

American Immigration Lawyers Association

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November 1, 2004

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US-VISIT, Border and Transportation Security
Department of Homeland Security
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Re: Comments to Interim Rule "Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry" 69 Fed. Reg. 53317-53333, August 31, 2004

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on interim regulations published in the Federal Register on August 31, 2004, expanding the US-VISIT program to the 50 most highly trafficked land border ports of entry. AILA is a voluntary bar association of more than 8,900 attorneys and law professors practicing and teaching in the field of immigration and nationality law.

AILA takes a very broad view on immigration matters because our member attorneys represent many types of persons seeking immigration and citizenship benefits in the United States. Our members represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives so that they can lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers if required, on a permanent basis. Our members also represent asylum seekers, often on a *pro bono* basis, as well as athletes, entertainers, and foreign students. Relevant to these comments, it is important to note that AILA members represent countless nonimmigrant visa holders who travel to and from the United States for business and pleasure.

AILA recognizes that it is vitally important to enhance our nation's security and we must do so in a way that balances our need for enhanced security with the cross-border flow of people and goods that are the foundation of our economic security which pays for our national security. We hereby offer suggestions on some ways that the US-VISIT program can strive to achieve that needed balance.

SUMMARY OF US-VISIT HISTORY

US-VISIT as a program has its roots in Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). Section 110 created the concept of an entry/exit system that would have applied to all non-U.S. citizens who entered or exited the United States at any port of entry. The purpose of section 110 was to identify visa status violators, mainly overstays. Subsequent laws amended the deadline for implementation and some parameters of the program, though the general framework of section 110 remains in place.

The Data Management Improvement Act of 2000 (P.L. 106-215) (“DMIA”) amended section 110 to require that the entry/exit system use data already collected from foreign nationals and prevented the then-Immigration and Naturalization Service from imposing additional entry or exit documentary or data collection requirements. DMIA further mandated the development of a centralized, searchable database and provided implementation deadlines. The first was the December 31, 2003 deadline for implementation in the nation’s air and sea ports. The next deadlines are December 31, 2004 for implementation at the 50 most highly trafficked land border ports of entry, and December 31, 2005 for all ports of entry.

The USA PATRIOT Act of 2001 (P.L. 107-56) (“PATRIOT Act”) mandated swift implementation of the entry/exit system and established a taskforce comprised of governmental and private industry members to oversee the establishment of the system. The PATRIOT Act also required the use of biometric technology and tamper-resistant documents which are machine readable at all ports of entry.

In response to concerns about the efficient flow of commerce and travel, Congress passed the Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) which mandated the utilization of technologies including interoperable data bases that aid in the determination of who should be permitted entry into the United States.

On January 5, 2004, interim regulations were published, simultaneous with implementation of the first phase of US-VISIT at 115 airports and 14 seaports nationwide. The exit element of the US-VISIT system requires that a US-VISIT-subject foreign national comply with US-VISIT procedures when departing the United States through a port equipped with US-VISIT exit capabilities. Currently, only the Baltimore-Washington International (“BWI”), Dallas, Denver, and Chicago airports and the Miami seaport have been equipped.

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COMMENTS ON THE INTERIM REGULATIONS

The Exit Element of US-VISIT Should Be a Seamless and Intrinsic Part of Departure

Since the announcement of the thirteen exit airports, we have since been advised as of October of 2004, that the exit ports at which the system is operational are currently only BWI, Dallas, Denver, and Chicago O'Hare. CBP should provide a separate, easily accessible part of its website to post the current exit ports, so that the public would have notice of where the system is in place. This type of public notice was accomplished successfully on the USCIS website with the InfoPass implementation nation-wide. In addition, CBP should provide the traveling public with a stated written policy on its website and within the regulations of good faith exceptions to exit compliance and its possible consequences. Since implementation at O'Hare, our members have reported that clients are unable to locate the kiosks for use in exit control compliance. In one instance, kiosks were located at O'Hare, but they were not operational.

AILA is concerned by reports by travelers that the US-VISIT exit equipment is hard to find. Even if the departure kiosks are marked, exit compliance is not likely to be the focus of most travelers' activities in the airport. Most travelers are concerned with their personal safety and the security of their possessions, as well as where their airline gate is located, as they make their way through airports to arrive on time for their departure flights. Unless they have been strongly alerted to look for it, a kiosk that looks like an ATM is not likely to draw their attention, even with adequate signage. Thus, we highly recommend that exit compliance during the first six months to one year of implementation at a port be manned with a CBP officer. AILA would like to express its gratitude for the implementation of the practice of issuance of paper receipts to those who manage to register their exit.

