



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

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Department of State Desk Officer
Office of Information and Regulatory Affairs
Office of Management and Budget

Bureau of Consular Affairs
Visa Office

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**Re: Notice of Information Collection under OMB Emergency Review:
Supplemental Questions for Visa Applicants
Form DS-5535**

The American Immigration Lawyers Association (AILA) submits these comments in response to the Department of State's (DOS) notice of request for emergency OMB approval and public comment on the proposed Form DS-5535, Supplemental Questions for Visa Applicants.¹

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, 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 this rule and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals seeking immigration benefits and in complying with U.S. immigration laws and regulations.

March 6, 2017, Presidential Memorandum and Proposed DS-5535

On March 6, 2017, President Trump issued a memorandum directing the Secretary of State and others to implement additional screening and vetting standards to ensure "the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of immigration benefits" and to prevent "the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts."²

¹ 82 Fed. Reg. 20956 (May 4, 2017).

² <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

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As a result of this directive, DOS proposes the creation of a new form DS-5535, Supplemental Questions for Visa Applicants that will be used to “more rigorously evaluate applicants for terrorism or other national security-related visa ineligibilities.”³ The new form would require visa applicants to provide the following information:

- Travel history during the last 15 years, including source of funding;
- Address history for the last 15 years;
- Employment history for the last 15 years;
- All passport numbers and country of issuance held by the applicant;
- Names and dates of birth for all siblings;
- Names and dates of birth for all children;
- Names and dates of birth for all current and former spouses, or civil or domestic partners;
- Social media platforms and identifiers (or handles), used during the last 5 years;
- Phone numbers and email addresses used during the last five years.

DOS states that this information will not be requested of all visa applicants, but rather will be focused on “populations warranting increased scrutiny” as identified by individual consular posts in cooperation with law enforcement and intelligence partners.⁴ DOS estimates that 0.5% of visa applicants worldwide will be asked to provide this additional information, or approximately 65,000 individuals per year, and that the estimated time burden is 60 minutes.⁵

DOS Has Not Adequately Justified the Need for Emergency OMB Approval

DOS has requested emergency OMB approval of the proposed form and as a result, has provided the public with two weeks to comment. In order to justify emergency approval, the Paperwork Reduction Act (PRA) requires agencies to provide “an explanation of why (for example) the normal process will result in public harm or is not possible because of an unanticipated event.”⁶ In its emergency justification memorandum, DOS states, “Adhering to ordinary time frames for review of newly proposed information collections...would impede the purposes behind the presidential memorandum and its call for immediate steps including the proper collection of all information necessary to rigorously evaluate those applicants for potential visa ineligibilities.”⁷ However, this statement is insufficient and conclusory.

Although the presidential memorandum calls for “immediate implementation,” it also states that agencies shall implement additional protocols and procedures to enhance screening and vetting “as soon as practicable.” Without any concrete and independent information to justify the need to implement this new information collection on an expedited basis, the term “as soon as practicable” does not mean that the public comment period should be cut short. Thus, DOS

³ 82 Fed. Reg. 20956 at 20957.

⁴ *Id.*

⁵ *Id.*

⁶ *Frequently Asked Questions*, Office of Information and Regulatory Affairs, Office of Management and Budget, <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

⁷ Emergency Memo/Justification submitted to OMB (Apr. 28, 2017), available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1405-001

should withdraw its request for emergency approval and proceed through the full notice and comment process.

Request for Information Places Excessive Burdens on Applicants and Could Lead to Unwarranted Denials and Misrepresentation Findings

As noted, proposed form DS-5535 would require select visa applicants to provide, among other things, travel, address, and employment history for the last 15 years. With regard to travel history, form DS-5535 would also require the applicant to document source of funds for all such travel over the course of 15 years. DOS states that the failure “to provide requested information will not necessarily result in a visa denial, if the consular officer determines the applicant has provided a credible explanation why he or she cannot answer a question or provide requested supporting documentation, such that the consular officer is able to conclude that the applicant has provided adequate information to determine the applicant’s eligibility to receive the visa.”⁸

Though it is somewhat reassuring that DOS will not automatically deny an applicant who is unable to provide the requested information, it is conceivable that most applicants will have difficulty recalling the full scope of information requested and providing supporting documentation where needed, in particular to verify the source of funds for travel that may have occurred a decade and a half ago. This could easily lead to unintentional errors in completing the form that could then lead to denial of a visa for misrepresentation and future bars to admissibility. In addition, the questions could have a chilling effect and discourage well-intentioned and eligible individuals from applying for visas.

Moreover, it should be noted that the estimated “average time per response” of 60 minutes, seems extremely low. Compiling the requested information, particularly for those who do not keep meticulous records, could take several hours at a minimum, and possibly days. DOS does not explain how it calculated the estimate and should review and reconsider its projected burden on the public.

Request for Social Media Platforms for the Last Five Years Raises Privacy and Other Concerns

DOS proposes to ask for “[s]ocial media platforms and identifiers, also known as handles, used during the last five years,” but provides no additional guidance as to the scope of social media platforms that should be disclosed.⁹ In addition, though it is not clear how this information will be used by consular officers to determine visa eligibility, an open-ended inquiry into social media platforms could lead many individuals to self-censor or delete their accounts. A review of social media profiles will, by necessity, not be limited to the applicant, and scrutiny would likely extend to U.S. friends, relatives, and business associates, and chill constitutionally protected speech. Moreover, the meaning of content and connections on social media is idiosyncratic and context dependent. Innocent communications could easily be misconstrued as nefarious and result in unwarranted denials with associated personal and business consequences.

⁸ 82 Fed. Reg. at 20957.

⁹ *Id.*

Though we appreciate the fact that consular officers will not request social media passwords, there are still concerns for those who wish to keep their online identity anonymous. By disclosing this information in writing to DOS, a record will be created which could be exposed through a breach of security protocols or perhaps through information sharing agreements between the U.S. and other nations.

Conclusion

For the foregoing reasons, we urge the Department of State to withdraw this emergency request for OMB approval and proceed through the regular notice and comment process for information collection instruments. At a minimum, we ask the Department to reconsider the scope of the proposed questions and associated burdens and reiterate its commitment to give full consideration to all visa applicants, even those who are unable to provide the requested information or who inadvertently provide incorrect information in response to one or more questions.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION