

American Immigration Lawyers Association

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<http://www.epa.gov/edocket>
Mr. Craig Howie
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Department of Homeland Security
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Re: Request For Comments Relating to "United States Visitor and Immigrant Status Indicator Technology Program, Notice on Automatic Identification of Certain Nonimmigrants Exiting the United States at Select Land Border Ports-of-Entry" 70 Fed. Reg. 44934-44938, August 4, 2005

Dear Sir or Madam:

The American Immigration Lawyers Association ("AILA") submits the following comments on the notice published in the *Federal Register* on August 4, 2005, advising of the expansion of the second phase of the US-VISIT program regarding the implementation of a proof of concept protocol testing the use of radio frequency identification ("RFID") technology at five land border ports as a means for tracking the exit of certain nonimmigrants. AILA is the immigration bar association of more than 8,900 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association ("ABA")

AILA supports the enhancement of our national security through the efficient and effective control of the cross-border flow of goods and people over our land borders, but with a critical view as to the cost benefit analysis and accountability for the measures implemented to achieve these objectives. Thus, we are submitting these comments as to the potential benefit of exit tracking at our ports of entry using RFID technology.

COMMENTS

A. The Exit Element of US-VISIT Should Be a Seamless and Intrinsic Part of Departure, but RFID Alone Is Not the Solution.

While an automated system, in theory, represents the kind of seamless exit controls that might create a workable solution to the legislated goal of exit control, the real world use of RFID technology will not accomplish the goals initially outlined for the US-VISIT program, regardless of DHS' long experience with this technology. Principal

among these goals was tracking overstays. It is important to reiterate from AILA's prior regulatory comments that, although US-VISIT is now considered part of a multilayered security initiative, the proposed use of RFID technology is fundamentally flawed both as a means for accurately tracking overstays and as a security measure.

First, scanning RFID-enabled I-94 arrival/departure cards as the cards depart the U.S. in and of itself does not resolve whether the foreign national has overstayed the period of authorized stay. Aside from the obvious security concern that the card may be given to third-parties who depart the U.S. without the company of the card's foreign national owner, who could then remain in the U.S., albeit illegally, there are rather basic instances when an "overstay" is not unlawful in the least and, therefore, should not prejudice a subsequent future admission of the foreign national. For example, when the card holder has submitted a timely request for a change of status or extension of stay or an adjustment application, as discussed in more detail later in these comments.

Simply put, even assuming RFID technology alone is capable of discerning whether the foreign national actually physically departed with the I-94 card, which it can not at this time, the proof of concept now undergoing testing fails to contemplate that not all I-94 cards are the same. An I-94 card might be issued by Customs and Border Protection ("CBP") at a land border port of entry, a seaport, or an airport. An I-94 may also be attached to the bottom of an I-797 approval notice issued by a U.S. Citizenship and Immigration Service ("USCIS") Service Center to document an approved extension or change of status. Thus, the I-94 is not in a consistent format.

This lack of consistent format is also borne out by the current regulation at 8 CFR §235.1(f), which indicates that all I-94s issued at a land border are by default multiple entry documents, while all air and sea port issued I-94s are by default, single admission documents. I-94s should all be, by default, multiple entry documents to recognize the benefits conveyed by US-VISIT in the visa issuance process by establishing a specific identity to a certain name and other biographic information provided at a consular post, including the digital photograph and two print review process currently applied for visa issuance. This process typically creates a multiple entry visa, which should be recognized at our ports for multiple entries to the U.S. in light of the additional layer of security provided by US-VISIT entry review for certain nonimmigrants.

Again, this lack of consistency in the exit process also exists concerning the surrender of I-94s upon departure from the U.S. At land borders, 8 CFR §235.1(f) may be recognized to allow for multiple entries, but at air ports, it is common for this provision to be abrogated by an across the board policy of airlines to pick up all I-94s upon departure on an international flight, even if only to Mexico or Canada. Departures on flights to Mexico or Canada from the U.S. should not result in the abrogation of the multiple entry nature of the I-94. With exit control at air ports, the US-VISIT tracking of such an exit should only make it easier to allow the traveler to retain the multiple entry I-94.

US-VISIT regulatory provisions have attempted to clarify that no multiple entry I-94s need be surrendered: “This amendment clarifies that air and sea carrier passengers will continue to be issued I-94s which must be surrendered upon departure, *unless the I-94 was issued for multiple entries by the alien.*” Implementation of the United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”); Biometric Requirements”, 69 Fed. Reg. 467 (2004), Interim Final Rule (DHS). Unfortunately, the practice of certain CBP air ports abrogates the regulation in practice.

It is also common at land borders for there to be no standard process for receipt of an I-94 upon a final timely departure. There are also typically no postings of the process by the port, so the timely surrender of an I-94 becomes a case by case, port by port guessing game. While exit control mandates of US-VISIT could possibly standardize the process, it would seem apparent that there are less expensive ways to achieve this objective. For example, the U.S. Embassy in London has the process to return unrelinquished I-94 after departure on its website at <http://www.usembassy.org.uk/dhs/cbp/i94.html>. Those who fail to timely depart the U.S. already suffer the penalty of having their visa voided due to an overstay under §222(g) of the Immigration and Nationality Act. If an I-94 holder fails to depart the U.S., US-VISIT exit control will not be triggered. Thus, the true overstay case of someone who will not depart the U.S. is not on the U.S. VISIT exit radar screen.

As noted earlier herein, not all “overstays” as indicated by the I-94, are the same. 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 U.S. during the pendency of the application. As the proof of concept testing proceeds to RFID implementation, the initial design of the architecture, testing models, and the information that will be provided to officers in the field, as well as any future regulations promulgated for the program, should contemplate the common “exception scenario” mentioned in this *Federal Register* notice as to individuals who depart the U.S. after the date on their I-94 card, but while they have pending, timely-filed extension of stay application filed with USCIS. These individuals must be considered to have complied with the departure requirements and not be recorded as overstays. Unfortunately, an RFID signature will correctly indicate a departure post expiration of the RFID enabled I-94 card, but not take into account compliance with status. RFID provides only part of the foreign national’s status picture to the CBP officials who will be relying upon it to make decisions on future admissibility of the foreign national.

We are encouraged that the current notice mentions that standard procedures will be designed and implemented with “exception scenarios” in mind. As stated in AILA’s comments last year during the implementation of exit controls at certain air and sea ports, if the Department truly understands and appreciates the limitations of RFID technology at a land border port, then at a minimum, a proviso must be included formally to recognize in the regulations that any failure of the system components will not result in negative

consequences to the foreign national. In addition, a formal mechanism for resolution of a false overstay read must be included as well.

We are concerned, however, that due to the way the RFID system is being tested, that if implemented in its current iteration, there will be a large percentage of needless referrals to secondary inspection to resolve the exception scenarios. This increase in more detailed inspections will be time consuming, inconvenient for the traveler, and will require significant investments in training and agency financial resources so that CBP officers tasked with the inspection will be able to determine quickly that the foreign national is admissible. These investments are clearly necessary, because hinging future admission to the U.S., not to mention avoiding other severe consequence of an inaccurate record of presence in the U.S. for future extensions or changes of status, eligibility for adjustment of status, imposition of U.S. taxes, etc., must be a critical consideration in developing a satisfactory entry control system. 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 U.S. for business and pleasure.

Second, the true security benefits of exit control appear limited at best utilizing US-VISIT, which is based on the concept that a foreign national overstay always departs the U.S. For those who intend to remain in the U.S. indefinitely upon entry, there is no sufficient interior enforcement mechanism available to trace every single foreign national admitted to the U.S. Once inside the U.S., unless the person attempts to depart the U.S. through a port of entry with a fully functioning exit control mechanism, US-VISIT will **not** address this type of overstay. In fact, even the overstay who departs will not be impeded by US-VISIT. The true potential control on the process is tied to the application for readmission to the U.S. by the overstay foreign national or by an application for a new visa by such foreign national. With or without US-VISIT, a consular officer should still review I-94 admission date and the CLAIMS database to determine whether a foreign national is an overstay. A CBP officer can do the same upon a foreign national's application for admission. So what indeed is the true benefit of exit control provided by US-VISIT at a land border? Possibly the base benefit, is setting the actual departure time in a government database, but to what end, when the person does not even have to be with the card upon such a documented departure at a land border using RFID technology?

B. Land Ports of Entry and the Use of RFID for Exit Control

1. Allocation of Resources Must Be Balanced Against Marginal Security Enhancements.

The DHS has indicated that enrollment in US-VISIT at land ports of entry would occur in secondary inspection, which is described in this context as the point at which foreign nationals obtain the I-94 arrival/departure card. In order to speed processing of automobile traffic at the land ports, DHS is investigating the use of a RFID technology,

which would transmit biographical information to the inspections officer. This technology would be similar to the SENTRI or NEXUS commuter programs implemented along the southern and northern border, respectively. However, RFID technology does not resolve identity- and security-related database issues without either pre-clearance review of the applicant or at least text-based checks, as in airports upon admission. As noted by Jeane J. Kirkpatrick, Director – Council on Foreign Relations Independent Task Force on Homeland Security Imperatives, in her March 12, 2003 testimony before the U.S. Senate Judiciary Subcommittee on Border Security, Citizenship, and Immigration, *“There will never be enough inspection resources and it would prove self-defeating to subject every person, conveyance, and cargo to the same inspection regime.”* She further notes that the, *“inspections processes at a port of entry must be an exercise in risk management.”*

Border communities depend on the cross border flow of goods and people for their economic survival. For example, in 2001, \$22.7 billion in imports and \$16.1 billion in exports passed through El Paso’s international bridges, constituting 19% of total trade through southern U.S. Customs Districts. Local El Paso economists estimate that between 15% and 30% of El Paso’s retail sales are derived from Mexican nationals. Just in time inventory management in cross-border manufacturing operations requires that Mexican and Canadian suppliers make their deliveries to the U.S. in predictable intervals. Delays in these cases can translate into disasters for these communities.

A June 1998 Senate Judiciary Committee report offers a compelling example of the challenges faced at our land border ports of entry. The report cites information from Dan Stamper, President of the Detroit International Bridge Co. Mr. Stamper noted that the Ambassador Bridge handles approximately 30,000 vehicle crossings per day. He calculated that, *“assum[ing] the most efficient and remarkable entry and exit procedures in the world [that] will take only 30 seconds per vehicle, and making the equally optimistic assumption that only half of the vehicles have to go through procedures, that would amount to an extra 3,750 minutes of additional processing time each day.”* As he sagely pointed out, *“There are only 1,440 minutes a day.”* Thus, the implementation of Section 110 would effectively close the border.

Unique infrastructure concerns also arise. The Data Management Improvement Act (“DMIA”) Task Force’s Second Annual Report to Congress notes that in fiscal year 2002, there were 358 million land border entry inspections of people and 11 million inspections of commercial vehicles. There are over 300 ports of entry to the U.S. The report further states that as to current port infrastructure: 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.”*

In addition, the high cost involved in developing an appropriate infrastructure also must be recognized. Along with the physical exits, these ports need adequate lanes, technologies, and trained officials, all of which costs, according to some experts, more than \$10 billion dollars. Furthermore, in contrast to airport ports of entry, land ports must deal with pedestrians, passenger vehicle occupants, and commercial vehicle occupants. Our current admissions procedures at land ports sheds some light on the complex environment in which US-VISIT is being implemented.

Pedestrians: Currently, there is no exit inspection for pedestrians and usually no space or personnel to perform such an inspection. RFID technology used solely to track I-94s departing by vehicle clearly does not solve the problem, no matter how well implemented.

Passenger Vehicle Occupants: Most passenger vehicle lane checks do not involve checking databases against the applicant's visa. Often, passenger vehicle inspectors will have access to Treasury Enforcement Communications System (TECS), which is a database managed by legacy Customs. It is possible to access IBIS via a mobile TECS unit, but the system is not amenable to scanning documents, so data must be typed in manually. In addition, to access Computer Linked Application Information Management Systems (CLAIMS III) for immigration status information, the person must be sent to secondary inspection for further review. Therefore, if vehicle inspectors want to conduct further checks on applicants, the applicants for entry must park their car and walk in front of oncoming lanes of vehicles to get to the secondary inspection area. Under the contemplated US-VISIT use of RFID, the vehicular traffic would be treated the same as pedestrian in that derogatory information calling into question the admissibility of the I-94 holder would have to be resolved at secondary inspection, thereby straining secondary inspection resources even further.

Exit lanes are usually not available to allow for exit inspection currently. This fact is confirmed in the DMIA Task Force's First and Second Annual Report to Congress. Obviously, in the passenger vehicle context, even fewer IBIS checks are conducted than of pedestrians. US-VISIT's proposed use of RFID to track the vehicle land departures at best records only when the I-94 card departs and not the individual. Therefore, as a viable means for tracking overstays it fails, even if the technology functioned 100% of the time. This does not enhance safety in the least, but instead provides something more dangerous than the current open procedures, a false sense of security and control over recording exit compliance.

Commercial Vehicle Occupants: Commercial vehicle occupants basically go through the same process as passenger vehicle occupants. However, the commercial parking lot often is far away from the secondary inspection area and commercial vehicle occupants must be escorted to secondary by a port employee. Due to inadequate staffing,

often no staff is available to perform this function and foreign nationals are often left waiting for long periods of time for further review.

2. A Full Environmental Impact Statement Should Be Prepared For the Use of RFID for Exit Control Land Ports of Entry.

Federal agencies are required to take a “hard look” at the possible environmental consequences of a proposed action in the environmental assessment process. In their review, agencies must also take into consideration the possible socioeconomic effects of the action, including the direct, indirect, cumulative, and reasonably foreseeable effects. An Environmental Assessment (“EA”) should briefly determine whether to prepare an environmental impact statement (“EIS”) or a finding of no significant impact (“FONSI”), aid an agency’s compliance when no EIS is necessary, and to facilitate the preparation of a statement when one is necessary. 40 C.F.R. §1508.9.

Implementing a national entry/exit monitoring system, even in increments, is a “significant” federal action, with the potential to affect the human environment of border communities and the United States in general. As such, a full environmental impact statement should be prepared, so that interested communities, citizens, and government agencies can be satisfied that DHS has sufficiently considered all reasonably foreseeable effects that will flow from the entry/exit tracking monitoring methods which are chosen. At a minimum, sufficient advance fact-finding and analysis is necessary (and compelled by law) to adequately address the full spectrum of possible socioeconomic and environmental impacts the US-VISIT implementation may have.

The National Environmental Policy Act of 1969 (“NEPA”) requires that federal agencies give adequate consideration to the *social* impacts of proposed projects as well as the *natural* impacts. According to 40 C.F.R. §1508.14, the “human environment is to be interpreted *comprehensively* to include the natural and physical environment *and the relationship of the people with that environment.*” Further, the United States Supreme Court established in Robertson v. Methow Valley, 490 U.S. 332 (1989), that agencies must take a “*hard look*” at the environmental consequences prior to taking a major action. We are concerned that the DHS has not yet taken a “hard look” at the full spectrum of possible social and environmental effects, both locally and nationally, that may flow from this project.

Specifically, the Council on Environmental Quality’s regulations and the environmental assessment process require DHS that several social impacts, such as economics, population density and growth rates, patterns of land use, cultural, and health impacts be considered both individually and cumulatively. 40 C.F.R. §1508.8. The regulations also require DHS to consider reasonably foreseeable indirect effects that are caused by actions that are later in time or farther removed in distance. 40 C.F.R. §1508.8(b).

Further, to properly determine whether an action is “significant,” the agencies must evaluate both the context and intensity of their proposed action. 40 C.F.R. §1508.27. The regulations say several “contexts” must be adequately considered, such as society as a whole (human, national), the affected region and interests, and the locality. As an example, the regulation states that in a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Short and long term effects are also relevant.

Concerning intensity, 40 C.F.R. §1508.27(7) also specifically states that agencies need to consider whether an action is individually insignificant but is related to other actions that are cumulatively significant impacts. In determining significance, the regulation also states that agencies must consider whether the effects on the quality of *human environment* are likely to be highly controversial, whether the effects present highly unknown risks, and whether the action establishes a precedent for future actions or a decision in principle about a future consideration. A full environmental impact statement should be prepared prior to implementation of RFID for exit control.

C. Congress Needs to Assess Other Alternatives to US-VISIT As Tools to Enhance Our Security.

Will US-VISIT land border exit control help to enhance our security? The accurate answer would be no, based on a true cost benefit analysis. Serious questions need to be addressed as to the achievable as well as desirable mission of US-VISIT to track all entries to and exits from the U.S. Such a rationale does not take into account the numerous frequent traveler programs, such as NEXUS and SENTRI, being promoted by CBP. What is our security and economic benefits of tracking all entries and exits of low risk travelers to the U.S.?

A June 1998 Senate Judiciary Committee Report (Senate Judiciary Report 105-197 on S. 1360, Border Improvement and Immigration Act of 1998, June 1, 1998) makes the following apt comment with regard to tracking visa overstays:

Even if a list of names and passport numbers of visa overstayers would be available, there would be no information as to where the individuals could be located. Even if there was information at the time of entry as to where an alien was expecting to go in the United States, it cannot be expected that 6 or more months later the alien would be at the same location. Particularly, if an alien were intending to overstay, it is likely that the alien would have provided only a temporary or false location as to where the alien was intending to go.

AILA has previously testified that immigration can best contribute to our national security by enhancing our intelligence capacities. To that end, AILA strongly supported

the Enhanced Border Security Act. The goal of this law is to make our borders the last line of defense. That support included the following provisions: authorizes increased funding for the DOS and Legacy-INS, requires federal agencies to coordinate and share information needed to identify and intercept terrorists; encourages the use of new technologies by authorizing funds to improve technology and infrastructure at Legacy-INS, Legacy-Customs, and DOS, targeting much of this effort at strengthening our nation's borders; mandates the transmittal of advance passenger lists; and implements a study to determine the feasibility of a North American Perimeter Safety Zone. (This study includes a review of the feasibility of expanding and developing pre-clearance and pre-inspections programs).

In placing the concept of RFID technology control of exits at land borders under the true security lens, the followings salient observations are warranted:

First, RFID technology implemented at land borders for exit control will never identify those who enter the U.S. as nonimmigrant with the intention to violate their status and remain in the U.S. permanently, because there will be no exit to trigger a future denial of a request for legal admission. The interdiction of these individuals will be left to interior enforcement, thorough reviews of admissibility issues by CBP officers and consular officers abroad in the visa process, and better database connectivity to ascertain a true overstay from one who is lawfully in the U.S. still based on a different benefit application.

Second, RFID technology for exit control at the land borders does not address those who entered the U.S. illegally without inspection at a port of entry. Exit controls and RFID enabled I-94s do not apply to these individuals. Consequently, RFID exit controls do nothing to address this rather glaring security concern. For the investment that RFID exit controls will entail, the taxpayer should be able to expect that the central issue of undocumented admissions be on the table. Thus far, the multilayered approach to security has ignored the issue entirely, presumably because increased efforts at the border alone is not the answer. Comprehensive reform of our immigration laws and regulations will be necessary, in conjunction with tracking and enforcement activities, if we are to regain control of our borders in any meaningful sense of the term.

Third, while § 222(g) of the Immigration and Nationality Act provides that a foreign national's visa is automatically revoked as a consequence of their overstay, the provision is toothless without enforcement. The individual can attempt to remain in the U.S. to keep from alerting officials he or she has violated the terms of the admission. Again, even if there were an alarm system indicating an I-94 date has passed with no saving departure on record, and interior enforcement personnel and resources were in place, and the individual's whereabouts were known, there remains the issue of expiring I-94s where a change of status or extension have been timely filed.

Recommendations: Based on the above discussion and in order to implement feasible security objectives without seriously harming the international and cross border flow of trade and people, we submit the following recommendations:

- 1. Provide a Cost-Benefit Analysis of Exit Control at our land border ports** - Exit control at our ports of entry should be reviewed in light of our true benefits of tracking such departures. In addition, the utility of tracking those with multiple entry visas should be analyzed in light of the improved security achieved from an identity and background check perspective in the visa issuance and admission process at ports via US-VISIT.
- 2. Make consistency the rule in I-94 admissions first** - I-94s should be issued for multiple entries to those for whom a multiple entry visa has been issued. The multiple entry visa should serve as the multiple entry document with CBP inspections serving as a continuing secondary review for admission purposes.
- 3. Frequent Traveler programs must be expanded** - Assessing low risk travelers for frequent traveler accelerated admission for legitimate travel to the U.S. must be expanded to allow limited security resources to be focused on higher risk travelers.

Operational Assistance

- 1. DHS must increase its outreach to the public concerning US-VISIT** - DHS must inform US-VISIT enrollees of the program's requirements, and information must be widely disseminated and presented in a timely manner. Without adequate public notice on how to comply with these new US-VISIT requirements, the program will not operate properly and will impede the flow of people who are essential to our economic well being. Such public notice campaigns are mentioned in the notice relating to RFID use, but should have been well-planned and considered before moving forward with proof of concept testing of RFID technology.
- 2. Give US-VISIT enrollees a receipt and issue regulations allowing leeway during the program's infancy** - Without giving US-VISIT enrollees physical proof of their entry and exit into US-VISIT, enrollees will have no way to rebut system errors or to identify informational mistakes inputted into the system. Additionally, during US-VISIT's infancy, enrollees are facing much uncertainty regarding their responsibilities under this program. A grace period for exit control compliance and alternative methods by which visa holders may comply with exit control without penalty are necessary to ensure that innocent travelers are not unfairly penalized by US-VISIT.

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October 17, 2005
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Conclusion

While we continue to seek and employ methods to improve our ability to protect our country, we must first be sure that such measures will actually work and are not merely the illusion of safety through increased efforts and expenditure of resources. Moreover, we must maintain those principles of fairness and process on which this country was founded. 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 US-VISIT program, in previously announced interim regulations, contains severe penalties for failure to comply with exit requirements. Alarmingly absent from those regulations are procedures to manage innocent human and technical error, on the parts of both the nonimmigrant and the government.

In moving forward with the proof of concept use of RFID technology to track compliance with exit controls, we urge DHS to consider whether RFID will really meet the stated goals of addressing overstays and whether the exit program at the land border merits the investment such an endeavor will require from a security perspective.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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