AMERICAN IMMIGRATION **ISSUE PAPER** *LAWYERS ASSOCIATION*

AMERICA'S BORDERS: FROM OUR CONSULATES TO OUR PORTS OF ENTRY BALANCING OUR SECURITY AND ECONOMIC NEEDS

THE ISSUE: Our nation needs to institute policies that both enhance our security and facilitate the flow of legitimate cross-border travel and trade necessary for our nation's economic survival. The Homeland Security Act of 2002 (P.L. 107-296), which created the Department of Homeland Security (DHS), codifies this challenge. One of the department's seven primary missions is to "[e]nsure that the overall. economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." Given this mandate, the DHS needs to focus on developing the necessary infrastructure, technology, databases, inspections process, and special programs at our borders.

BACKGROUND: The United States has over 300 ports of entry through which authorized travelers and commercial goods annually enter the country. In fiscal year 2004, over 428 million people entered the U.S. through these ports. If the inspection of each of these entrants took a few seconds longer than it currently does, the ports (particularly land ports) would come to a grinding halt. The DHS thus has the challenge of streamlining current border procedures and evaluating future initiatives so that the border crossing processes are both more secure and efficient. Otherwise, security measures that do not take into account travel and trade could cripple our nation's economic viability and could lead to conditions that do not make us safer.

Getting to the Border—Visa holders currently are subject to security checks at multiple venues and times before they are permitted to enter the U.S. At consular offices abroad, foreign nationals are run through security checks using the Consular Lookout and Support System (CLASS). The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458, S. 2845) (Intelligence Reform Act) includes a statutory provision requiring the Department of State (DOS) to subject most nonimmigrant visa applicants between the ages of 14-79 to face-to-face interviews with a consular officer. This law follows in the wake of a similar DOS rule that went into effect on August 1, 2003. The consular post also may send the foreign national's information to Washington, D.C. for security clearances by the DOS and other relevant agencies such as the Federal Bureau of Investigation (FBI). Because visas are not issued until the DOS gets an affirmative response from these agencies, long delays for visa issuances now are commonplace.

As of October 26, 2004, all 211 consular posts have begun enrolling nonimmigrant and immigrant visa applicants into the US-VISIT system when processing the new biometric visa. Individuals enrolled at the consulates will still be "visited" upon their entry to the U.S.: they will have their entry recorded via a biometric identity review. By October 26, 2005, U.S. consulates also will have to issue visas for travelers from those visa waiver countries that are not issuing tamper-proof machine-readable passports (MRPs) with biometric identifiers.

Arrival at the Ports of Entry—After a visa is issued, most foreign nationals proceed directly to U.S. ports of entry. Some points of embarkation also are equipped with pre-inspection stations. These facilities require international cooperation. Congress had previously authorized the creation of six pre-inspection stations and, in the Intelligence Reform Act, mandated 25 additional stations by January 1, 2008.

Foreign nationals must go through primary inspection once they arrive at our ports of entry. Many nonimmigrants arriving via airports and the 50 busiest land ports of entry also are subject to US-VISIT (which is described in more detail in the following section). During primary inspection, inspectors examine passports and visa documents and run security checks using the Interagency Border Inspection System (IBIS), which interfaces with the DOS's CLASS database, as well as with FBI and Drug Enforcement Agency (DEA) databases. Based on this primary check, some foreign nationals are allowed to proceed into the U.S., while others are sent to secondary inspection for closer scrutiny. The secondary inspection process involves additional interviews, document screening, and security checks through a battery of databases. A partial list of the databases utilized at this stage include: the National Automated Immigration Lookout System (NAILS)

which contains lookout information and access to several databases in order to give the inspector biographical and case data on foreign nationals who have been found inadmissible to the U.S.; the Central Index System (CIS); the Non-Immigrant Information System (NIIS); the Computer Linked Application Management System (CLAIMS); the National Crime Information Center (NCIC); and the Automated Biometric Identification System (IDENT).

Specific land ports of entry have special technology-based programs that allow low-risk travelers to use special lanes. These technologies include the NEXUS and FAST programs along the Northern Border, and SENTRI along the Southern Border. Although each program differs slightly, they all are based on the same principle: pre-screen and identify low-risk travelers so that they may cross the border without having to go through the traditional inspections process. For example, the NEXUS programs allow applicants to be pre-screened and approved for entry into the U.S. Travelers are given a card containing their personal data and are allowed to cross the border using special dedicated commuter lanes. These lanes are equipped with technology that can transmit the data from the card to the inspector at the port of entry. This pre-clearance method has been efficient for those enrolled in the program. However, the programs are not interoperable with each other or with US-VISIT. In moving forward, DHS should create one seamless low-risk traveler program that shares information. Another problem that needs to be addressed is the low-level of program participation due to the lengthy application process and denial of applications for very minor customs violations. Due to the stringent nature of the application process, one out of every thirty applications is denied, and no mechanism exists to appeal a denial. DHS should redesign the application process to facilitate as many low-risk travelers as possible, thereby enabling inspectors to focus on higher-risk travelers.

US-VISIT—The DHS started implementing the United States Visitor and Immigrant Status Indicator Technology program (US-VISIT) in 2003. US-VISIT is an entry-exit system designed to register foreign nationals each time they cross the border by collecting information, confirming identity, measuring security risks and assessing the legitimacy of travel. Ultimately, the information captured through US-VISIT would be available at both the ports of entry and throughout the entire immigration enforcement system. Ideally, the system also would record changes and developments in a foreign national's immigration status. However, in order to use US-VISIT as a means to enhance the immigration system, DHS must work to make its databases interoperable and improve their accuracy and reliability.

Enrollment in US-VISIT occurs at every port of entry where the program has been implemented. Currently the entry portion of US-VISIT is operational at 115 airports and 14 seaports, and, as of December 29, 2004, at the 50 busiest land ports. Entrants are enrolled into the US-VISIT program during primary inspection in the air and seaports and during secondary inspection at the land borders. Upon enrollment, the nonimmigrant visa holder's travel documents are scanned; a photo and index fingerprints are taken and checked against databases such as IBIS and the watch lists. Information is collected on immigration and citizenship status; nationality; country of residence; and the person's address while in the United States. An IDENT biometric database check is performed after the individual is admitted to the U.S.

Recording departures through US-VISIT is still being tested through pilot programs. Currently a handful of airports are equipped with US-VISIT exit capabilities. If a nonimmigrant visa holder departs the U.S. from one of these ports, the individual must input his or her departure information, visa data and fingerprints into the US-VISIT system through an automated self-service kiosk (similar to an ATM machine). By July 2005, DHS is expecting to launch a new pilot program to test US-VISIT exit procedures at three land ports. This pilot program will utilize radio frequency (RF) technology as a means to implement the exits at land ports. While there are still unknowns surrounding RF technology, conceptually it could transmit biographical information to the inspections officer, in order to speed processing of automobile traffic. This technology presumably also would link to the US-VISIT databases and watch lists. Even if such a technology is made available, it is unclear how efficiently the US-VISIT exit function will operate at the land borders given the infrastructure constraints. According to the DMIA Task Force's Second Annual Report to Congress, 64 ports have less than 25% of the required space; 40 ports have between 25 and 50% of the required space; 13 ports have between 50 and 75% of the required space; and some existing ports lack "any land for expansion."

At this time, US-VISIT applies only to nonimmigrant visa holders and visa waiver program participants. Canadians entering without visas and those Mexican nationals who do not require an I-94 arrival/departure record and enter with a laser visa will remain exempt from US-VISIT.

As originally set forth in Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208) (IIRAIRA), the entry-exit system would have applied to all non-U.S. citizens who enter or exit the United States at any port of entry. The Data Management Improvement Act of 2000 (DMIA) (P.L. 106-215) subsequently merged the entry-exit system with a searchable centralized database, prohibited INS from introducing new entry or exit documentary requirements on any visitors to the country (such as Canadians), and staggered the entry-exit implementation deadlines into three groups:

- Airports and seaports-- December 31, 2003
- Top 50 high traffic land border ports-- December 31, 2004
- Remaining implementation for all other ports-- December 31, 2005

In 2001, Congress mandated in the PATRIOT Act (P.L. 107-56) that the entry-exit system include the use of biometric technology and tamper-resistant documents readable at all ports of entry. Later that year, with the passage of the Enhanced Border Security and Visa Entry Reform Act (P.L. 107-173), Congress finally addressed the entry-exit system as a program that balances security with the economic realities of our busy ports of entry. To strike this balance, the Act includes a provision that mandates that the program utilize technologies that facilitate the efficient flow of commerce and travel. This provision is extremely important because a system that impedes cross-border travel and trade would shut down our borders.

NSEERS—As part of the entry process, certain foreign nationals have to register with the National Security Entry Exit Registration System (NSEERS). This system is designed to keep track of arriving nonimmigrants from Iran, Iraq, Sudan, and Libya, and certain male nonimmigrants from Pakistan, Saudi Arabia, and Yemen. Nonimmigrant aliens from other countries may be required to register if they match current intelligence characteristics or database searches, have made unexplained trips (especially if the countries visited include certain middle Eastern countries or other countries such as North Korea or Cuba), or have previously overstayed their period of admission in the United States. Inspectors also have the authority to register any nonimmigrant at their discretion. Accounts of the registration process at the border indicate that it can take several hours, and the questions asked can be very intrusive. After registrants enter the country, DHS also may notify a particular individual to appear before immigration officials for additional interviews and to re-register. Persons subjected to Special Registration must register their departure with NSEERS and must leave the U.S. through a designated port of departure. Those who fail to comply with departure control rules under NSEERS may be subject to future inadmissibility to the United States.

Expedited Removal—IIRAIRA established a new procedure, dubbed expedited removal, to streamline the detention and removal of noncitizens seeking admission to the United States who lack appropriate documentation or make a misrepresentation. This procedure allows a front-line inspector to order the detention and removal of an applicant without according the individual access to counsel or an opportunity for a hearing or review. Under this draconian procedure, an inspection officer can bar a person from entering the United States for five years or life, depending upon the particular ground(s) of inadmissibility alleged in the case.

While the expedited removal process raises serious due process concerns for all noncitizens seeking admission to the U.S., it raises particular concerns for individuals seeking asylum. Although the law specifically directs immigration inspectors to refer asylum seekers to asylum officers for a credible fear interview, a recent study by the U.S. Commission on International Religious Freedom illustrates how flaws in the expedited removal system and inconsistent practices between ports undermine protections for asylum seekers. Some of the problems at the border identified by USCIRF include: inspectors urging asylum seekers to withdraw their applications for admissions to the U.S.; overbroad discretion of inspections officers denying asylum seekers credible fear interviews; and inspectors pushing back asylum seekers at primary inspection and not sending them to secondary inspection.

Management of U.S. Ports-of-Entry—The management of the Border Patrol, primary and secondary inspections, and immigration investigations now falls under the jurisdiction of the Bureau of Customs and Border Protections (CBP) in the DHS. This bureau consists of employees formerly from the Agricultural Quarantine Inspection program, INS inspection services, and the Customs Service and is headed by

Commissioner Robert Bonner, former U.S. Customs Commissioner. Commissioner Bonner reports directly to the Under Secretary for Border and Transportation Security.

Prior to March 1, 2003, the ports of entry were managed by separate chains of command and inspections personnel from both Customs and INS. On that date, CBP became the sole governmental presence along the border and at the ports of entry with the mandate to fuse the old agencies' chains of command at each port of entry into one common chain and put all inspectors under a single port director. While U.S. Citizenship and Immigration Services (USCIS) is responsible for handling benefit adjudications, applications for asylum and other immigration benefits and customer service functions, USCIS does not have a presence at the border. Rather, CBP inspectors are being cross-trained on adjudications.

CBP has continued its border consolidation efforts with its "One Face at the Border" program. This program established a new position of CBP Officer to interact with all border traffic and goods. These officers are responsible for primary and secondary inspections, but do not have the assistance of an immigration specialist. Rather, they are responsible for knowing immigration and customs regulations. However, it is apparent already that this arrangement has led to much confusion and inefficiencies. The training they receive is especially inadequate with regard to immigration and language skills. Given the complex immigration issues arising at our nation's ports of entry, the absence of immigration specialists raises concerns regarding the treatment of foreign nationals at our borders. Furthermore, it is unclear why CBP refused to create an immigration specialist position when it clearly recognized that specialists were needed for other substantive areas, such as agriculture.

Complicating matters is the fact that foreign nationals are not allowed representation by counsel at the time of admission. Such access would enable the foreign national to understand the inspections officer in cases of a language barrier and give the foreign national the means to provide the officer with any additional information relevant to a determination of admissibility. The counsel would also help minimize the major problems created by mistaken applications of the law. Permitting counsel would save both the nonimmigrant and the government substantial work, time and cost.

AILA's POSITION: Each action the DHS takes at our borders should be examined in light of how the agency balances our enhanced security needs with the efficient flow of travel and trade. Such a balance demands adequately trained staff, appropriate infrastructure and sufficient appropriations. Especially important are the following:

1. Reduce delays at the border through the use of interoperable technology and pre-screening activities that receive sufficient funding: The DHS should examine ways to expand the use of pre-inspection stations and authorize pre-clearances for low-risk travelers. Clearing travelers before their voyage to the United States gives inspectors more time to scrutinize each applicant for entry, reduces delays at the border, and provides international travelers with a sense of certainty that they will be admitted into the U.S.

2. Enhance accuracy and interoperability of databases and take steps to address problems with technology. As technology plays an increasingly central role at our consulates and ports of entry, it is vital that DHS take the necessary steps to ensure that this new technology enhances both our efficiency and security. A necessary step toward meeting this challenge would involve DHS increasing the interoperability of its database systems and other agencies' database systems to give inspectors the ability to more thoroughly review each applicant requesting entry into the U.S. A complete and accurate database system also would include a mechanism for correcting database errors, which is currently extremely difficult to achieve. Having incorrect information only serves to hinder the inspections process and discredit the reliability of the security checks. Such initiatives should be a top priority and would require sufficient funding to succeed.

In addition to database integration and funding issues, DHS must develop proper safeguards to ensure that promising technologies do not fall victim to: inadequate on-site testing to determine actual capacity; failure to perform and follow up on cost-benefit analyses; lack of adequate training; insufficient analysis of cross-over agency issues in implementation; delayed implementation schedules; inaccurate and untimely database records; and ineffectiveness due to a failure to fully integrate watch list databases. Safeguards addressing these concerns would help DHS mitigate many technology-related problems the agency currently is experiencing at the border, including performance problems with technology designed to assist with the

existing expedited traveler programs and document scanners at ports of entry with a no-read rate that exceeds 40%.

3. Coordinate CBP policies at the Border with CIS: Enforcement and adjudications come together at our ports of entry. Our national security and economic security depend on the efficient movement of cross-border travel and trade at these ports. As the CBP develops its policies and procedures, it must prioritize its coordination with USCIS. Furthermore, CBP inspectors and investigators must be knowledgeable about the policies and practices of the CIS. To ensure consistent policies, key responsibilities should reside with the CIS personnel present at each port. Failure to take these actions will result in inconsistent adjudications, which will have a deterrent effect on international travel to the U.S. Furthermore, access to counsel should be allowed at the ports as a means to make admissibility determinations efficient, fair and accurate. Given that a 10-year bar against entering the U.S. applies to all foreign nationals who receive expedited removal and there is no appeal from this determination, it is fundamentally unjust not to allow these foreign nationals to have access to representation.

4. Develop and adequately fund a workable entry-exit system: As our entry-exit system, US-VISIT must enhance our security and allow the flow of people and goods to support our economy. Such a system needs to be adequately funded. The U.S. government needs to appropriate billions of dollars to purchase real estate, upgrade facilities, develop an infrastructure and technological capabilities, and hire inspectors to manage the program. This cost includes neither the millions of dollars needed to fully address current staffing shortages of inspectors at ports of entry nor the money now needed to supply all ports with basic technology such as document readers. With a preliminary estimated price tag of billions of dollars, and only one billion invested into the program thus far, the $390 million slated for appropriations in fiscal year 2006 is grossly insufficient to fund the expansion of this program.

While having a functional and reliable program is necessary, US-VISIT has not been adequately funded. Without sufficient funding to support a fully operational program, delays could result in the entry and exits at our nation's ports, particularly land ports. Such delays would undermine the entire effort to maintain an efficient border, and efficiency is a vital component of increased security.

In addition, as the number of enrollees into US-VISIT increases, it is incumbent upon DHS to insure that information input into the database is accurate and reliable. This includes integrating into US-VISIT the databases from the three immigration bureaus. Unless these databases are integrated with US-VISIT, visitors who have applied for visa extensions might be detained for overstaying their visas, when in reality, they had maintained proper visa status. Having complete and correct information will make the difference between having a workable secure system or a discredited inefficient one.

While US-VISIT is still in its infancy, database studies and reports should be completed on the feasibility of every aspect of the program. The Administration and Congress should use that information to develop a comprehensive plan that takes into account adequate funding levels, resources and obtainable deadlines.

5. Repeal expedited removal and allow for counsel at the border: Allowing an individual inspector to order a person removed with <u>no</u> opportunity for further administrative or judicial review of the order is bad policy for all noncitizens seeking to enter the U.S. Congress should repeal the expedited removal program, which undermines our time-honored commitment to fair procedures and makes little sense in terms of international security. The truncated review process means that DHS agent would gain little to no intelligence on fraudulent documents or other indicators that could prove useful in the war against terrorism.

At a minimum, Congress should allow noncitizens access to counsel at ports of entry. Permitting counsel would help ensure that the government's broad powers to admit or bar noncitizens from entry are not used improperly or arbitrarily and would streamline the admissions process. Serving as an intermediary, counsel can help reduce confusion by providing requested documentation and bridging language or cultural divides between the applicant and the inspector.

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