case basis to other visa applicants, depending on their field of study, research, or employment.

TAL checks can cause unexpected delays, since many researchers mistakenly believe that long security delays only occur with males from Muslim countries. The Massachusetts Institute of Technology reports that extensive delays for Mantis checks in the past two years for nationals from a wide variety of countries resulted in serious disruption to ongoing research projects: Romania (nine months), Spain (four and one-half months), and Taiwan (six months). The fields involved were immunology, fruit fly genetics, and spectroscopy. In one case, the delay resulted in the researcher being stranded abroad with no salary.

The TAL's areas of focus include "dual-use" (civilian and military) technologies that may pose a security risk if "exported" to other countries.[87] The TAL is among the most serious areas of concern for students and researchers[88] because of the wide array of fields, including biochemistry, microbiology, engineering, urban design, and computer technology, that are listed as possible critical fields of concern. Consular officers are not allowed to issue a visa until the DOS response to the SAO is received.[89] A

2004," *The Visa Processing Guide: Process and Procedure at U.S. Consulates and Embassies* 3 (2004–05 ed.).

[67] U.S. General Accountability Office, *Major Management Challenges Facing the Department of Homeland Security*, GAO-03-322 (Dec. 2003), *posted on* AILA InfoNet at Doc. No. 04021369 (Feb. 13, 2004).

[68] Office of the Inspector General, *DHS Challenges in Consolidating Terrorist Watchlist Information*, OIG 04-31, *available at www.dhs.gov/interweb/assetlibrary/OIG-04-31_Watch_List.pdf* (Aug. 2004).

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[79] Cuba, Iran, Libya, North Korea, Sudan, and Syria; 9 FAM Part IV, Appendix C.

[80] Specific criteria for the Visas Condor are classified. "DOS Answers to AILA Questions (3/27/03)," *supra* note 19.

[81] "The Consul and the Visas Condor," *supra* note 31.

[82] "DOS Answers to AILA Questions (3/4/04)," *supra* note 16.

[83] INA §212(a)(3)(A)(ii) provides for inadmissibility of foreign nationals who seek to enter the United States to engage solely, principally, or incidentally in any unlawful activity.

[84] DOS Cable, "Visas and Non-Compliance with National Security Entry Exit Registration System (NSEERS)," Ref 02 State 186027, *posted on* AILA InfoNet at Doc. No. 03051245 (May 12, 2003).

[85] For a comprehensive review of TAL issues, *see* T. Loke Walsh, "The Technology Alert List, Visas Mantis, and Export Control: Frequently Asked Questions," 2 *Immigration & Nationality Law Handbook* 412 (2004–05 ed.).

[86] "Using the Technology Alert List (Update)," 03 State 147566 (Aug. 1, 2002), *posted on* AILA InfoNet at Doc. No. 03030449 (Mar. 4, 2003). The TAL issued in prior years was not as expansive, *see, e.g.*, "Summary of Special Processing Requirements" (Jun. 23, 2001), *posted on* AILA InfoNet at Doc. No. 01072031 (Jul. 20, 2001). While DOS annually updates the TAL and DOS issued an update in October 2003, *continued*

this is the most recent available TAL cable. The latest DOS cable update has not been released, but is mentioned in "DOS Answers to AILA Questions (10/14/03)," *posted on* AILA InfoNet at Doc. No. 03102043 (Oct. 20, 2003).

[87] There are four security objectives under the TAL: Stem the proliferation of weapons of mass destruction and missile delivery systems; restrain the development of destabilizing conventional military capabilities in certain regions of the world; prevent the transfer of arms and sensitive dual-use items to terrorist states; and maintain U.S. advantages in certain militarily critical technologies. 9 FAM §40.31, Exhibit I.

[88] *See* J. P. Eyster, "It's Academic!: Overcoming the Challenges Facing Foreign Students, Researchers, and Professors," 23 *AILA's Immigration Law Today* 4, (July/Aug. 2004). The article concludes, "increasingly high barriers to entry have been erected that threaten to stop the flow of top-level students and scientists from other countries. The array of clearance checks . . . as well as the broad range of the Technology Alert List (TAL) and the increased consular scrutiny, have resulted in statistically verifiable delays in entry and increases in visa denials for students, academics, and researchers." *Id.*

[89] 9 FAM Appendix G, §501.

negative SAO can result in the applicant being found inadmissible under security grounds.[90]