Further, as the number of ports supplied with the US-VISIT departure kiosks is gradually expanded, there is no good method for notice to nonimmigrants of the new locations. The interim regulation requires that the designations of the equipped airports for departure be published in the Federal Register, but it's a rare case that traveling foreign nationals will be familiar with, much less have read, the Federal Register.

Unfortunately, the interim rule appears to be modeled on the failed NSEERS program with respect to the exit solution, and relies on the stick of draconian punishments for failing to participate in the system, rather than the carrot of good, efficient departure control. As we have seen with the NSEERS program, few people know about the requirement and it is easy to overlook it on departure.

For these reasons, sanctioning those who fail to utilize the kiosks on exit is unjust and illogical. To make the departure solution for US-VISIT at all feasible, it must be an

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intrinsic part of the exit process, and not something that the traveler must affirmatively seek out. Few travelers will be educated about immigration requirements to the level of looking for an automated machine, and the resources required to adequately publicize the need to seek out this machine are prohibitive. The exit solution must be designed to be user-oriented, which means that all travelers subject to it must be specifically directed to it, and not left to intuit that there is a process and seek that process out.

However, if the Department insists upon handling this system in the manner already discredited under NSEERS, then at a minimum, a proviso that any failure to utilize the exit system must be knowing and willful must also be included. If there is a government interest in enforcement of the departure requirements, there also must be a government interest in the fair and reasonable application of its laws and the admission of legitimate travelers to the United States for business and pleasure.

AILA is concerned that pending applications for change of status or extension of stay properly serve to protect those who depart after “the period authorized at the last time of admission.” The timely filing (prior to the expiration of the period of stay authorized at the time of last admission) of a bona fide change of status or extension of stay application results in the individual remaining in a period of authorized stay in the United States during the pendency of the application. The regulation should acknowledge that individuals who depart after the date on their I-94 card, but while they have pending, timely-filed change of status or extension of stay applications, will be considered to have complied with the departure requirements and not be recorded as overstays.

The Regulations Should Clarify the Waiver for Failure to Comply

Extenuating or emergent circumstances may prevent an individual from complying with the departure requirements. As amended 8 CFR 235.1(d)(ii), states that failure by an alien to provide the requested biometrics necessary to verify his or her identity and to authenticate travel documents may result in a determination that the alien is inadmissible under section 212(a)(7) of the INA for lack of proper documents, or other relevant grounds in section 212 of the Act.

In the context of the Visa Waiver Program, CBP has recently announced the exercise of leniency as to those VWP applicants for admission who may fail to comply with exit control. It is difficult enough to determine what ports have exit control in place, much less to find the kiosk. We believe that CBP should have a standing “good faith” exception to exit compliance set forth in the regulations. We would suggest use of DOS Cable May 2003 NSEERS (02 State 186207) for reference and use in the VISIT exit situation. In this cable, the DHS recognizes that aliens will be allowed an opportunity to show that they had good cause for failure to comply with NSEERS in the past, and

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therefore can overcome DHS ineligibility entries based on NSEERS violations. In an INS {DHS} memorandum of December 20, 2002, the agency provided the following field guidance relating to returning NSEERS violators:

"Another issue that has been of some concern is the repeated admission of prior registrants who have not complied with the departure registration requirement. As a reminder, registrants who fail (without good cause) to be examined upon departure shall thereafter be presumed inadmissible under, but not limited to, 212(a)(3)(A)(ii) of the Immigration and Nationality Act (the Act). Officers and their supervisors, as always, have the authority to take and consider evidence that the registrant had good cause for not being able to comply. However, the concern is repeated departures without registration. Good cause will always be a case-by-case determination by the officer through the appropriate chain-of-command."

In the context of US VISIT, we would suggest a six month to one year grace period for those making less than 3 to 4 exits during this time frame at a port of entry, which has VISIT exit control procedures in place.

It appears that INA section 212(d)(3) would be the appropriate waiver application individuals in such circumstances who are seeking admission subsequent to failure to comply under section 215.8. Inclusion in this new section 215.8 of a clarification that an individual who willfully fails to comply with the departure requirements may apply for a waiver pursuant to section 212(d)(3) would serve both to reduce the already high level of confusion surrounding these new procedures, and provide a level of assurance of full and fair process with regard to the imposition of the severe consequences resulting from what may have been emergent or extraordinary conditions causing the failure to comply. With respect to our country's economic need for foreign travel and trade of services and goods, clarity of procedure is an important and facilitating factor.

The Regulations Should Provide the Ability to Establish Admissibility

These interim regulations make clear that the DHS intends to impose severe penalties for failure to comply with departure requirements. Given the need for greater publicity for nonimmigrants to be aware of the departure requirements, the potential for unintentional failure to comply is enormous. Exacerbating this disadvantage to nonimmigrants, there is not yet a system in place that guarantees accurate databases. Ensuring that all of the databases involved be coordinated has already proven itself a challenge to the DHS. The current system often enough does not show accurate information regarding an individual's status. An individual may have complied with the departure requirements, but somehow the information is not updated or even entered into the system, or an individual may have filed for an extension of stay, but departed after the date appearing

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on his I-94 card. In either case, the system may incorrectly show that the applicant failed to comply because he or she departed after the date on the I-94 card.

In such a situation, it is very important, and would greatly facilitate processing, if the applicant is permitted representation by counsel or at least access to a phone to contact someone to provide relevant information at or near the time of application for admission. Allowing an individual access to counsel would minimize the major problems created by mistaken imposition of the severe penalties. For example, there is a great risk that a nonimmigrant whose record shows a failure to comply with departure requirements may be removed under expedited removal procedures. Permitting counsel or at least access to someone to provide relevant information could save both the nonimmigrant and the government substantial work time and cost and save the U.S. significant international embarrassment.

Mexican Laser Visa Holders Should Remain Exempt from US-VISIT

We are in full support of the exemption provided to Mexican laser visa holders, who do not require an I-94 for entry to the U.S. The laser visa biometric database maintained by the Department of State must be integrated into the US-VISIT biometric database. Random IBIS checks should be conducted regularly to determine, if certain laser visas should be revoked due to legal violations.

Canadian Nationals

The visa and passport exemptions currently provided to Canadian citizens came under scrutiny by the 9/11 Commission Report which suggested that both Canadians and United States citizens be required to submit passports or some other acceptable biometric document to gain readmission to the United States. If this is enacted, it is important to provide Canadians with the same US-VISIT exemption as Mexicans. Contrary to popular belief, Canadian nationals are not exempt from the I-94 entry document to gain admission to the U.S. Such policy should be clearly stated in the regulations.

Exemptions for the Multiple Entry Nonimmigrant

The regulations should clarify that nonimmigrants with valid visas and I-94s tied to a work or study related approval, when applicable (e.g., Es, Fs, Hs, Js, Ls, TNs, Os, Ps, etc.) should be exempted from US-VISIT after initial admission in this status during the

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validity period of the status. As done with the US-VISIT portion of the IDENT database and the laser visa holder database, these applicants can be periodically run against criminal/terrorist databases to determine their ongoing eligibility for admission. On a day to day basis, however, when these visa holders have been vetted by the Department of State and the Department of Homeland Security, they should be exempted from US-VISIT procedures. This is especially important in the land border context in which it is common for such nonimmigrants to make multiple applications for admission each week. This group of nonimmigrants includes commuter students, TN nurses providing critical medical services in border communities, and cross-border manufacturing plant professionals among others.

The I-94 Form

8 CFR § 235.1(f) provides that: “Unless otherwise exempted, each arriving nonimmigrant who is admitted to the United States will be issued a Form I-94 as evidence of the terms of admission. For land border admission, a Form I-94 will be issued only upon payment of a fee, and will be considered issued for multiple entries unless specifically annotated for a limited number of entries. A Form I-94 issued at other than a land border port-of-entry, unless issued for multiple entries, must be surrendered upon departure from the United States in accordance with the instructions on the form.”

This provision has not been revised to include the I-94 forms issued at the bottom of petition approvals on Form I-797 by USCIS for a change or extension of status. To effectuate legitimate business travel without reducing security, these approval notice I-94s should be recognized for multiple entries. For that matter, since US-VISIT applies to basically almost all nonimmigrant visa categories, the more secure biometric visa stamp implemented at all 211 nonimmigrant visa issuing consular posts as of October 26, 2004 and the more secure I-797 approval notice should supplant the need for the I-94 issued at a port of entry when combined with US-VISIT. Please note that nonimmigrant categories, which do not require an I-797 approval notice, such as the B-1/B-2 must still focus on admission periods tied to the time of admission.

The current system of I-94 issuance does not recognize the reality of the use of land border issued I-94s for air and sea travel or vice versa. Whether issued at land, air, or sea, the I-94 should be issued for multiple entries tied to the I-797 approval notice, when applicable. In the future, such approval notices should serve as the authorizing document for periods of admission along with the appropriate visa when required, except in the B context as noted hereinabove.

In addition, to further reduce admission period error at the ports of entry, consular posts should issue visas tied to the petition approval period granted by USCIS rather than

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Department of State reciprocity schedules, when applicable. If the visa should not be issued based on some ineligibility, then the consular officer may refuse to issue the visa. Airlines and the Department of Homeland Security should end the process of attempting to collect a paper I-94 to try to enforce exit control. Departure manifests, US-VISIT exit receipts, and US-VISIT, ADIS, and APIS databases should serve this function tied to a single period of admission time frame for multiple entries based on the approval notice issued by the Department of Homeland Security. With the lack of current interior enforcement staffing, single admissions do not serve to address security related concerns and also do not take into account even the entry portion of the US-VISIT's utility.

In the interim, DHS should request that nonimmigrant applicants retain travel documentation to show their compliance with departure requirements. The issue of overstays and status violations must be addressed by interior enforcement.

The Regulations Should Clarify When an Alien's Biometrics Will be Verified Through US-VISIT

The regulation states that "DHS will verify an alien's identity using biometrics at the time of issuance of a Form I-94, or at any time DHS determines such verification is necessary." We understand that the latter half of that sentence refers to verification of identity through US-VISIT for visa issuance benefits. The specific intent should be clarified in the regulation instead of the more ambiguous statement provided. Furthermore, if US-VISIT is used in the context of construing visa benefits, it cannot hamper visa application processing times.

Other Suggestions for Improving US-VISIT

AILA has given considerable thought and attention to the issues surrounding entry and exit control, and suggests the following:

1. Establish an immigration specialist position at the ports of entry: It is important that immigration specialists be designated and accessible to apply our immigration laws. For consistency and accurate applications of our complex immigration laws, the decisions of these specialists should be directed and coordinated by immigration counsel within the office of the DHS General Counsel. Such legal counsel must be coordinated with benefit-related adjudications housed in United States Citizenship and Immigration Services (USCIS) and enforcement policy and procedures applied by United States Immigration and Customs Enforcement (ICE).

2. Provide notice of departure requirements upon entry: If the government is going to phase in the exit element and impose potentially serious consequences for failure to comply with departure procedures, the government should provide clear notice of this at the time of entry. Such notice should be dispensed clearly, and must be offered in many languages, in written and symbol formats. Because the program's requirements will be changing as more ports are designated and as the processes are adjusted, the instructions should be sufficient to provide notice of departure requirements, but not so specific that information may change prior to a foreign national's departure.

3. Don't conduct redundant security checks: Many border residents cross the international border several times per day. It is critical to integrate existing voluntary frequent traveler programs so that enrollment in one provides a uniform access process at all our ports of entry. There should be one consistent enrollment process for air, land, and sea admissions. The Application Support Centers in the U.S. could help facilitate the process for those already here to enroll in such programs by providing biometrics. The former U.S. Customs Service created the C-TPAT program, which is a joint government-business initiative to build cooperative relationships that strengthen overall supply chain and border security. Why not allow and encourage employees of qualifying employers to enroll in frequent traveler programs as well? In addition, goods programs must merge with people-related programs. For example, the NEXUS and SENTRI programs should merge and become the same uniform process. Why not allow such enrollment eventually at consular posts overseas as well? These actions require major funding and staffing, and yet they improve security and reduce congestion at our ports.

4. Place cameras at the ports-of-entry: Cameras have been used successfully at many ports to record the behavior and statements of the applicant and the officer. Immigration supervisors have praised the tool from a personnel perspective and embassies and applicants for admission have benefited from the recordings of this silent and objective witness. In addition, in some cases, these cameras could also implement cutting edge facial recognition technology to assist inspectors. These cameras should be installed at least in all secondary inspection areas.

5. Do not use US VISIT as a substitute for increasing our intelligence capacity: Security experts agree that our national security is best enhanced by increasing intelligence and database security checks performed outside the country. DHS should examine ways to expand the use of pre-inspection stations and authorize pre-clearances for low-risk travelers. By clearing travelers before their voyage to the United States, inspectors will have more face time with applicants and could better scrutinize each applicant for entry. Such practices would reduce delays at the border and allow inspectors more time to do their job. Pre-clearances also would provide international travelers with a sense of certainty that they will be admitted into the U.S. Such pre-inspection expansion though must be coupled with the ability to require supervisory standard review procedures for denied applications for admission/pre-clearance.

6. Make enforcement databases accurate: CBP should create an office of intelligence to liaise with the efforts of DHS to consolidate the watch list databases to ensure accuracy. Currently the IDENT biometric database does not have to comply with accuracy standards set forth in the Privacy Act. The concept of a watch list database is dependant on accurate information. There must be accountability to ensure accuracy. In addition, all public inquiries concerning enforcement-related database entries should be consolidated. The general public should be able to contact this office to timely remove inaccurate information to avoid the continuation of injustices tied to the dissemination and provision of any inaccurate information. This office should be able to reach beyond the US-VISIT database and ensure that all the databases feeding into US-VISIT are accurate. Furthermore, these databases should not be exempt from the accuracy standards of the privacy act. Failure to do so should result in a cause of action against the agency for libel or defamation of character.

7. Develop efficient and open mechanism for correcting database errors: A complete and accurate interoperable database system must include a mechanism for correcting database errors. Currently this process is very difficult, if not impossible, to achieve since information can only be corrected by the agency that originally inputted the erroneous information. If that initial correction is achieved, then the aggrieved person must hope that the other agencies which have used that erroneous information notice the change and correct their records. Having incorrect information stored in databases serves only to hinder the inspections process and discredit the reliability of the security checks.

We are aware of the efforts of the DHS privacy office to serve this purpose, but public awareness of the process is still limited. We support and encourage further public outreach and increased staffing and funding of this office.

8. Increase the interoperability of database systems: DHS should prioritize its efforts to increase the interoperability of the database systems to give inspectors a more thorough and streamlined review of each applicant requesting entry into the U.S. Currently, the separate databases from the three immigration bureaus have not been fully integrated into US VISIT. Due to this lack of information transfer, 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.

9. IDENT checks: Currently IDENT checks are being run at the time of US-VISIT enrollment at the U.S. Consulates (thereby delaying visa processing for each applicant by roughly three days) and are run at the ports of entry after the foreign national has entered the United States. IDENT checks must be given a priority status so that they are completed quickly and while the applicant for admission is at the port of entry. In addition, we question the ability of IDENT to continue its expansion tied to

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IDENT/IAFIS integration and the additional stresses placed on the database by the expansion of US-VISIT to VWP travelers and to more exit ports of entry. The exit airports have obviously not gone “on-line” in accordance with the August 2004 regulations. Thus, we would suggest that US-VISIT adopt realistic recommendations for any further roll-out tied to review of such issues.

10. Develop a biometric US-VISIT database: Currently the biometrics and biographical data of foreign nationals enrolled into US VISIT is warehoused within the IDENT biometric database. This purpose of this database is capture information on malefactors so that they may be identified and kept out of the U.S. By lumping US-VISIT enrollees in with criminals, we are sending the message that immigrants are criminals. Furthermore, commingling these two groups makes it more likely that errors will occur within the database and innocent travelers will be denied entry into the U.S. Thus, we believe that the US-VISIT database should developed separate from the IDENT and IAFIS databases, which house malefactor information to establish clarity of purpose, if nothing else.

Conclusion

AILA concurs that enhancing our national security is in the interest of the United States. While we continue to seek and employ methods to improve our ability to protect our country, we must maintain those principles of fairness and process on which this country was founded. Moreover, to protect our economic and cultural future, we must ensure the orderly flow of tourists and business travelers in and out of the United States. The interim regulations contain severe penalties for failure to comply with exit requirements, and are absent procedures to manage innocent human and technical error, on the parts of both the nonimmigrant and the government.

We urge the Department of Homeland Security to revisit the interim rule on implementation of US-VISIT in light of these comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION