American Immigration Lawyers Association

918 F Street, N.W. Washington, D.C. 20004 (202) 216-2400

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Michael Hardin and Craig Howie
Senior Policy Advisors, US-VISIT
Department of Homeland Security
1616 North Fort Myer Drive,
18th Floor
Arlington, VA 22209

Re: DHS Docket No. DHS–2005–0037
United States Visitor and Immigrant Status Indicator Technology Program (‘‘US-VISIT’’) – Enrollment of Additional Aliens in US-VISIT, published in the July 27, 2006 *Federal Register* at page 42605 et seq.

Dear Messrs. Hardin and Howie:

The American Immigration Lawyers Association ("AILA") submits these comments on the Proposed Rule published by the Department of Homeland Security (DHS) concerning a possible expansion of the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program to cover additional categories of aliens who enter and depart from the United States.

AILA is a voluntary bar association of more than10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. We appreciate the opportunity to comment on the Proposed Rule and believe that our members’ collective expertise provides a real-world basis that makes us particularly well-qualified to offer views which we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents (LPRs) and other foreign nationals in seeking immigration benefits (including lawful admission to the United States) and maintaining compliance with U.S. immigration laws and regulations.

AILA recognizes that it is vitally important to enhance our nation’s security, and that 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 the economic security that pays for our national security. AILA has consistently supported legislation to expand staffing for our nation's Ports of Entry and to ensure that they are otherwise well-equipped. For example, AILA strongly supported the Enhanced Border Security Act. The goal of this law is to make our borders the last line of defense. To that end, the Act authorizes

increased funding for immigration and border functions, 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 for immigration functions, targeting much of this effort at strengthening our nation's borders; mandates the transmittal of advance passenger lists; and mandates a study to determine the feasibility of a North American Perimeter Safety Zone. (This study would include a review of the feasibility of expanding and developing pre-clearance and pre-inspections programs.)

The Proposed Implementation of US-VISIT Screening on an Expanded Class of Aliens Is Premature Because It Will Trigger Costly Yet Unexamined Interruptions in the Free Flow of Trade and Travel

AILA supports carefully considered, adequately funded and thoughtfully implemented measures to improve the administration of the immigration laws and protect homeland security. We are, however, concerned that the Proposed Rule, which would extend US–VISIT requirements to all aliens, including LPRs and Canadian citizens entering as nonimmigrant workers and students, but would expressly exempt certain narrow classes (such as "A" and "G" nonimmigrants and Canadians applying for admission as B-1/B-2 visitors for business or pleasure), is not yet fully considered.

Although we applaud efforts to apprehend terrorists and criminals before they can harm our people, businesses, institutions and infrastructure, AILA believes that the strategy suggested in the Proposed Rule, although potentially appropriate, is premature. Implementation of the strategy requires a far more detailed assessment of the costs of implementation and ongoing administration (including the potentially adverse environmental effects and the programmatic impact on the free flow of international travel and trade) in light of the mutually agreed benefits to be derived from more careful monitoring of admissions to and departures from the United States.

Information in the public domain, including various reports outlining environmental impact assessment findings published by DHS and accessible at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0596.xml, leads us to conclude that the specific costs and environmental and programmatic impacts of screening the expanded categories of aliens (as suggested in the Proposed Rule) have not as yet been subjected to adequate scrutiny. We also believe that the conceptual design of the Proposed Rule (a plan of moving quickly into airport screening of the additional categories, while postponing land-border implementation, and adopting mitigation measures that suspend the operation of US-VISIT if wait times become prolonged) is likely to incur substantial unexamined costs and yield little of the desired fruit (the apprehension of terrorists and lawbreakers).

As a "Significant Regulatory Action" under Executive Order 12866, the Proposed Rule Must Be Subjected to a Probing Cost/Benefit Analysis Prior to Implementation

In its Preamble to the Proposed Rule, DHS correctly recognizes that interagency analysis is mandated because the proposal is a "significant regulatory action subject to Executive Order [EO] 12866." The agency wrongly concludes, however, that there are no potential costs or consequences associated with the rule that would impede the free flow of travel and trade. This conclusion is unsubstantiated and incorrect, given that the Proposed Rule does not consider the impact of probable US-VISIT associated user fees on travel and trade. Even more fundamentally, DHS fails to provide a cost-benefit analysis on US-VISIT's potential impact on border economies or on the travel and tourism industry or on overall U.S. international commercial interests. Therefore, the ultimate costs and impacts of US-VISIT remain undefined.

A review of environmental impact assessment findings published by DHS, as required by the National Environmental Policy Act (NEPA) of 1969, shows that the agency has not expressly analyzed the expansion of US-VISIT screening to LPRs. While the environmental impact findings suggested – without analysis – that entry and exit procedures would be expanded eventually to include additional categories of aliens, the focus of these studies involved nonimmigrants, and even as to that category, most of the impact analysis considered exit screening alternatives (with self-service kiosks chosen as the preferred mode of departure confirmation).[1]

Aside from US-VISIT's environmental and programmatic impacts, AILA is also concerned that DHS has not studied, or explained, how funds will be secured to pay for the proposed expansion of the program - or for that matter to sustain the program in its current state. AILA fears that DHS will ultimately attempt to subject cross-border travelers to substantial user fees to pay for US-VISIT development and maintenance. US-VISIT's Director acknowledged this possibility at a January 5, 2006 press roundtable in which he reportedly stated that whether user fees will be required to pay for US-VISIT is an issue "dependent on funding from Congress."[2] DHS suggests that the Proposed Rule will expand the US-VISIT user base, but its comments regarding the regulation fail

[1] In evaluating the environmental impact of US-VISIT airport screening alternatives DHS considered a number of defined factors and criteria that would meet the minimum requirements for deployment. These included:

> • Cost: US-VISIT funding is limited to those funds appropriated by Congress on a fiscal year basis;
> • Space: space at the airports is inherently limited. The allocation of suitable space to deploy Off-The-Shelf (OTS) technology at airports will be evaluated and negotiated on a site-by-site basis;
> • Staffing: US-VISIT's ability to hire additional government personnel in an acceptable timeframe is constrained by Congressional funding and time;
> • Security: US-VISIT's ability to accurately acquire biographic and biometric data; and
> • Use of technology: time and funding to develop new technology are not available in order to meet current security needs.

[2] See Meg Olson, "US-VISIT system hitting a technological wall,", *The Northern Light (Blaine WA),* Jan. 12, 2006.

to address the issue of future user fees, including the foreseeably adverse effect user fees will have on border commerce.

Congress has not enacted legislation to exempt US-VISIT enrollees from user fees, nor has DHS acted to achieve this end through regulation. Meanwhile, law and policy currently in place foretell that US-VISIT enrollees ultimately will be charged user fees to pay for the system. Specifically, 31 USC §9701, OMB Circular A-25 and other provisions of law mandate that user fees, sufficient to cover the costs of such technology and its administration, are to be charged to its users.

Failure to consider the impact of user fees is contradictory to the plain language and intent of The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). Specifically, Section 101(b)(1) of the Homeland Security Act of 2002 sets out the seven components that comprise the primary mission of DHS. Subparagraph (F) affirmatively establishes that an integral part of DHS' primary mission is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland…" Moreover, DHS has indicated that one of its goals for US-VISIT is for the system to facilitate legitimate trade and travel. Given its statutory mandate and articulated goals, DHS should not proceed to expand the design for US-VISIT without disclosing candidly the amount of the user fee to be imposed if the program must be self-sustaining when finalized, and the effect of user fees on legitimate cross-border trade and travel.[3]

Further, despite DHS's recognition that the proposed regulation is a significant regulatory activity that impacts cross-border trade and commerce, the drafters of the Proposed Rule offer no cost/benefit analysis of the impact of this dramatically expanded US-VISIT program on several vital U.S. national interests. AILA harbors strong concerns that premature expansion of US-VISIT as suggested in the Proposed Rule will harm "the economy, [certain sectors of the economy], productivity, competition, [and] jobs."[4] Executive Order 12866 contemplates that such recognition of economic significance requires the following from DHS:

1. A thorough explanation as to how US-VISIT will benefit the efficient functioning of the economy and private markets.

[3] AILA notes the analogous example of the NEXUS program to illustrate that a US-VISIT user fee could be substantial. NEXUS enrollment is subject to a reduced enrollment fee pursuant to §102(a)(2) of The Enhanced Border Security Act of 2002 which provides for waiver of all or part of enrollment fees for technology based programs to encourage voluntary participation by United States citizens and aliens in such programs. NEXUS enrollment costs $50 per person, which is fairly substantial, although the fee is categorized as "reduced."

[4] See § 3, EO 12866 (definition of "significant regulatory action"). For similar reasons, the Proposed Rule also triggers the threshold for more expansive review under the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Act, the Paperwork Reduction Act, and yet another executive order, EO 12988. The Proposed Rule, if made final as proposed, would likely result in an annual effect on the economy of $100 million or more.

2. A full assessment of the costs of US-VISIT. (AILA considers one significant component of costs will be the impact on tourism and business travel of user fees sufficient to pay for the system, but DHS should also explain how much it will cost the federal government to create, operate, and administer US-VISIT technology and operating systems.)

Beyond the impact on the economy, AILA also notes concerns about the untested technologies to be used or integrated in the operation of US-VISIT. A January 2006 General Accountability Office (GAO) report (accessible at http://www.gao.gov/cgi-bin/getrpt?GAO-06-318T) is unequivocal in stating that US-VISIT's operational and technology context remains "unclear." The GAO report, at p. 12, offers this troubling account of the many unknowns arising from the design and implementation of US-VISIT in its current form:

> A prerequisite for prudent investment in programs is having reasonable assurance that a proposed course of action is the right thing to do, meaning that it properly fits within the larger context of an agency's strategic plans and related operational and technology environments, and that the program will produce benefits in excess of costs over its useful life. We have made recommendations to DHS aimed at ensuring that this is in fact the case for US-VISIT, and the department has taken steps intended to address our recommendations. These steps, however, have yet to produce sufficient analytical information to demonstrate that US-VISIT as defined is the right solution. Without this knowledge, investment in the program cannot be fully justified. The report's conclusion observes that US-VISIT's "core capabilities, such as exit, have yet to be established and implemented, and fundamental questions about the program's fit within the larger homeland security context and its return on investment remain unanswered.

An EO 12866 cost/benefit analysis for the Proposed Rule would address many of the questions raised by the GAO report and in the foregoing commentary by AILA.[5]

[5] The supplementary information to the Proposed Rule raises another operational concern. There, DHS provides information regarding the time required for collection of biometrics to support its argument that US-VISIT reduces border processing times. The argument is misleading, given that the estimated time for fingerprinting is based on index-finger printing (two-print fingerprints). DHS has already announced that it is implementing 10-print fingerprinting in US-VISIT. Specifically, in recent news stories, US-VISIT Director Robert Mocny indicates that DHS is operating 10-fingerprint scanners in US-VISIT pilots now and plans to deploy them for general US-VISIT purposes in 2008 or 2009. See, e.g., Wilson P. Dizard III, "US-VISIT to Expand Border Screening," *Government Computer News*, July 27, 2006. A time estimate for 10-print fingerprinting can be found in a DHS official's comments to a Department of Justice (DOJ) Office of Inspector General (OIG) report. On December 3, 2004, in comments about an OIJ report on DHS and FBI fingerprint databases, then DHS Director of Border and Transportation Security, Asa Hutchinson, was asked whether it would be "operationally feasible" to consider adding 10 to 15 seconds per traveler to capture 10 fingerprints, rather than two index prints, for 43 million visitors a year. "Even discounting the processing time required, the additional 10 to 15 seconds for print capture would have an enormous impact," Hutchinson wrote. "It would require a significant number of additional inspectors and consular officers, as well as significant facility modifications to handle the increase in wait times." (See Appendix 5 to DHS Office of Inspector General Evaluation and Inspections Report I-2005-001(December 2004)). As a

The Unknown Costs of the Proposed Rule on the Free Flow of Trade and Travel through Our Airports Are Likely to Be Substantial

As shown in the DHS October, 2003 "Nationwide Environmental Assessment: US-VISIT Implementation at Air Ports of Entry", roughly 449 million people enter the U.S. each year. Of these 173 million are citizens. Approximately 196 million entrants are foreign citizens other than LPRs and travelers entering under the visa waiver program (44 % of the total travelers entering the United States). The remaining travelers (56%) include U.S. Citizens, LPRs, and travelers from visa waiver countries. DHS inspects these citizen and non-citizen travelers as they seek entry into the U.S. through 330 designated air, sea, and land ports of entry. There are 115 airports with arrival checkpoints and 80 airports authorized for departure abroad. Thus, the scope of Proposed Rule's expanded reach for US-VISIT is indeed breathtaking.

As international travelers, arriving passengers entering the U.S. on international flights face two sets of queues for screening by U.S. Customs & Border Protection (CBP) – Category (1) U.S. Citizens and LPRs; and Category (2) all other aliens. Typically, CBP processes persons in Category (1) swiftly, while persons in Category (2) must wait significantly longer to clear primary inspection. Nowhere in the Preamble to the Proposed Rule or any of the agency's environmental impact assessment findings does DHS analyze the wait time impact, space configuration requirements or modifications, or other costs associated with a proposal that would mandate that LPRs on arriving flights be fingerprinted and photographed.

Does the proposed rule contemplate that LPRs would be required to enter through the queues for Category (2), thereby prolonging wait times for that set of queues?[6] Or, does it mean that U.S. citizens will be delayed in being cleared through primary inspection because LPRs (who would remain in the line for citizens) now must be photographed and fingerprinted? In either case, how will primary inspection stations, facilities for secondary inspection and adjoining secure premises be configured or modified to accommodate this change "VISITed" on LPRs?

Moreover, how will all of this be accomplished given the constraints of cost and staffing (US-VISIT requires Congressional appropriations each fiscal year and qualified CBP staff take time to hire, train and deploy), space (DHS admits that secure airport space is

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practical matter, it will take more than an additional 10 or 15 seconds per traveler for the 10 print fingerprinting. Clearly two-print time estimates cannot be used as a predictor for decreased border processing times for US-VISIT enrollees.

[6] Traditionally, a major advantage of grouping United States citizens and lawful permanent residents jointly is that it keeps families together: A family may well consist of two lawful permanent resident parents, a United States citizen minor child, and her older lawful permanent resident brother. If permanent residents seeking reentry to the U.S. are processed separately from citizens it is conceivable that minor U.S. citizen children will be separated from their lawful permanent resident parents and siblings during the process.

"inherently limited" and must be evaluated on a "site-by-site basis"), security and technology (the legacy systems used to capture biographic and biometric data must be able to scale up and stand up to the huge increases in the population to be screened because, as DHS has acknowledged in environmental assessment of airports, "time and funding to develop new technology are not available in order to meet current security needs")?

The DHS Preamble to the Proposed Rule and available published reports offer no answers to the foregoing questions. Clearly, however, DHS cannot take an unexamined gamble on the Proposed Rule. At a time when the agency is moving ahead on several major fronts concurrently, AILA believes that this is not yet the time to place significant additional stress on the present system for screening arrivals and departures. The impact of this additional stress is as yet unknown but is likely to be substantial. Without further study, AILA is concerned that these unanalyzed pressures, if allowed to go forward as proposed, will cause a breakdown in the already overtaxed screening system and irreparably damage our economy, security, and society.

The Unknown Costs of the Proposed Rule on the Free Flow of Trade and Travel through Our Land Border are Likely to Be Substantial

DHS states that it will implement the proposed amendment of US-VISIT yet minimize the impact on travel and trade. The agency also suggests that it will not screen all aliens entering at a land port until technology is tested and implemented to minimize any traffic delays and harmful impact on legitimate commerce. Beyond the mere statement of these laudable goals, we find little in the Preamble to the Proposed Rule that would allow the public to understand DHS' explanation of how it will conduct US-VISIT screening at land ports of entry.

The proposed treatment of certain returning nonimmigrants subject to US-VISIT is unclear. The agency ought to state plainly if it plans to conduct re-screening of all returning nonimmigrants arriving at a land port who, during primary inspection, present a valid visa (if one is required) and a current, multiple-entry Form I-94 (Arrival/Departure Record) for a nonimmigrant status subject to US-VISIT. If this is not the plan, DHS should articulate clearly which aliens seeking nonimmigrant status, who possess a current, multiple-entry I-94 (and a visa, if one is needed), will be referred to secondary inspection for US-VISIT screening.[7]

[7] The proposed regulation at 8 CFR §235.1(d)(ii) provides for the possibility of requiring evidence of maintenance of status at each entry into the United States. The Preamble indicates that Canadians with H-1B nonimmigrant status who commute "…will be screened biometrically via US-VISIT when applying for a new multiple-entry Form I-94 which happens at approximately six-month intervals… ."

Current regulations governing nonimmigrant categories specify the period of time for which status can be accorded. None of the regulations limit status to six months. For example, under 8 CFR §214.6(e), TN Canadians shall be admitted for up to twelve months. Under 8 CFR §214.2(l), L-1 status is accorded for one year, two years, or three years. Under 8 CFR §214.2(h), H-1B status is accorded for up to three years. During these periods of time, when the beneficiary re-enters the United States, neither evidence of

Thus, the proposed expansion of the US-VISIT program at land ports prompts many questions. After screening, (1) will I-94s issued to aliens seeking initial status be granted for the full time accorded in an I-797, Notice of Action approval notice for a pre-approved petition, or, for the maximum time accorded by law to a status, if the status application is adjudicated at a port[8], and, (2) will I-94s issued to a returning alien accord

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eligibility for the classification, nor evidence of maintenance of status is normally required as an element of admissibility.

The proposed regulation would inject uncertainty and inefficiency into the process. If a Canadian were subject to review of maintenance of status every six months or on every entry, the person potentially would need to carry along on each trip, and CBP officers could be required to review, the entire set of documentation for the classification, as well as payroll records and employment records to prove whatever the examining officer might decide was required to establish maintenance of status.

In effect, the proposed regulation would effectively shorten the duration of status accorded to the shorter of the following, depending on whether the person remained in the United States or departed:

(1) The full term of status (up to three years, for H-1B or L-1), if the person did not leave the United States during the term; or

(2) The period of stay, if the person departed and CBP challenged status on each entry, as anticipated in the proposed regulation; or

(3) Up to six months, if the person departed the United States, and CBP followed the "rule" as anticipated in the Preamble.

Further the proposed regulation fails to consider the multiple entry characteristics of the I-94 entry document. Under 8 CFR §214.6(e), form I-94 for TNs for Canadians are to be annotated "multiple entry." A Canadian applying for TN admission at a land border would be issued an I-94 valid for multiple entry with or without the annotation according to 8 CFR §235.1(f). The regulation at 8 CFR §214.6(e) helps to clarify that airport and seaport issued I-94s for TN status, as well as those issued at pre-clearance operations, must be issued for multiple entry. With an alien's lawful status effectively ending on each departure, the term "multiple entry" would be rendered meaningless.

Proposed 8 CFR §235.1(d) is in conflict with 8 CFR §235.1(f), which provides that an I-94 form issued at a land border "shall" be for multiple entry, unless specifically annotated, while an I-94 issued by an air or sea port is a single entry document by default. AILA urges that 8 CFR §235.1(f) be revised to reflect that all I-94s are multiple entry documents, unless stated otherwise on the form and in the passport of the applicant. The current provisions of 8 CFR §235.1(f) do not reflect the reality of the overlap of international travel and cross-border admissions. US VISIT has an opportunity to serve as an extra layer of security as intended, but there is no need to reissue the I-94 card base to document a period of authorized admission, when US VISIT can be used to track admissions and reaffirm the lack of security risk tied to such admission as deemed necessary.

[8] This can arise in a variety of situations. An alien presenting an I-797, Notice of Action approval notice for three years in H-1B status ought to be granted an I-94 providing status for this full period. In such case, a judgment has already been made that the alien is qualified under the program to be in the U.S. for the stated time. If an alien's application for L-1A, L-1B or R status, for instance, is adjudicated and approved at a port of entry, the alien ought to be admitted for the full term allowed by the governing regulations. If admission in any of these instances is for a shorter time, the rights normally accorded an alien would be denied arbitrarily and the alien may be obliged to seek an extension of status unnecessarily.

the remaining time in status previously granted, as evidenced by presentation of an unexpired, multiple-entry I-94?[9]

Any answer to these questions that is less than an unqualified "Yes" raises serious concerns about the use of US-VISIT as a means, perhaps not inadvertent, to deny substantive rights typically granted to admissible nonimmigrants.