Notably, the TAL does not apply to information in the public domain or information presented in an academic course. Among the information the consular officer may request to determine potential TAL applicability is the applicant's research or business interests, the specifics of the research or studies in the United States, the person or entity funding the travel or education, and how and where the applicant will use the knowledge acquired.[91]

Unfortunately, due to the expansive breadth of this security check, the TAL can potentially be misapplied to the detriment of U.S. interests. For example, a Russian Nobel laureate who has been credited with laying the foundation of modern information technology was unable to obtain a visa to speak at a U.C. Berkeley symposium; as a result, the event was cancelled.[92] Similarly, a report by the Immigration Policy Center found that TAL/Mantis-related delays have a significant effect on students and researchers from India and China because of its focus on science and engineering.[93] A GAO report found that visa processing time at U.S. consulates depends largely on whether an applicant must undergo a Visas Mantis check, and that average processing time for applications requiring a Visas Mantis check was over two months.[94] DOS representatives state that as of September 2004, the processing time has been reduced to within 30 days for 98 percent of cases;[95] however, the uncertainty of the extent of the delay poses a significant deterrent to travel, and reports of remarkable delays continue.[96]

The TAL instructs consulates to pay special attention to technologies that fall under the Export Administration Regulations (EAR)[97] of the Commerce Department's Bureau of Industry and Security (BIS). The EAR requires that institutions obtain a license to transfer dual-use technologies listed on the Commerce Control List[98] to foreign nationals. BIS is responsible for enforcing the EAR and processes deemed export licenses for dual-use technologies. Licenses may be required depending on the field of technology, and the applicant's nationality. Under the BIS Visa Application Review Program, the visa applications of students and researchers are reviewed for possible EAR violations.[99]

Some technologies are under the jurisdiction and licensing regimes of other U.S. government agencies and are not subject to the EAR. These include defense technology that is governed by DOS International Traffic in Arms Regulations (ITAR),[100] and

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[90] INA §212(a)(3)(A)(i)(II) provides for inadmissibility of foreign nationals who seek to enter the United States to engage solely, principally, or incidentally in any activity to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information. 9 FAM §40.31, Exhibit I.

[91] "Using the Technology Alert List (Update)," *supra* note 86.

[92] "Star Scientist a No Show," *San Francisco Chronicle*, Sept. 22, 2004 at B8.

[93] Paral & Johnson, "Maintaining a Competitive Edge: The role of the Foreign-Born and U.S. Immigration Policies in Science and Engineering," *supra* note 2. The report finds that visa problems of foreign national scientists and engineers "have had wide-ranging effects on the S&E establishment in the United States . . . in 2003 the National Academy of Sciences had to postpone a meeting with the Chinese Academy of Sciences because of problems that Chinese scientists were confronting in getting visas. As a result, the National Academies decided to hold any future conferences with foreign academies outside of the United States. . . ."

[94] U.S. General Accountability Office, *Improvements Needed to Reduce Time Taken to Adjudicate Visas for Science Students and Scholars*, GAO-04-371, February 2004. GAO found that between April and June 2003, 2,888 Visas Mantis cables were submitted by consular posts and on average it took 67 days for the security checks to be processed.

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[95] "Federal officials declare visa delays nearly resolved" *Govexec.com* (Oct. 5, 2004), available at *www.govexec.com/dailyfed/1004/100504tdpm2.htm*. *See* "America Closes Its Doors: Washington Says IT Is Fixing the Post-9/11 Visa Mess, Yet Complaints from Businesses and Universities Mount," *Newsweek*, Sept. 27, 2004.

[96] "[O]ne top Chinese PhD student . . . enrolled in a university in Singapore because she could not obtain a visa after more than a year's effort. The cancer research of two other postdoctoral students was delayed more than three months due to visa problems." Spencer Ante, "Keeping Out the Wrong People," *supra* note 3.

[97] 15 CFR §§730–774.

[98] *See* "Deemed Export" Questions and Answers, at *www.bis.doc.gov/deemedexports/deemedexportsfaqs.html*. *See also* F. Amanda DeBusk & D. M. Fisher-Owens, "Safeguarding America's Nonmilitary Technology: Export Licensing Requirements for Foreign Nationals," 22 *AILA's Immigration Law Today* 5, (Sept./Oct. 2003). The "state sponsors of terrorism" as well as China, India, Pakistan, and Israel are among the nationalities BIS focuses upon.

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technology related to nuclear materials, which is under the U.S. Department of Energy jurisdiction. These export controls may not apply if the technology is publicly available, *e.g.*, if the technology is the subject of fundamental (not proprietary) research, education, or the subject of available publications.

How can schools and research institutions prepare for the possibility of an export control issue? To the extent possible, institutions should prepare job descriptions and employees should prepare their curricula vitae with export control in mind. DOS has confirmed that publication lists are helpful.[101] Some institutions arrange for an employment letter for scholars to present to the consulate that includes a detailed and nontechnical description of the research to be conducted by the scholar, indicating whether it is basic research or applied research. If the research has no military or defense-related applications, this should be clearly stated. The visa applicant should be prepared to provide additional documentation of his or her area of study and demonstrate that this research is publicly available (*e.g.*, through publications, course offerings). Unfortunately, while these measures may assist in preparing for and decreasing the possibility of a TAL check, there is an element of unpredictability in the process, such that even the most prepared visa applicants cannot rest assured.

SECURITY CHECKS AT THE PORT OF ENTRY/EXIT

Another round of security checks is required to achieve admission to the United States, and will increasingly be required as part of exit from the United States. At ports of entry, CBP officers consult IBIS, which utilizes data from numerous agencies (including FBI, Interpol, DEA, IRS, FAA, and the Secret Service)[102] to access information on previous contacts with government agencies, criminal records, and other existing "lookout" records. CBP inspectors access DOS-collected biometric information, and compare it to the information collected at the port of entry through the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system.[103] In addition, CBP officers have access to information about passengers through the Advance Passenger Information System (APIS) and the Arrival Departure Information System (ADIS) that is compared against IBIS.[104] CBP officers also check NAILS[105] and the Automated Biometric Identification System (IDENT)[106] biometric database for identifying inadmissible foreign nationals. Finally, CBP officers have access to "publicly available" data that is accessible through a credit report, *e.g.*, the existence of U.S. bank accounts.

CBP officers either grant or deny admission, or refer more "complex" cases for in-depth secondary inspection. While the nature of a port of entry necessitates more efficient processing, it is not infrequent that foreign nationals spend hours waiting at secondary inspection. Inexplicably, such more complex cases include not only foreign nationals with outstanding criminal warrants, but also NSEERS special registrants and adjustment of status applicants seeking admission on an approved advance parole. As there is no right to a representative at ports of entry,[107] and as the consequences of failure to register include expedited removal, the inspection process can be stressful, especially for those foreign nationals selected on the basis of nationality.

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[101] "DOS Answers to AILA Questions (3/27/03)," *supra* note 19.

[102] IBIS Fact Sheet, at *www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/ibis.xml*.

[103] 69 Fed. Reg. 467 (Jan. 5, 2004).

[104] "In 1988, Congress mandated the development of the Interagency Border Inspection System (IBIS). This system, previously maintained by the Customs Service, allowed DOS, INS, and Customs to share watch lists, including terrorist lookout records, at international ports of entry. This system is currently maintained by the DHS' CBP." *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, CRS Report for Congress (Apr. 21, 2004); INA §231(a)–(c). Such information includes a passenger's name, date of birth, nationality, citizenship, gender, passport and visa information, and U.S. address. *See also* APIS Fact Sheet, at *www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/apis/apis_factsheet.xml*.

[105] INA §215(d); INS *Inspector's Field Manual* §31.4(a).

[106] *See* IDENT Fact Sheet, at *http://uscis.gov/graphics/aboutus/foia/ereadrm/reference/majorinfosys/ident_9.htm*.

[107] 45 Fed. Reg. 81732 (Dec. 12, 1980), *reproduced in* 57 *Interpreter Releases* 572, 581 (Dec. 12, 1980). The rule states in its Supplementary Information that the "right of representation does not apply to a person who is being processed through primary or secondary inspection at a port of entry." This regulation assumes that there will be subsequent administrative proceedings and predates expedited removal but continues to serve as the basis for the denial of right to counsel at the port of entry. *See also* "CBP Liaison Minutes (11/13/03)," *posted on* AILA InfoNet at Doc. No. 03123110 (Dec. 31, 2003), reiterating no right to counsel at the port of entry.

Nationality-Based: NSEERS

The NSEERS special registration program was initiated as a national security measure in response to 9/11 and requires nonimmigrants who are nationals and citizens of certain mostly Middle Eastern or Muslim countries to "special register." Legacy INS issued a rule[108] and a subsequent series of notices that required that "certain" nonimmigrants[109] either be registered at the port of entry, or if already in the United States, called in to report at local INS offices to register. NSEERS also required special registration between 30–40 days after admission, annually, and on departure that was restricted to designated ports of exit. NSEERS continues to require re-registration upon departure, which was restricted to certain designated ports of exit. Foreign nationals are fingerprinted, photographed, and interviewed, and in some cases have been detained and removed.

Legacy INS initially publicized NSEERS poorly, and some offices engaged in unjustified detentions. Upon the reorganization of INS in March 2003, DHS temporarily delegated NSEERS to USCIS, then to ICE. Travel triggered not only the 30–40-day registration requirement but also reset the annual registration timeline. Also, the targeting of foreign nationals based on nationality and religion generated controversy. As a result, the program became increasingly unwieldy. In December 2003, ICE issued a rule suspending "blanket" 30-day and annual re-registration requirements,[110] such that the remaining major components of NSEERS are administered by CBP at the ports of entry, and at designated ports of exit.

Foreign nationals are currently identified as subject to NSEERS at the port of entry based on holding a nationality or citizenship designated in a Federal Register notice,[111] based on a lookout in IBIS, which may have been placed by a consular officer in CLASS and transmitted to CBP through NAILS, based on "pre-existing" or "established" criteria that include designation of entire nationalities, or based on officer discretion.[112] Foreign nationals selected for NSEERS registration or re-registration at the port of entry are not processed through the US-VISIT system but rather are referred to secondary inspection, where a CBP officer conducts an interview, and takes their fingerprints and photographs. Information relating to NSEERS is gathered in a distinct component of the IBIS database called ENFORCE.[113] The CBP officer is to notify the non-

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[108] 67 Fed. Reg. 52584 (Aug. 12, 2002), *posted on* AILA InfoNet at Doc. No. 02081245 (Aug. 12, 2002). NSEERS also imposes additional obligations, such as reporting of not only change of address, but also of school or employment, to legacy INS/USCIS within 10 days.

[109] INS designated the four groups of nationalities subject to "call in" registration in the following notices: Iran, Iraq, Libya, Sudan, and Syria: 67 Fed. Reg. 66765, (Nov. 2, 2002), *posted on* AILA InfoNet at Doc. No. 02110670 (Nov. 6, 2002); Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen: 67 Fed. Reg. 70526 (Nov. 22, 2002), *posted on* AILA InfoNet at Doc. No. 02112240 (Nov. 22, 2002); Armenia, Pakistan, Saudi Arabia: 67 Fed. Reg. 77136 (Dec. 16, 2002), *posted on* AILA InfoNet at Doc. No. 02121643 (Dec. 16, 2002); Armenia was subsequently removed. 67 Fed. Reg. 77642, (Dec. 18, 2002), *posted on* AILA InfoNet at Doc. No. 02121840 (Dec. 18, 2002); and Bangladesh, Egypt, Indonesia, Jordan, or Kuwait: 68 Fed. Reg. 2363, (Jan. 16, 2003), *posted on* AILA InfoNet at Doc. No. 03011670 (Jan. 16, 2003).

[110] 68 Fed. Reg. 67577 (Dec. 2, 2003), *posted on* AILA InfoNet at Doc. No. 03120240 (Dec. 2, 2003). ICE amended *continued*

the change of address, school, and employment notification requirement to state that such notification to USCIS is not required if it is provided to ICE through SEVIS. In place of blanket "call in" registration, ICE conducts discretionary case-by-case "call in" re-registration. *See* "ICE Begins Individual Re-Registrations under NSEERS," *posted on* AILA InfoNet at Doc. No. 04060761 (June 7, 2004); "Example of Letter Used by ICE for Special Registration Individual Re-Registration," *posted on* AILA InfoNet at Doc. No. 04060762 (June 7, 2004).

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[112] INS Memorandum, "Standard Operating Procedures for Alien Registration—IFM Update IN02-34" (Sept. 5, 2002), *posted on* AILA InfoNet at Doc. No. 03043048 (Apr. 30, 2003).

[113] INS Memorandum, "Strengthening the National Entry-Exit Registration System (NSEERS), or the Special Alien Registration Program" (Sept. 5, 2002), *posted on* AILA InfoNet at Doc. No. 03050140 (May 1, 2003) (describes the data collected by ENFORCE).

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immigrant of all special registration requirements including restriction of departure to certain ports of exit, and the exit registration requirement, and provide him or her with "walk away materials." In practice, legacy INS did not, and CBP does not, uniformly notify foreign nationals of all requirements or always provide "walk away materials."

Legacy INS provided notice of the designated ports of departure by notice in the Federal Register.[114] Remarkably, the list of the designated ports of exit is not to be found on the CBP Web site but rather, is available on the ICE Web site, under "walk away materials" and in archives.[115] Even with the "call in" requirements eliminated, compliance with NSEERS, especially exit re-registration upon departure from the United States, can be formidable. Failure to comply with exit registration, and consequent denials or delays in readmission, have caused students to miss academic deadlines and in some cases, prevented them from completing academic programs and compelled transfer to academic institutions outside the United States.

"Willful" failure to comply with NSEERS can involve numerous serious penalties, such as criminal misdemeanor or removal.[116] For foreign nationals who have traveled and are seeking a visa at a U.S. consulate or readmission at a port of entry, failure to comply with exit registration creates a presumption of inadmissibility as it indicates the nonimmigrant may seek to enter the United States "to engage in unlawful activity."[117] This presumption can be overcome if a consular officer finds "good cause." A consular officer's determination is final and not subject to appeal. An adverse decision is persuasive but not determinative in the event of subsequent application for a visa or readmission. On the other hand, a consular officer's finding that a foreign national has overcome the presumption of inadmissibility is a significantly favorable factor, but not binding on the CBP inspector at the port of entry.[118] If the traveling foreign national has a valid visa in his or her passport, the CBP officer at the port of entry makes the admissibility determination.

While the burden of restricting travel to designated ports of exit and complying with exit registration is on the foreign national, it is up to the CBP inspector at the port of entry to refer the foreign national to secondary inspection for re-enrollment in NSEERS. It is possible that a CBP omission to re-register a foreign national formerly subject to NSEERS on re-entry releases that foreign national from continuing NSEERS obligations.[119] While neither CBP nor ICE has provided written guidance on this issue, the regulations provide that the CBP officer has the authority to make the determination that the foreign national is not subject to NSEERS.[120] However, in the exercise of caution, some academic institutions and attorneys insist that foreign nationals who have been subject to NSEERS but who were not selected for re-registration at the port of entry still attempt to comply with exit registration by limiting their travel to designated ports of exit, reporting for special registration, and surrendering their I-94 cards at the special registration departure office instead of to the airline.

Foreign nationals may seek exemption from NSEERS at a U.S. consulate when they apply for a visa,[121] for example by arguing that they are not a national or citizen of a subject country.[122] Only DOS has authority to determine exemption from NSEERS. Traveling foreign nationals who are subject to NSEERS can apply for a waiver of future entry-exit registration requirements for a period of up to one year. Only a CBP port director has the au-

[114] 68 Fed. Reg. 8047 (Feb. 19, 2003), *posted on* AILA InfoNet at Doc. No. 03021947 (Feb. 19, 2003).

[115] ICE provides two separate lists, *www.ice.gov/graphics/specialregistration/WalkawayMaterial.pdf* and *www.ice.gov/graphics/specialregistration/BLISTOFP.pdf*. Notably, both Web pages list two ports of exit (Whirlpool Niagara Falls Amtrak and Rouses Amtrak) that are not listed in the legacy INS notice.

[116] INA §§266 and 237(a)(3)(A).

[117] INA §212(a)(3)(A)(ii).

[118] 8 CFR §264.1(f), as amended by 68 Fed. Reg. 67577 (Dec. 2, 2003). *See also* DOS Cable, "Visas and Non-Compliance with National Security Entry Exit Registration System (NSEERS)," *posted on* AILA InfoNet at Doc. No. 03051245 (May 12, 2003).

[119] 8 CFR §264.1(f)(1). In addition, at least one CBP representative has confirmed that if a nonimmigrant is not re-registered at the port of entry, he or she is "out of the system." Colleen Manaher, Supervisor, Passenger Operations, US-VISIT Liaison, CBP, Comments at the AILA Spring Conference, Mar. 5, 2004 (tape available through AILA)).

[120] "ICE Liaison Minutes (11/12/03)," *posted on* AILA InfoNet at Doc. No. 03120243 (Dec. 2, 2003).

[121] 8 CFR §264.1(f)(7)(iii).

[122] One potential, although dated, source of reference is U.S. Office of Personnel Management, "Citizenship Laws of the World," (Mar. 2001); *http://www.opm.gov/extra/investigate/IS-01.pdf*.

thority to grant a waiver; this determination is final and not subject to appeal.[123] This waiver is unavailable to foreign nationals who failed to comply with registration requirements in the past.

DHS has described NSEERS as a "pilot" project in preparation for US-VISIT, and has claimed that it will discontinue NSEERS by December 31, 2005, upon US-VISIT's implementation at all ports of entry and exit.[124] In the meantime, traveling foreign nationals subject to NSEERS must deal with increasingly overlapping processes at the port of entry, continue to encounter misinformation and lack of information regarding port of exit restrictions and re-registration requirements, and risk potential inadmissibility determinations at U.S. consulates and ports of entry.

Biometric-Based: US-VISIT

Congress initially mandated a national entry-exit system in 1996 that was not implemented. Congress then outlined a three-step implementation plan in 2000, and finally added the biometric technology requirement in 2001.[125] The legislation has mandated implementation of a biometric system at air and sea ports by December 2003; high-traffic land ports by December 2004; and all remaining ports by December 2005. The U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system represents a massive restructuring of the U.S. entry-exit system. The extent of the restructuring, and the issues it has raised, is detailed in various GAO reports.[126]

DHS published a rule launching the US-VISIT biometric registration system in January 2004,[127] and began to implement the automated entry/exit system at ports of entry and exit, with an emphasis on airports.[128] Notably, while CBP is responsible for oversight of daily processing of foreign nationals, US-VISIT is a BTS program.[129] Consequently, BTS, not CBP, is responsible for policy-level decisions on implementation of US-VISIT.

At air ports of entry, most foreign nationals[130] are subject to US-VISIT's biometric scanning (two fingerprints and a photograph) as a record of their arrival, verification of their identities, and authentication of their travel documents[131] as a

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[123] In advance of departure, a nonimmigrant may submit an application to the CBP port director with jurisdiction over the port of intended departure. If the basis for waiver is frequent business travel, a nonimmigrant may submit an application to the CBP port director with jurisdiction over the port where he or she most frequently arrives. The applicant must establish that exigent or unusual circumstances exist, or in the case of business travelers, good cause exists, and that he or she warrants a favorable exercise of discretion. 8 CFR §264.1(f)(7)(i). For a more in depth analysis of NSEERS waivers, *see* M. Maglich and R. Pacis, "Don't Forget About Me: A Discussion of the National Security Entry and Exit Registration System," 1 *Immigration & Nationality Law Handbook* 82, 89, (2004–05 ed.).

[124] "Special Registration to End, be Replaced by Upcoming 'U.S. VISIT' Monitoring Program for All Visitors," 80 *Interpreter Releases* 690 (May 12, 2003); *see also* "CRS Issues Statutory Analysis of the Entry-Exit System," *posted on* AILA InfoNet at Doc. No. 03112546 (Nov. 25, 2003). The ICE Web site (*www.ice.gov/graphics/news/factsheets/visit051903.htm*) reiterates: "When the US-VISIT system is fully implemented . . . any remaining elements of NSEERS, such as port of entry arrival registration, will become part of the US-VISIT system."

[125] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA); Data Management Improvement Act of 2000, Pub. L. No. 106-215, 114 Stat. 339 (DMIA). Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (USA PATRIOT Act).

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[126] U.S. Government Accountability Office, "Risks Facing Key Border and Transportation Security Program Need to Be Addressed," *posted on* AILA InfoNet at Doc. No. 04031815 (Mar. 18, 2004); *see also* U.S. Government Accountability Office, "Homeland Security: First Phase of Visitor and Immigration Status Program Operating, but Improvements Needed," *posted on* AILA Doc. No. 04051165 (May 11, 2004).

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[128] US-VISIT has thus far implemented entry controls at 115 international airports and 14 sea ports of entry with high traffic in foreign nationals, and exit controls at 13 airports and two seaports. *See also www.dhs.gov/dhspublic/display?content=3875.*

[129] 69 Fed. Reg. 467 (Jan. 5, 2004); *see also www.dhs.gov/dhspublic/display?theme=9&page=2; www.dhs.gov/dhspublic/interapp/editorial/editorial_0440.xml.*

[130] US-VISIT does not apply to U.S. citizens, permanent residents, Canadian citizens, foreign nationals who present certain visas (A-1, A-2, C-3, G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6), and foreign nationals under 14 years of age or over 79 years of age.

[131] "DHS Publishes Notice Regarding US VISIT Requirements," 69 Fed. Reg. 482 (Jan. 4, 2004), *posted on* AILA InfoNet at Doc. No. 04010514 (Jan. 5, 2004).

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continued

condition of their admission.[132] BTS has estimated that processing takes an average of 15 seconds, and has provided for a mitigation strategy involving suspension of US-VISIT in the event of lengthy delays (*e.g.*, one hour).[133] However, there is no "back-up" system if the US-VISIT system malfunctions, and unless the mitigation strategy is taken, foreign nationals must wait at ports of entry or exit until the system comes back up.[134]

CBP implemented US-VISIT at the 50 land ports of entry with high volumes of traffic in December 2004, and began to produce electronic I-94 cards through a "US-Arrival" component of US-VISIT.[135] As it is not possible to control volume of admissions at land ports of entry, and due to the high volume of traffic, full implementation of US-VISIT at land ports of entry presents serious complications that have the potential to effectively close the borders.[136]

As the United States has not had exit controls on departing foreign nationals (with the exception of NSEERS special registrants), instituting US-VISIT at ports of exit promises to be especially challenging.

Similar to NSEERS, "willful" failure to comply with US-VISIT exit procedures involves potentially serious penalties including a determination of inadmissibility at a U.S. consulate or port of entry.[137] However, as the US-VISIT regulations do not specifically provide for the array of serious penalties that may apply in the event of failure to comply with NSEERS requirements (*e.g.*, imprisonment, civil penalties, removal), it appears that the focus of US-VISIT enforcement will be to track overstays and willful failure to comply.

CBP has stated that rather than penalizing foreign nationals who do not comply with exit controls during the transitional period, it plans to provide foreign nationals with "counseling and education," and that it plans to confirm departures with passenger manifests or I-94 cards.[138] Until departure control is fully implemented, CBP is likely to admit a foreign national who did not process his or her Form I-94 through the US-VISIT system upon departure.[139] However, if DHS is to be believed that NSEERS is a "pilot" for implementation of US-VISIT, foreign nationals have a basis for concern that the worst is not over, and that the national security measures will continue to complicate travel to and from the United States.

MISLEADING, INCORRECT, OR MISSING INFORMATION IN SECURITY DATABASES

The multiplicity and imperfect interoperability of security databases compounds the problem: false alarms, gaps, and errors in security databases have the potential to mildly or seriously complicate the travel of foreign nationals. For example, a CBP

[132] Foreign nationals who are subject to US-VISIT but do not comply are inadmissible under INA §212(a)(7) documentation grounds.

[133] CBP Memorandum, "US-VISIT Implementation Plan for January 5, 2004" (Jan. 2, 2004), *posted on* AILA InfoNet at Doc. No. 04012144 (Jan. 21, 2004).

[134] AILA Northern California—CBP Northern California Field Office Liaison Minutes (July 2004), available at *www.ailanorcal.com/site/postings/liaison-reports.shtml.*

[135] 69 Fed. Reg. 64964 (Nov. 10, 2004), *posted on* AILA InfoNet at Doc. No. 04111060 (Nov. 10, 2004); "CBP Liaison Committee Provides Update on the Addition of US Arrival to US-VISIT," *posted on* AILA InfoNet at Doc. No. 04121368 (Dec. 13, 2004).

[136] Testimony of Kathleen Campbell Walker before the Subcommittee on Infrastructure and Border Security of the Select Committee on Homeland Security, 108 Cong. 2d Sess. (Jan. 28, 2004), *posted on* AILA InfoNet at Doc. No. 04012940 (Jan. 29, 2004).

[137] "DHS Publishes Interim Final Rule Implementing US VISIT," 69 Fed. Reg. 482 (Jan. 5, 2004), *posted on* AILA InfoNet at Doc. No. 04010513 (Jan. 5, 2004). The Supplementary Information states:

> An alien who fails to comply with the departure requirements may be found in violation of the terms of his or her admission, parole, or other immigration status. . . . The Department intends to focus its enforcement of departure requirements in this rule on cases where the alien willfully and unreasonably fails to comply with this regulation. The rule provides that an alien's failure to follow the departure procedures may be considered by an immigration or consular officer in making a discretionary decision on whether to approve or deny the alien's application for a future immigration benefit. The rule does not, however, state that an alien's failure to comply with departure procedures in every instance will necessarily result in a denial of a future visa, admission or other immigration benefit.

[138] "CBP Liaison Minutes (11/13/03)," *posted on* AILA InfoNet at Doc. No. 03123110 (Dec. 31, 2003).

[139] The current Form I-94 will continue to be utilized until alternatives and automated systems are developed to collect and provide the same information and have passed quality control and field-testing. 69 Fed. Reg. 53317 (Aug. 31, 2004); "DHS Publishes Interim Rule Expanding and Amending US-VISIT, effective 9/30/04," *posted on* AILA InfoNet at Doc. No. 04090162 (Aug. 31, 2004).

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officer determines that a foreign national formerly subject to NSEERS is no longer subject, and places notes on the passport, but does not update the database, causing repeated referrals to secondary inspection and much explanation at the port of entry. Or, a foreign national is repeatedly subjected to lengthier security checks at the consulate because his name and nationality are the same as a convicted criminal. Or, a failure by legacy INS to update I-94 departure information creates a record of prior overstay. In each case, the brunt of the government error falls on the traveling foreign national.

Requests for correction of agency records can be made under the Privacy Act of 1974.[140] As a practical matter, government agencies have provided varying and sometimes conflicting guidance on how to correct or update a security database. Agencies have advised that a request for correction of agency records must be submitted to the agency that the applicant believes "owns" or created the record, either together with or having received the results of a Freedom of Information Act[141] (FOIA) request. Alternately, the request should be submitted as a letter, without a FOIA request.[142] Agencies may acknowledge the request, and may confirm correction has been made. Due to security concerns, database content, including database inaccuracy, is shrouded in mystery.[143]

There are no processing times, and typically no verifiable processing, for correction requests. In addition, agencies may acknowledge the request, but typically do not provide confirmation that the correction or update has been made. US-VISIT presents a unique exception in this regard. For inaccuracies that result in a "hit" in US-VISIT, DHS has directed that the applicant should make the request for correction to the US-VISIT Privacy officer.[144] US-VISIT system corrections are reportedly currently taking only one to 20 days.

While the request for correction is pending, and also if all else fails, the traveler can carry a letter and support documentation (affidavit, copy of agency documents retrieved through FOIA, copy of FBI fingerprint report, representative's coverletter, etc.) explaining the nature of the problem, to present to the consular or CBP officer.

CONCLUSION

Security measures taken in the wake of 9/11 have increasingly restricted the passage of foreign nationals at U.S. borders. Decreased visa applications and academic enrollments of foreign nationals signal a growing adversity to inhospitable controls at ports of entry and exit. Extensive delays that amount to rejections, and the increasing complexity of procedures at U.S. consulates and ports of entry, have led many foreign nationals to conduct study and research elsewhere. Hopefully, DHS will continue to improve security procedures without further damaging our country's international reputation for academic and research excellence, and our economic and cultural vitality.

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[140] 6 CFR §5 Subpart B §5.26.

[141] 5 USC §552.

[142] Michael Cronin, Associate Commissioner of Immigration Policy and Programs with CBP, has offered to clear erroneous outdated information from databases accessible to CBP that cause problems with admission. "CBP Liaison Minutes (11/13/03)," *supra* note 138. CBP deferred inspection offices may also be amenable to reviewing requests for correction. The IBIS Q&A, at *www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/ibis.xml*, provides the FOIA/IBIS correction request address for CBP: 1300 Pennsylvania Ave. N.W., Room 5.5C, Washington, DC 20229.

[143] For example, USCIS has indicated that it cannot confirm or deny the existence of an IBIS "hit." A new IBIS clearance procedure should not be necessary, "once a positive result is resolved and properly documented, there is no new clearance process to complete should the same information be retrieved during a subsequent check." "USCIS HQ Provides Written Responses to Issues Raised in Liaison (10/1/03)," *posted on* AILA InfoNet at Doc. No. 03112457 (Nov. 25, 2003). Unfortunately, the only means of testing proper documentation is to potentially trigger a new IBIS check.

[144] 69 Fed. Reg. 46556 (Aug. 3, 2004). The rule states in its Supplementary Information that those "who wish to contest or seek a change of their records should direct a written request to the US-VISIT Program Office at the following address: Steve Yonkers, Privacy Officer, US-VISIT, Border and Transportation Security, Department of Homeland Security, Washington D.C., 20528" and also provides phone, fax, and e-mail contact information. If the matter cannot be resolved by the privacy officer, "further appeal for resolution may be made" to the chief privacy officer.