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July 2, 2010

Mr. Joseph M. Gerhart
Chief, Records Management Branch
U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Room 3138
Washington, DC 20024

**RE: OMB Control No. 1653-0036
Comment Request: Extension of an Existing Information
Collection; National Security Entry-Exit System
(NSEERS) (75 F.R. 24721, 5/5/2010)**

Dear Mr. Gerhart:

The American Immigration Lawyers Association (AILA) submits this comment in response to the information collection notice published in the Federal Register (Vol. 75, No. 86) on May 5, 2010, regarding the collection of information for the National Security Entry-Exit System (NSEERS).

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government, and we appreciate the opportunity to comment on the information collection extension request.

From its beginning, AILA has called for the termination of NSEERS and for the repeal of its authorizing regulations. The well-documented and overwhelming monetary, human, and foreign policy costs that the program has had since its inception support and validate our concerns and criticisms.¹ In response to the specific questions raised in the May 5, 2010, Notice, AILA provides four specific comments concerning the proposed extension of collection of information.

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- **First:** NSEERS has not been effective for the proper function of the Department of Homeland Security (DHS), and the practical utility of the program is in question.
- **Second:** NSEERS has not only continued to burden governmental agencies with unnecessary costs (adversely affecting the government's efficiency), but also encumbered those who were or are required to respond (i.e., NSEERS registrants).
- **Third:** The dissemination of inaccurate information regarding NSEERS registration procedures persists, as evidenced by the May 5, 2010, Notice.
- **Fourth:** NSEERS continues to have a negative impact on many communities, particularly those of the Muslim faith and those from the Arab-American and South Asian-American communities, and has consequently damaged DHS's outreach efforts to those communities. Moreover, NSEERS has left a regrettably lasting imprint.

Please find below the above-mentioned comments in detail:

1. NSEERS has not been effective for the proper function of DHS, and the practical utility of the program is in question.

With counterterrorism being one of the five areas of responsibilities for DHS,ⁱⁱ and with NSEERS being created as essentially a counterterrorism tool,ⁱⁱⁱ there has not been any clear evidence to this day that the program has made the U.S. any safer -- a conclusion reached by the National Commission on Terrorist Attacks Upon the U.S., where it was stated that the counterterrorism benefits of NSEERS are unclear.^{iv} A former Immigration and Naturalization Service (INS) Commissioner also found NSEERS "to be ineffective in producing terrorism related convictions"^v and to have "misdirected precious counterterrorism resources."^{vi} Moreover, the Constitution Project^{vii} concurs that none of the NSEERS registrants "has been convicted of a terrorist crime."^{viii} Together, this illustrates that NSEERS has not been effective for the proper function of DHS.

Furthermore, the practical utility of the program is in question, as the Office of Inspector General (OIG) at DHS will be conducting an audit on the "Effectiveness of NSEERS" by the end of 2010.^{ix} As the OIG notes in its Revised Annual Performance Plan, the report prepared for the American-Arab Anti-Discrimination Committee by the Center for Immigrants' Rights at Penn State's Dickinson School of Law "argues that NSEERS was poorly conceived, and executed, and that it had a 'damaging impact ... on individuals, public policy or due process.'"^x Of particular significance to this comment is one of the audit's objectives, which is to "determine the effectiveness of NSEERS as a counterterror[ism] tool focusing on the utility of the information collected, the uses to which that information has been put to DHS, and positive outcomes," if any.^{xi}

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2. This type of information collection (i.e., NSEERS) has not only continued to burden the government agencies with unnecessary costs (adversely affecting the government's efficiency), but has also encumbered those who were/are required to respond (i.e. NSEERS registrants).

Finding a solution to reduce the significant costs and burden incurred by DHS in relation to the information sharing and processing of NSEERS is not new. In fact, such assessment was subjected to scrutiny by DHS itself in 2003, when it amended the regulations and suspended the 30-day and annual interview requirements for registrants.^{xii} The rule even acknowledged that “[t]he costs to DHS of not amending the regulations would be significant.” Therefore, in the interest of reducing the burden on DHS, it was estimated that - with the interim rule - DHS “would be able to reallocate almost 62,000 work hours, [and] ... shift personnel who would have conducted these re-registration interviews to other law enforcement functions.”^{xiii} According to DHS, had the interim rule not been implemented, “DHS would be forced to reallocate personnel resources from other law-enforcement functions in order to timely register aliens.”^{xiv}

Sadly, seven years after the rule suspending the 30-day and annual requirements from the registration process, the burden on DHS continues due to the residual effects of the program, particularly when dealing with late NSEERS registrants. In fact, an analysis of the handling of NSEERS by government agencies involved with the program indicates that “the haphazard treatment of late NSEERS registrants has been very costly not only for individuals but both for the Department of Justice [DOJ] and the [DHS].”^{xv}

For instance, hundreds of men who have failed to register or who registered late are being placed into removal proceedings in the immigration courts of the Justice Department's Executive Office of Immigration Review (EOIR), imposing unnecessary burdens on the already-strained resources of the EOIR, and diverting precious DHS resources and time away from actual pressing cases. Registrants who are not being placed into removal proceedings are instead “required to undergo an interview and exchange dense correspondence with ICE [Immigration Customs Enforcement] and/or USCIS [United States Citizenship and Immigration Services] in order to be ‘cleared’ for late registration.”^{xvi} Such extra costs are falling on DHS, particularly on the local immigration offices.

In addition to reducing the burden and costs on its sub-agencies in 2003, DHS expressed an equal interest in reducing the burden on registrants. The rule stressed DHS's belief in “an urgent need for the ... implementation of this rule [...] to avoid unnecessarily burdening the public impacted by this rule.”^{xvii} In discussing the assessments of costs and benefits of the then-interim rule, and with an eye towards the burden placed on the public, the assessment concluded that the rule would “significantly reduce[] costs to the public by reducing the burden of re-registration and continuing registration requirements

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for aliens present in the United States. [...] DHS anticipates that between December 2003 and May 2004, the burden reduction on the public to be a total of over 103,000 hours.”

The goal of reducing 103,000 public burden hours for 6 months (from December 2003 to December 2004) was deemed sufficient to implement changes in NSEERS registration procedures. Seven years later, the “estimate of the total public burden (in hours) associated with the collection [which amounts to] 29,000 *annual* burden hours”^{xviii} - as stated in the May 5, 2010 Notice - must also trigger changes towards the termination of NSEERS, especially where the costs incurred by both the government agencies and registrants “have far outweighed any counterterrorism benefits.”^{xix}

3. The dissemination of inaccurate information regarding NSEERS registration procedures persists, as evidenced by the May 5, 2010, Notice.

The government’s dissemination of inaccurate information on NSEERS continues, as exhibited by the very Notice upon which these comments were requested. The Notice states that NSEERS “requires certain non-immigrants aliens to make specific reports to USICE upon arrival, approximately 30 days after arrival, every 12 months after arrival; upon certain events, such as change of address, employment or school, or at the time they leave the United States.” This information has however been partly overruled by DHS’s 2003 interim rule - discussed above - where the automatic 30-day and annual registration requirements have been suspended.^{xx} Moreover, the procedures for special registration at departure remain intact, and are conducted by Customs and Border Patrol (CBP) agents or a CBP field office director and not by USICE, as stated in the Notice.

Such dissemination of inaccurate information about NSEERS is not new, as it falls in line with a history of previous incidents of dissemination of inaccurate information on NSEERS. For instance, during the initial stages of NSEERS, “government officials ... even noted that ... notices sent out were at times inaccurate.”^{xxi} Recent NSEERS registrants at ports of entry report similar incidents where inaccurate information on the current status of NSEERS has been disseminated. Confusion remains among CBP agents as to where NSEERS currently stands and/or what it requires. Finally, “in some cases, local USCIS offices continue to misinterpret any noncompliance with registration as a ‘willful’ failure to register, thereby subjecting individuals to immigration and criminal-related penalties.”^{xxii}

4. NSEERS continues to have an adverse impact on the Muslim, Arab-American and South Asian-American Communities, and has damaged DHS’s outreach efforts to that community. From a foreign policy perspective, NSEERS has left an unfortunately negative and lasting imprint.

“Impacted individuals from the Muslim, Arab-American and South Asian-American communities include those who are married to United States citizens or meaningfully

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employed in the United States. Well-intended individuals who failed to comply with NSEERS due to a lack of knowledge or fear have been denied ‘adjustment of status’ (green cards), and in some cases have been placed in removal proceedings under the premise that they have ‘willfully’ failed to register. [Such a] scenario has torn apart families because of the real implications of having a spouse without a legal status.”^{xxiii}

From a foreign policy perspective, NSEERS has left an unfortunately negative and lasting imprint. Many of America’s close allies were “opposed to having their nationals subject to NSEERS registration.”^{xxiv} Furthermore, fewer visitors from NSEERS countries are coming to the United States, even as travel has largely recovered from most countries in the world to pre-9/11 levels.^{xxv} The U.S. has been losing tourists, businesses, and international students to other countries. These losses have an undeniably adverse effect on the U.S. economy as well as the U.S. image abroad.

CONCLUSION:

In light of the concerns and comments detailed above, the American Immigration Lawyers Association calls for the termination of NSEERS and the repeal of its related regulations. The ineffectiveness of NSEERS and its interference with the proper function of DHS, its burdensome costs on government agencies and registrants, the government’s continued dissemination of inaccurate information on NSEERS, and the residual effects of the program at both the domestic and international levels all urge against the extension of such information collection.

Thank you for your consideration. AILA respectfully requests to be informed about the next steps to be taken by DHS, once the comments have been considered.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

ⁱ See, e.g., AM.-ARAB ANTI-DISCRIMINATION COMM. & PENN ST. U. ‘S DICKINSON SCH. L. CTR. FOR IMMIGRANTS’ RTS. NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS 9 (2009), available at <http://www.adc.org/PDF/nseerspaper.pdf> [hereinafter NSEERS REPORT]; NAT’L COMM. ON TERRORIST ATTACKS UPON THE U.S., 9/11 AND TERRORIST TRAVEL 157-60 (2004); DORIS MEISSNER & DONALD KERWIN, MIGRATION POL’Y INST., DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE (2009), available at http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf. [hereinafter MPI Report]; American Immigration Lawyers Association, AILA’s Comments on the Interim Rule Suspending NSEERS’ Re-Registration Requirements, <http://www.aila.org/content/default.aspx?docid=10002> (last visited Jun. 29, 2010).

ⁱⁱ See Department of Homeland Security, Department Responsibilities, <http://www.dhs.gov/xabout/responsibilities.shtm> (last visited Jun. 28, 2010).

ⁱⁱⁱ See NSEERS REPORT, *supra* note i.

^{iv} NAT’L COMM. ON TERRORIST ATTACKS UPON THE U.S., 9/11 AND TERRORIST TRAVEL 157-60 (2004).

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^v See MPI Report, *supra* note i.

^{vi} *Id.*

^{vii} See The Constitution Project, *About the Constitution Project*,

<http://www.constitutionproject.org/detail.asp?id=2> (last visited Jun. 28, 2010) (“The Constitution Project seeks consensus solutions to difficult legal and constitutional issues. It does this through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts.”)

^{viii} See THE CONSTITUTION PROJECT, *THE USE AND ABUSE OF IMMIGRATION AUTHORITY AS COUNTERTERRORISM TOOL: CONSTITUTIONAL AND POLICY CONSIDERATIONS* (2008), *available at* http://www.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf.

^{ix} OFF. INSPECTOR GEN., DEP’T HOMELAND SEC., *REVISED ANNUAL PERFORMANCE PLAN FOR FY 2010* (2010), *available at* http://www.dhs.gov/xoig/assets/OIG_APP_Rev_FY10.pdf.

^x *Id.* at 57.

^{xi} *Id.*

^{xii} Department of Homeland Security, *Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Non-immigrants*, 68 Fed. Reg. 67578 (Dec. 2, 2003).

^{xiii} *Id.*

^{xiv} *Id.*

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} Department of Homeland Security, *Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Non-immigrants*, 68 Fed. Reg. 67578 (Dec. 2, 2003). (emphasis added)

^{xix} Posting of Shoba Sivaprasad Wadhia to Race Matter,

<http://endnseers.blogspot.com/2009/11/commentary-on-late-nseers-registration.html> (Nov. 19, 2009).

^{xx} Department of Homeland Security, *Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Non-immigrants*, 68 Fed. Reg. 67578 (Dec. 2, 2003).

^{xxi} See NSEERS Report, *supra* note ii, at 21.

^{xxii} Posting of Shoba Sivaprasad Wadhia to Race Matters,

<http://endnseers.blogspot.com/2009/11/commentary-on-late-nseers-registration.html> (Nov. 19, 2009).

^{xxiii} See NSEERS Report, *supra* note i, at 6.

^{xxiv} NAT’L COMM. ON TERRORIST ATTACKS UPON THE U.S., *9/11 AND TERRORIST TRAVEL* 159 (2004).

^{xxv} See COUNCIL ON FOREIGN REL., *U.S. IMMIGRATION POLICY 25* (2009), *available at* <http://www.cfr.org/publication/20030/>.