Further ambiguity arises from a remark in the Preamble to the Proposed Rule where DHS suggests that Canadian border commuting aliens will not be referred to secondary inspection upon each entry to the U.S., partly because DHS takes comfort in existing protocols that result in aliens seeking issuance of new multiple-entry I-94s in intervals of approximately six months.[10] The remark is both mystifying and potentially troubling.

The statement suggests a fundamental misconception about the use of I-94s at land ports. Aliens admitted for one or more years or for duration of status, each with multiple-entry privileges, typically seek a new I-94 at a land port only to renew an expired period of authorized status. AILA is not aware of any protocol which requires aliens with unexpired time on a multiple-entry I-94 to seek a new I-94, particularly in such an arbitrarily short time period as six months. Canadian nonimmigrants, just like nonimmigrants of other nationalities, who hold any of the statuses to be made subject to US-VISIT, are accorded periods of admission of one year or longer or are admitted for duration of status. Admission in these statuses is uniformly for the maximum time accorded under the particular status. For example, TN status is routinely granted for one year despite an employer's stated need to hire the alien for a shorter period. It is, therefore, not the custom to renew status and issue new I-94s every six months, a period of admission that is shorter than any period accorded by law to an alien in any of these statuses.

The DHS prefatory section sows further confusion in suggesting that the practice of "US-VISITing" aliens for screening at land ports is premised on the current procedure of referring aliens who require an I-94 to secondary inspection. This concept ignores the fact that, at present, only aliens seeking initial grants of nonimmigrant status require an I-94. Returning nonimmigrants in possession of a current, multiple entry I-94 do not currently require another I-94 and are not routinely referred to secondary inspection. At land ports, secondary inspection of such returning aliens occurs only when the identity or admissibility of an alien is in question. Further, it is unusual for returning nonimmigrants to receive a new I-94 even if they are referred to secondary inspection, so long as there is time remaining on their multiple entry I-94s.

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[9] For example, many aliens seeking readmission present valid multiple entry I-94s connoting prior admission for the full, unexpired period permitted in their status. TN, L-1A, L-1B, H-1B, H-2B, E-1 or E-2 approved aliens should not have their periods of admission shortened upon US-VISIT screening at a port of entry. Mistaken or deliberately shorter periods of admission would be unfairly and unnecessarily disruptive to the alien, derivative beneficiaries and employers who depend upon the right to employ an alien for the entire time that a non-immigrant program allows.

[10] AILA asks whether these protocols are in effect at all land borders and requests disclosure of specifics regarding the protocols.

The apparent expansion of the US-VISIT program, which will necessitate the use of secondary inspection for all screening at land ports, prompts concerns that: (1) I-94s issued upon screening of returning nonimmigrants may result in re-admissions for less than the unexpired term of the original admission; and, (2) upon an initial application for admission in nonimmigrant status, adjudicated at a land port or based upon an I-797, the grant of status may be for less time than is allowed pursuant to the rules of the nonimmigrant status sought or the time granted in the I-797.

If CBP were to engage in the practice of recurrent re-adjudication of previously approved nonimmigrant status, this would unnecessarily deprive aliens and their employers of the benefits of the longer periods of status permitted under these programs. U.S. employers, their alien employees and derivative beneficiaries have all too often been inconvenienced when inspectors at ports grant periods of admission shorter than the periods granted in a pre-approved petition, shorter than the nonimmigrant program allows, or for a period that ends arbitrarily on the date that a visa or passport expires.

If US-VISIT is to be expanded at land ports, it must be implemented so that aliens seeking initial admission receive the full period of status provided in the I-797 or provided by a nonimmigrant program adjudicated at the port. Returning aliens must be granted the full period of status accorded them prior to being screened. Screening should not become an opportunity to interfere with the benefits traditionally granted to admissible aliens.

The proposed treatment of an expanded US-VISIT program at land borders raises other concerns. DHS recognizes that US-VISIT screening at land ports is affected by the physical limitations of facilities. Screening, DHS says wisely, must be done in secondary inspection because is it not practical to screen people in cars at primary inspection.[11]

What DHS omits to state is that the physical facilities at land ports may not be able to accommodate the increased secondary inspections without interfering significantly in the flow of people and material across the border. At many land ports, aliens in secondary inspection already experience unpleasant delays. As the number of aliens being referred to secondary inspection increases, these delays will inevitably increase. Measuring with precision the time needed to screen an alien standing at a counter and then issue an I-94, as DHS professes to have done, cannot account for the time it will take to find a parking place (if one can be found, given the shortage of such space at a number of border posts), walk to and from a car, and stand in what is likely to be a long, slow-moving line. Delays

[11] DHS has already issued an interim final rule on the use of Radio Frequency Identification (RFID) chips embedded in special I-94 forms for use in a few border posts. While this unproven application of RFID technology may work for nonimmigrant travelers bearing I-94s who place the forms on their automobile dashboards, AILA questions how such technology will work for LPRs whose Form I-551 (resident alien cards) do not, to our knowledge, contain embedded RFID chips. The lack of such technology in I-551s suggests a most perverse result – LPRs (who have already been diligently screened before receiving such status) will require time-consuming secondary inspection, while nonimmigrant entrants (whose scrutiny has been more cursory) will likely cruise through at our land ports of entry.

and congestion will only increase as screenings increase. DHS should acknowledge that increased US-VISIT screening is inimical to its stated goal of increasing security while facilitating the speed and ease of crossing at a land port.

The foregoing concerns about land border I-94 duration alone that arise from the proposed expansion of the US-VISIT program are amplified when the implications arising from related legislation are considered. Provisions of the REAL-ID Act forbid the issuance of drivers' licenses acceptable for federal purposes to a nonimmigrant unless the alien possesses a valid, unexpired visa or nonimmigrant status. Although this provision is not binding upon the states until May 2008, many states have already begun to require this evidence before issuing a license. Aliens who meet this requirement will receive a temporary license that will expire on the last day of the alien's lawful admission, a date which must be verified by accessing the Systematic Alien Verification for Entitlements (SAVE) program.

In light of the REAL-ID Act's mandates, DHS must clarify how the agency will treat the validity period of a temporary license (and how the states should treat this period) if a returning alien's time in lawful status is unduly shortened after a US-VISIT screening and the issuance of a new I-94. Will an alien be deemed to be driving without a valid state license or will the license become invalid for federal purposes as of the expiration of the shortened period of valid status? How will those who must rely on the license to earn a living or care for their families be assured that their lives and livelihood are not illegally disrupted? Have DHS and the Office of Management and Budget (OMB) contemplated the additional impositions and expenses visited upon aliens and upon the states that will result from the unanticipated increase in driver's license re-issuances, should this become necessary to protect the integrity of the licenses? [12]

Further compounding our concerns is the lack of comment in the Preamble to the Proposed Rule and its passing references to I-94s on whether the agency intends and has

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[12] Pursuant to the mandate of Executive Order 13132, DHS and OMB must analyze the federalism impact of a potential rule. Quite inexplicably, DHS states that "this proposed rule would not have a substantial direct effect on the States . . . [and] this proposed rule does not have federalism implications." DHS is simply wrong. This rule will have a profoundly adverse impact on federalism. If the six-month I-94 rule goes into effect, there will be a significant impact on the States, in that the REAL ID Act of 2005 mandates that State driver's licenses can only be issued for the length of time on an alien's I-94. So when REAL ID goes into effect, a TN who is given only six months after being subjected to US-VISIT must then renew a driver's license twice in one year, rather than once. A rule that results in more frequently issued I-94s promises to have a substantial impact on the State Departments of Motor Vehicles, and other State and local entities that require aliens to prove that they are legally present in the United States in order to access benefits.

Moreover DHS has not considered the potential federalism impact of its new regulation in that this regulation will likely lead to numerous new lawsuits against state, local, and federal officials for violations of civil rights where these officials improperly deny benefits to aliens (and possibly citizens) because DHS databases provide erroneous information about the person's status. For example, the six-month I-94 rule may also affect people who rent apartments in localities that are now requiring landlords to rent only to aliens who are legally present, although those laws – which apparently ignore settled principles of federal preemption – have not yet been (but are about to be) tested in court. See *Lozano v. City of Hazelton*, No. 3:06-cv-01586-JMM (M.D.Pa. filed Aug 16, 2006).

the capacity to update the database underlying the SAVE program in a prompt manner each time a new I-94 is issued. If SAVE data is not current, how will DHS or the states rely on it? If licenses may only be reissued to aliens with new I-94s after the states contact SAVE to confirm valid status, how will license-reissuance occur if SAVE data is incomplete? Will the increase in the number of entries resulting from more screening and I-94 issuance overload SAVE? Studies have revealed that SAVE experiences an error rate as high as 40%.

The unanswered questions noted above will assuredly multiply as we extrapolate from DHS's Proposed Rule and consider the impact on spouses and children of aliens admitted in the statuses subject to US-VISIT. Ordinarily, nonimmigrants in derivative status are eligible for a grant of status commensurate with that of the primary alien. Moreover, in some instances, the derivative beneficiary is authorized to be employed and is working in the United States. If the primary alien, traveling without family, is screened and readmitted for a shorter period of time than the original status period granted on an unexpired, multiple-entry I-94, the right of the derivative beneficiaries to remain in the U.S. will be unexpectedly and unlawfully shortened. The derivative beneficiaries and the primary alien then must apply for extensions of status at considerable unnecessary expense and inconvenience. This scenario is ripe to create inadvertent overstays (and concomitant unlawful presence – arguably, a strict-liability immigration violation), arguably unauthorized employment for a spouse with a facially valid work permit, the loss of ability to adjust to lawful permanent residence and other sanctions that would never happen to compliant nonimmigrants but for an unanticipated loss of status at the hands of DHS. DHS will also cause an increased demand on its own benefits-adjudications process, which is already struggling under heavy caseloads.

Sanctions in such circumstances will also endanger and burden law-abiding U.S. employers (although DHS and OMB have apparently not studied the potential paperwork and business burdens arising from the unlawfully foreshortened I-94s described in the foregoing situations). Nonimmigrants and their employers rely on the I-94 to demonstrate that the alien is authorized for employment up to the expiration date on the document. If the employer wishes to employ the alien beyond the last date of status, the alien must present another document extending work authorization. Employers are justified in thinking that they are entitled to employ the alien until the date of expiration on the I-94 shown to the employer when employment begins. Aliens are right to think that they are employable until that date, unless they violate status. The system imposed to verify employment authorization depends on the ability of the parties to rely on these reasonable expectations. Legacy INS and now DHS have tried with only modest success to achieve compliance with these rules during the 20 years that the Immigration Reform and Control Act (IRCA) has been law.

Reliance on these bedrock premises will be in doubt if the periods of admission and status of returning aliens are unexpectedly shortened as a result of a US-VISIT screening. Understandably, both the alien and the employer may not recognize the significance of this change in the context of employment authorization. How does DHS plan to obtain

employer compliance with IRCA if employment authorization ends at a time that the employer may not know and cannot predict?

DHS and OMB ought to evaluate the negative impact on the employment eligibility verification program if its administration by employers is made unreasonably more difficult as a result of shorter periods of admission being granted upon screening of returning nonimmigrants under the proposed expansion of US-VISIT.

The Proposed Rule Is Premature and Unsound Because DHS Has Failed to Consider the Cumulative Impacts on the Free Flow of Trade and Travel and the Interaction of the Proposal with the Agency's Other Impending Initiatives

This rule comes at a time when DHS is also attempting to implement several other significant border security initiatives. DHS has failed to consider the collective impact that simultaneous implementation of all these initiatives will have, particularly on legitimate trade and travel. These initiatives cannot be implemented in isolation, and DHS should not be treating them as independent, non-interactive programs.

WHTI. Current law regarding the Western Hemisphere Travel Initiative (WHTI) requires travelers entering or re-entering the United States from Canada, Mexico, or the Caribbean to present a document or combination of documents denoting both identity and citizenship by January 1, 2008. On August 11, 2006, DHS published a Notice of Proposed Rulemaking (NPRM) with regard to WHTI in the Federal Register. The NPRM for WHTI proposes that beginning January 8, 2007, most travelers entering at air and sea ports-of-entry will be required to present a passport. As discussed in DHS's own NPRM, WHTI threatens to trigger a significant impact on legitimate travel in North America. While AILA intends to comment separately on the impact of the NPRM for WHTI, it is critical at this juncture to point out that WHTI will go into effect at the same time that DHS attempts to implement an expanded version of US VISIT on the northern and southern borders. In its proposed rulemaking, DHS has failed to consider the impact of implementing these two programs at the same time.

Existing Unresolved Problems With US-VISIT. In its Proposed Rule, DHS has failed to acknowledge the significant problems with US-VISIT identified to date by the GAO, which has published several reports documenting serious failures in the implementation of US-VISIT. Before expanding the program further, DHS should resolve the existing problems with US-VISIT. For example, in March of 2004, the GAO conducted a study of US-VISIT and found that it is "inherently risky" because of the demanding and challenging implementation schedule, enormous potential cost, uncalculated and underestimated costs, and problematic program management.

In a February 2005 study, GAO found that a high risk remains that US-VISIT will fail to meet its stated goals. Among other findings, the study found that DHS has failed to identify non-governmental costs such as social costs associated with adverse potential

economic impact at the border that may be attributable to US-VISIT implementation. In the January 2006 study, GAO found that DHS's return-on-investment analyses for US-VISIT exit tracking systems do not demonstrate that these schemes will be cost-effective or work as intended.

In February 2006, GAO issued a report that was highly critical of the overall management of US-VISIT. The report incorporates the criticisms of the January 2006 report but also looks at deficiencies in US-VISIT "critical areas" more broadly than does the January report. The February report states: "[P]rogress in critical areas has been slow. ... [T]he longer that US-VISIT takes to implement our recommendations, the greater the risk that the program will not meet its stated goals and commitments."

Finally, in June 2006, GAO issued yet another report critical of US-VISIT management. The agency said, "US-VISIT related contracts have not been effectively managed or overseen…effective financial controls were not in place on any contracts that GAO reviewed." The cost of developing the program has been estimated to be in excess of $10 billion.

As noted above, the January 2006 GAO report found that DHS return-on-investment analyses for US-VISIT exit tracking systems do not demonstrate that these schemes will be cost-effective or work as intended. The report is unequivocal that US-VISIT's operational and technology context remains "unclear." The report's conclusion observes that US-VISIT's "core capabilities, such as exit, have yet to be established and implemented, and fundamental questions about the program's fit within the larger homeland security context and its return on investment remain unanswered." Former US-VISIT Director Jim Williams has acknowledged US-VISIT's technological challenges. Despite having failed to resolve these major issues, DHS now plans to expand the program significantly. AILA believes that problems with the existing program, as outlined by the GAO, should be resolved before the program is expanded further.

Moreover, in section III-J of the supplementary information to the Proposed Rule, DHS states that it "will maintain secure computer systems that will ensure the confidentiality of an individual's personal information is maintained." DHS also promises to comply with all federal laws and regulations relating to government computer systems. Currently, however, DHS is not in compliance with federal law governing administrative agency computer systems. DHS offers no timetable or benchmarks for ensuring that it first conforms to existing laws and regulations before gathering massive amounts of additional information on new categories of aliens under US-VISIT. Before this large expansion of US-VISIT goes into effect, DHS should first be required to conform its operations to existing laws and regulations regarding computer security. At the very least, DHS should do a cost-benefit analysis of the potential security impact of collecting new data on existing, non-conforming information technology systems.

IDENT/IAFIS Integration. In Fiscal Year (FY) 1999, Congress mandated the integration of the legacy INS's IDENT (Automated Biometric Fingerprint Identification System) database with the FBI's IAFIS (Integrated Automated Fingerprint Identification

System) database. In FY 2004, DHS was required to continue this project, but without funding. In FY 2005, DHS was tasked to lead the future development of IDENT/IAFIS integration. In 2005, CBP officials indicated that integrated workstations allowing field agents to take a single set of prints and simultaneously query both IDENT and IAFIS would be in place in 2005.

Due to the delays in this integration, systems such as US-VISIT still fail to fully query IAFIS at time of enrollment and watch-list checks upon admission at ports of entry. There remains a major difference between technologies used to scan two databases at the same time versus true database integration. Under US-VISIT, biometric queries through IDENT result in a modified query of targeted information, including FBI hot files on known and suspected terrorists, wanted persons, and sexual offenders.

DHS now plans to expand the current US-VISIT process even further, at the same time that it has announced that it will begin taking 10 prints from all aliens subject to US-VISIT, rather than the two index prints currently taken. Without full IDENT/IAFIS integration, the expansion of US-VISIT to cover more aliens promises to be a potential fiasco. The July 2006 Office of Inspector General, Department of Justice report[13], on the progress on IDENT/IAFIS integration estimates that by December 2009, IAFIS and IDENT users are expected to be able to submit a single request that searches all fingerprint records maintained by the FBI and the DHS to receive associated criminal history and immigration information about the subject. As of June 2006, FBI officials stated for this report that they are on schedule for achieving full interoperability among IAFIS, IDENT, and US-VISIT by December 2009.

This report also contains some disturbing statements regarding the IAFIS/IDENT integration in concert with US VISIT. For example, in relation to the plan to make IAFIS/IDENT fully operable with US VISIT, the report states that:

> In response to that decision, the FBI and the DHS are implementing the first phase of a three-phase plan to make IAFIS and IDENT, including US-VISIT, fully interoperable by December 2009. In the first phase, the agencies plan to deploy a joint automated system for near real-time sharing of certain key immigration and law enforcement data between the FBI and the DHS by September 3, 2006. The data to be shared are the FBI's "Wants and Warrants" records that have fingerprints associated with them and the DHS's "Visa Denial" and "Expedited Removal" records. In the remaining two phases, the FBI and the DHS plan to expand the data shared to include law enforcement and immigration data in IAFIS, IDENT, and US-VISIT and to allow access to that data by federal, state, and local law enforcement agencies, authorized non-criminal justice agencies, and immigration authorities.

Authorized non-criminal justice agencies are those agencies permitted to request criminal background checks for employment, licensing, immigration, credentialing, and volunteer activities. Based on this report, it appears that the plan is for non-criminal US VISIT database entries to become available in the criminal IAFIS database. AILA already

[13] *Follow-Up Review of the FBI's Progress Toward Biometric Interoperability Between IAFIS and IDENT* , U.S. Department of Justice, Office of Inspector General (July 2006).

pointed out in testimony before Congress regarding the use of the legacy Immigration and Naturalization Service (INS) database, that the mingling of criminal and civil immigration violations was an approach which would heighten the potential of erroneous hits causing severe consequences. H.R. 4437 contains proposals allowing for civil immigration violations to be placed in such criminal databases such as the National Crime Information Center (NCIC) database. Without defining the types of shared information provided by US VISIT to IAFIS, this proposal could accomplish the same objective without specific legislative base. We ask for clarification of this issue before any further integration.

We also ask for an update as to the ability of US VISIT to reflect changes and extensions of status timely. Otherwise, such database sharing through US VISIT could result in thousands being considered overstays, who have timely filed extensions and changes of status pending with USCIS to be placed in a criminal database when they have made no criminal action. AILA stands firmly against any plan to place civil immigration violations in a criminal database reserved for those who pose a threat to the security of our country and communities. AILA also notes that such a stance does not restrict placing those who do pose a national security threat in such databases.

Suggestions

In its concluding remarks in the Preamble to the Proposed Rule, DHS requests input on specific steps or milestones it might undertake in enhancing US-VISIT. We close with such suggestions.

Specifically, DHS needs to determine that applicants for admission and the U.S. companies who employ them are entitled to attorney representation on entry, in secondary inspection. With the heightened review of admissibility, and with the potential for errors and erroneous refusals of admission as the US-VISIT database expands with added records, DHS should recognize and publicize the right of attorney representation at ports of entry, as well as in preclearance operations. In addition, DHS should establish lines of communication with ports of entry to deal with problems at entry, which may be addressed efficiently with the provision of additional documentation or information.

Applicants for admission often do not understand the legal underpinnings of an immigration classification or the ramifications of an innocent misconstruction of a legal term that could render an applicant inadmissible on unjustified grounds. Errors take valuable DHS resources to resolve. Attorney representation can facilitate the entry process.

Conclusion

US-VISIT expansion should be held in abeyance pending a full programmatic cost/benefit analysis and resolution of the serious program deficiencies as documented to date by GAO.

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. 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 Proposed Rule carries the potential for significant adverse impact to the free flow of travel and trade, and contains other significant flaws as discussed above. Meanwhile, serious program deficiencies as identified to date by GAO bring into question US-VISIT's ability to meet stated goals.

Accordingly, the Proposed Rule should be withdrawn.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION