

IMMIGRATION AND THE DEPARTMENT OF HOMELAND SECURITY: CHANGES AND CHALLENGES

THE ISSUE: President Bush signed into law The Homeland Security Act of 2002 (HSA) (PL 107-296) on November 25, 2003. The Act created the Department of Homeland Security (DHS), merging 22 agencies involving 170,000 employees. The DHS gained Cabinet-level status on January 24, 2003. Because the former Immigration and Naturalization Service (INS), along with numerous other agencies, merged into DHS on March 1, 2003, the DHS now administers the nation's immigration functions. The first Secretary of the department, Tom Ridge, resigned on November 30, 2004. Michael Chertoff, formerly a Third Circuit judge and head of the Justice Department's Criminal Division, became the second Secretary of the Department on February 15, 2005.

The reorganization of our immigration functions did not impact the Executive Office for Immigration Review (EOIR) which oversees the immigration courts. The EOIR remains housed in the Department of Justice (DOJ). (Please see AILA's issue paper entitled "The Importance of Independence and Accountability in our Immigration Courts" for a discussion of issues related to the EOIR.)

AILA long called for the reorganization of our immigration functions based on three principles: coordinating the separated service and enforcement functions; placing at the helm one leader with the authority to develop and administer policy for all immigration functions; and adequately funding our immigration functions. Unfortunately, the DHS's structure neither coordinates services and enforcement nor has one person in charge of these functions. In addition, immigration services continue to be underfunded, absent sufficient direct federal appropriations.

BACKGROUND: The HSA radically restructured our nation's immigration functions as follows:

1. Directorate of Border and Transportation Security (BTS): The Undersecretary for Border and Transportation Security is responsible for preventing the entry of terrorists into the U.S., securing the borders, carrying out the immigration enforcement functions of the former INS, establishing national immigration enforcement policies and priorities, and establishing and administering rules governing the granting of visas or other forms of permission, including parole. Asa Hutchinson, the first BTS Undersecretary, resigned his position in early 2005, and his replacement has yet to be nominated. While the law established the Bureau of Border Security under BTS to perform these functions, the Administration reconfigured the structure and divided enforcement responsibilities into two bureaus:
 - The United States Immigration and Customs Enforcement (ICE): ICE is in charge of interior enforcement and is made up of about 14,000 employees from the INS, U.S. Customs Service, and the Federal Protective Service. Former INS Acting Commissioner Michael Garcia leads ICE as Assistant Secretary. ICE's web address is: <http://www.ice.immigration.gov>.
 - The United States Customs and Border Protection (CBP): CBP is made up of about 30,000 employees, including inspectors from legacy INS, U.S. Customs, Agricultural Quarantine Inspections, and Border Patrol. CBP is charged with focusing on the movement of people and goods across borders, and ensuring consistent inspection procedures and coordinated border enforcement. Former U.S. Customs

Commissioner Robert Bonner is the CBP Commissioner. The link to the CBP is: <http://cbp.gov>

The House Homeland Security Committee in March 2005 held hearings about merging the interior and border enforcement agencies into one bureau. These hearings were called due to Congressional concerns about the lack of effectiveness by the bureaus. At the hearing, witnesses discussed the problems that plagued both CBP and ICE, including: inadequate coordination, budget shortfalls, conflicting mandates, personnel hiring freezes, stovepipe information systems that impede investigation efforts, and a lack of adequate resources and training for personnel.

2. United States Citizenship and Immigration Services (USCIS): USCIS has jurisdiction over the immigration services functions. The Director of USCIS reports to the Deputy Secretary for Homeland Security and is responsible for the adjudication of all applications and petitions previously adjudicated by the INS, including asylum and refugee applications. The USCIS has about 15,000 employees. Eduardo Aguirre, the first Director, resigned and was nominated to be the Ambassador to Spain. His replacement has not yet been nominated. The link to USCIS is <http://uscis.gov>
3. Visa Issuance: The HSA vests the Secretary of Homeland Security with exclusive authority to administer all laws, issue regulations relating to the functions of consular officers in the granting or refusal of visas, and develop programs of homeland security training for consular officers. The Act also mandates that information on visa denials be entered into an electronic data system.

The DHS and the Department of State (DOS) entered into a Memorandum of Understanding (MOU) clarifying the roles and responsibilities of both agencies. Under this agreement, DOS retains day-to-day control over managing the visa process and foreign policy. The DHS is responsible for establishing and reviewing visa policy, ensuring that homeland security requirements are fully reflected in the visa process, and rendering final decisions over policy areas that include: classification, admissibility and documentation, place of visa application, personal appearance, visa validity periods and multiple entry visas, the Visa Waiver Program, notices of visa denials, and processing of persons from state sponsors of terrorism.

4. Children's Affairs: The Act transferred the care and custody of unaccompanied alien children from INS to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services.
5. Office of Civil Rights: The Act created the position of Officer for Civil Rights and Civil Liberties which has been filled by Dan Sutherland. This office reviews and assesses abuses, including racial and ethnic profiling, by DHS employees and officials, and issues an annual report on abuses reported to the office and any actions taken in response.
6. Ombudsman: The HSA established an ombudsman (and local ombudsman offices) to identify severe problem areas in the delivery of immigration services, report these problems, and propose changes. Prakash Khatri is the Ombudsman.
7. FOIA: The HSA provided broad Freedom of Information Act (FOIA) exemptions for information related to the security of critical infrastructure or protected systems, including computer systems and information. Improper disclosure of this information by a federal employee could trigger criminal liability. If this provision is interpreted broadly, the FOIA exemption could have a dramatic chilling affect on both the ability to request information contained in the immigration databases as well as the dissemination of policy memos and other official information from the immigration-related bureaus.

In addition to the new law that could make it harder to obtain information through a FOIA request, the resulting fragmentation of the immigration function under DHS has created a new burden for FOIA filers. In the past, all FOIA requests were funneled through one agency. Now, requesters have to ask for information from CBP, ICE and USCIS separately. Hence, an information requester may now have to submit multiple FOIAs for a single case file.

AILA'S POSITION: The DHS must balance national security goals with laws and policies that welcome newcomers and recognize the strong and vital connections between the U.S. and the rest of the world. While AILA strongly criticized the INS for its past performance, it was both unfair and inaccurate to blame the INS alone. Congress and the Administration need to learn from the past to help ensure that DHS succeeds by adequately funding the agency and taking care not to impose conflicting, underfunded and complicated mandates. AILA has raised the following concerns with Congress and the DHS:

- **Concurrent Jurisdiction:** In a February 28, 2003 rulemaking purporting to transfer immigration authorities to the DHS, the Attorney General asserted the DOJ's concurrent authority to promulgate substantive rules in numerous areas. The implications of this assertion of concurrent jurisdiction are enormous, with the potential for either complete gridlock or for the DOJ and DHS to issue conflicting regulations in a whole range of areas. Such dual rulemaking authority could precipitate Cabinet-level institutional power struggles and paralyze the government's ability to administer our immigration laws fairly and consistently.

The most complete solution to this problem would be to reconstitute EOIR as an independent adjudicative body with no substantive rulemaking authority. Unleashing EOIR from its DOJ moorings would eliminate concerns about conflicting interagency authority. In addition to neutralizing concurrent jurisdiction concerns, this restructuring would further other important goals. It would provide immigration judges with the independence necessary to conduct fair and impartial hearings. This change thereby would significantly enhance the perceived legitimacy of immigration decisions, a major concern under the present system.

Alternatively, DOJ must be limited to making procedural rules related to the operation of EOIR and compelled to abandon its asserted authority to make any substantive immigration rules.

- **Coordination:** While the two enforcement bureaus (ICE and CBP) are clearly separated from USCIS, successful adjudication and enforcement initiatives depend on their close coordination. Such coordination is not formalized anywhere in the new law, is not reflected in DHS's current practices, and does not appear to be a priority. This lack of coordination within the DHS needs to be addressed through oversight and practice, as does the lack of necessary coordination between the DHS and other federal agencies including the Departments of Justice and State, the FBI and the CIA.
- **Culture of "No" and Consequences of Delays:** Widespread reports of unfair, arbitrary and inconsistent adjudications have reinforced the perception that adjudicators' "fail safe" position is "no," notwithstanding the merits of the petition or application. Reinforcing this view is the recent move to summarily deny applications without the opportunity to respond to adjudicator concerns. USCIS needs to efficiently and fairly adjudicate petitions and applications. In addition, many organizations and individuals are reporting severe delays in processing that have led to negative impacts for American business and family members.
- **Adequate Funding and Services:** Enforcement and services are two sides of the same coin and merit equal attention, support and funding. Especially in light of the historical underfunding of immigration functions, USCIS needs adequate funding to successfully do its job. AILA long has supported direct congressional appropriations to supplement the user fees that almost totally fund the USCIS today. Such direct congressional appropriations are necessary in order to ensure

that the USCIS adequately delivers services and admits into our country the appropriate people while barring those who mean to do us harm. The FY 06 proposed funding is inadequate, and the funding dedicated to backlog reduction was actually decreased from last year's budget. At a time when the quality of service is at an historic low and the growing processing backlogs have reached crisis proportions, insufficient funding is difficult to justify. Meanwhile, the agency wastes resources revisiting issues already resolved and harassing honest petitioners with requests for paperwork unrelated to their immigration eligibility. Making matters worse, in most cases, the public's only available avenue to resolve government errors and problems is a contractor-run 800 number that has proven problematic to deal with these issues. Fortunately, the Administration was defeated in its attempt to contract out the Immigration Information Officer (IIO) function.

- Ports of Entry: Enforcement and adjudications come together at our ports of entry, with the CBP taking over operations at these ports. Our national and economic security depends on the efficient flow of people and goods through these ports. Unfortunately, the Homeland Security Act was largely silent on how our immigration functions should operate there. It is critical that those responsible for inspections at our entry points be fully trained in the policies and practices of the USCIS. Unfortunately, current reports suggest that CBP is giving inadequate attention to immigration and is initiating policies that do not reflect the intricacy of the subject and its importance to our country. To take one example, the "One Face at the Border" program does not ensure that an immigration specialist will be available at secondary inspections. The proposed expansion of US VISIT at our land ports-of-entry also is troubling due to the lack of clarity about the function of this program, inadequate funding and training of staff, impossible deadlines, unresolved issues regarding technology, and other concerns. (Please see AILA's issue paper "America's Borders: Balancing our Security and Economic Needs" for more information on our ports-of-entry.)
- Problems with Technology: While technology can assist DHS in its mission, it does not offer magic solutions. Currently DHS has to deal with a myriad of technology-related problems, including performance concerns of cameras installed along the border; document scanners with a no-read rate that exceeds 40%; and decreased effectiveness of the US-VISIT system due to the lack of integration of the IDENT legacy INS database and the FBI's IAFIS database. These examples reinforce that even the most promising technologies can fail due to a variety of factors including: inadequate on-site testing to determine actual capacity; failure to perform and follow up on cost-benefit analyses; failure to provide adequate training; failure to analyze cross-over agency issues in implementation; failure to adhere to implementation schedules; failure to ensure that database records include accurate and timely information; and failure to fully integrate watch list databases to improve effectiveness.
- Local Immigration Offices: Local offices are the backbone of our immigration functions and must be staffed by knowledgeable people capable of making crucial, often life and death, decisions. These offices must be accessible to the communities they serve and must operate within a clear chain of command. These offices must be adequately funded because expertise, accountability and accessibility alone cannot solve the pervasive financial crisis and resulting backlogs.
- Visa Policy: With the Department of Homeland Security's authority to establish and administer rules governing the granting of visas, it is vitally important that visas be granted to the people who come to build America and denied to those who mean to do us harm. We must balance our national security and economic security needs by recognizing that the U.S. is tied to the rest of the world economically, socially, and politically. However, severe delays at the consulates continue to hamper the visa issuance process, with serious consequences for businesses, families, schools and others in the United States. The gridlock that has paralyzed the visa issuance

process in the past two year must be resolved – the agencies charged with clearing security checks must be motivated to give these operations the priority that they deserve.

- Refugees: To ensure that refugee and asylum adjudicators are properly trained, that there is a clear line of accountability from headquarters to the field on refugee protection matters, and that the flexibility to respond to refugee emergencies is maximized, the dedicated corps for Asylum and Refugee claims should be preserved within the Citizenship and Immigration Services structure, as should the policy-making mechanisms that support the corps' activities. Of great concern is the small number of refugees that have gained admission into the U.S. during the past several years. Although 70,000 slots were available for refugee admissions in FY 2002 and FY 2003, only about 28,000 refugees were admitted to the U.S. during each fiscal year. In FY 2004, a larger number, about 50,000, were admitted. In contrast, in FY 1995, the U.S. admitted 99,490 refugees.
- Civil Rights Protections: While the law establishing the new department recognizes the need for internal oversight by creating a civil rights officer and a privacy officer, provisions in the bill do not go far enough to empower these officials to effectively protect civil rights and liberties. Such authority is vitally needed, given the scope and authority of the new agency.
- Ombudsman: The ombudsman should be empowered to: assist individuals and employers in resolving problems with USCIS, ICE and CBP; identify areas in which individuals and employers have problems in dealing with USCIS, ICE, and CBP; and propose changes in the administrative practices of USCIS, ICE and CBP to mitigate identified problems. The statute, however, restricts the Ombudsman to USCIS. Additionally, the Ombudsman should submit annual reports to Congress on problems and improvements within USCIS, ICE and CBP, and should be provided with sufficient funding to successfully fulfill the obligations of this position. Finally, the Ombudsman's office must be adequately funded to enable the opening of local offices, as contemplated by the HAS. At present, no such offices are planned because of the absence of funding.
- Congressional Oversight: The DHS's creation has generated questions about congressional oversight of our immigration functions. The Senate Judiciary Committee (chaired by Senator Arlen Specter (R-PA) with Senator Leahy (D-VT) as Ranking Member) will maintain jurisdiction over all immigration laws. The Senate Immigration, Border Security and Citizenship Judiciary Subcommittee is chaired by Senator John Cornyn (R-TX), with Senator Edward Kennedy (D-MA) serving as Ranking Member.

The House created a Committee on Homeland Security (chaired by Representative Christopher Cox (R-CA), with Ranking Member Bennie Thompson (D-MS). While the House Judiciary Committee, chaired by Representative James Sensenbrenner (R-WI) and Representative John Conyers (D-MI) as Ranking Member, has jurisdiction over "immigration policy" and USCIS, while the Homeland Security Committee has jurisdiction over CBP, jurisdiction is still unclear given that legislation that would appear to go to one committee has received joint referrals. The House Subcommittee on Immigration, Border Security and Claims (formerly the Immigration and Claims Subcommittee) is chaired by Representative John Hostettler (R-IN), with Representative Sheila Jackson Lee (D-TX) continuing as Ranking Member.