

SECURE BORDERS, OPEN DOORS:

Visa Procedures in the Post-September 11 Era

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TABLE OF CONTENTS

Executive Summary	v
I. Introduction	1
A. Visa Policy Goals	3
B. Research Outline and Methodology	7
II. Visa Procedures before and after the September 11 Attacks: A Chronological Summary	9
A. Visa Adjudication Procedures	10
B. The Relevant Law	13
C. Visa Procedures after September 11	15
D. Results	21
E. Looking Forward	27
III. Visa Petitions	28
A. Visa Petition Adjudications	28
B. Waivers of Inadmissibility	32
IV. Visa Adjudication	34
A. Visa Issuance Procedures	34
B. The Role of the Department of Homeland Security	44
C. Staffing and Personnel	60
V. Border Inspections	69
A. Inspection Procedures	69
B. Staffing and Personnel	78
VI. Retention and Revocation of Status	82
A. Visa Revalidation and Reissuance	82
B. Revocation	86
VII. Visa Security Policies	90
A. Name Checks and Watchlist Consolidation	90
B. Biometric Identifiers	97
C. Security Checks	107

VIII. Conclusions and Recommendations	115
A. Summary of Ideas for Reforming Visa Procedures and Operations	117
B. The Key: Reforming the Visa Issuance Process	119
C. Conclusion	126
 Additional Documents	
<i>Sidebars:</i>	
Visa Interviews	37
Trade NAFTA (TN) Visas	70
Fictional Case Study: Visa Reissuances	84
Visa Revocations at Work	87
EU/US Cooperation on Passports and Visa Policy	98
 <i>Figures and Tables:</i>	
Reported Nonimmigrant Visas Processed	22
USCIS Immigration Benefits	31
Terrorist Identification, Watch Listing, and Watch List Dissemination Process	93
 <i>Appendixes:</i>	
Appendix A: The Visa Application Process	129
Appendix B: A Chronology of Major Actions Related to Visas, Terrorism, and Travel, 1980 to Present	132
Appendix C: Visa Categories	164
Appendix D: Immigration and Nationality Act Categories of Inadmissibility	167
Appendix E: A Spotlight on Student Visa Policy	170
Appendix F: Glossary and Abbreviations of Visa-Related Term	182
 Advisory Board	191
Acknowledgments	192

EXECUTIVE SUMMARY

The terrorist attacks of September 11, 2001 have challenged both the US government and US society in many and novel ways. Among the responses that the US government has adopted since that date, the lion's share have focused on protecting our homeland from the entry of foreigners who may wish us ill. The adjudication of visas has been front and center among those responses. And as visas have come to be understood as the first line of defense in a “layered approach” to homeland security, the systems that support them, in addition to the processes themselves, have become subject to the heaviest scrutiny in the post-September 11 era—and are among the mechanisms that have changed the most.

This report discusses reforms to the entire system through which foreigners travel to and seek entry into the United States. It investigates changes to the visa issuance process and to the infrastructure that supports that function at the Departments of State and Homeland Security. It then discusses how well the new post-September 11 policies, mechanisms, and procedures advance the stated goals of the visa program: Secure Borders, Open Doors.

The report finds that the basic legislative framework that determines who is admissible to the United States, and, by extension, the legal structure of the visa process itself, has not changed in significant ways. In fact, the visa classes themselves remain intact, applicants still must have a US petitioner for certain classes of visas and make an application at a consular office, and a successful visa applicant gets to travel to a US border where the decision to admit (or not) is made by an inspector. However, the administrative elements of the process have changed substantially. These include the expansion of interview requirements, the creation of additional security checks, the development of special registration programs, and the use of biometric identifiers.

This report finds that the issuance of US visas has become a much more security conscious process since September 11 and notes the gradual

reintroduction of a sense of balance, proportion and flexibility to the visa program. Nonetheless, a number of problems remain:

Agency Cooperation and Coordination: The agencies involved in visa policy must learn to coordinate their decisions better and communicate them to the field more efficiently. Specifically, timeliness, completeness and accuracy of information, and a secure way for storing such information and making it available in real time to anyone who should have access to it are essential to a secure travel and border inspection system. The US government has much ground to cover in meeting these higher standards of procedural robustness and security.

Facilitation and Efficiency: The visa, travel, and border inspection processes should be facilitated for travelers with a vetted identity, adequate and current background information, and a legitimate purpose for travel. Travelers who have already been approved for visas and have up-to-date security checks in the recent past should be fast tracked through the travel continuum.

Administrative Reform—Transparency, Evaluation, and Data: The administrative components of issuing visas, while seemingly mundane, are key to a stronger and more coherent process. Improved transparency, better and continuous program evaluation, and publicly available information that does not compromise security will contribute to a more reliable and effective visa system.

Training and Investment in Personnel: Many consular and DHS officers may not be fully prepared to apply immigration law in ways that guarantee that US security interests are met. Among the unresolved issues in this regard are the continued uncertainty between DHS and the State Department over which agency has responsibility for training personnel, and the lack of capacity within the State Department to provide updated security training for seasoned officers at their posts.

The report makes four broad recommendations for the visa adjudication process:

- **Articulate a Vision for US Visa Policy:** The State Department and DHS should clearly define the purposes of US visa policy and jointly develop a strategic plan to operationalize it.
- **Develop Interagency Evaluation Mechanisms:** The State Department and DHS should create an interagency board to review incidents that have resulted in the admission of persons who commit or attempt to commit terrorist attacks. The departments should also create a federal advisory committee on immigration with a working group focusing on the visa system.
- **Simplify the Visa Classification System and Application Process:** The visa system should be simplified, and the tools to help officers classify visa applicants should be improved.
- **Back to Basics—Improve Intelligence:** National terrorist watchlists and the information that finds its way onto them must have more and better field intelligence as well as access to technologies that are truly compatible. Relevant information must be made available in real time to all those who must make decisions about travel to and entry into the US.

Other key recommendations for specific components of the visa issuance process include:

For the State Department:

- Offering waivers of personal appearance for low risk applicants who have recently applied for visas and have adequate biometric identifiers on record.
- Developing the capacity for and creating a system of more thorough reviews of applications of interest (similar to the border's secondary inspection system) at all consular offices.
- Reconsidering whether all visa applicants who are now required to demonstrate that they have no intent to immigrate permanently to the United States should continue to have to do so.
- Investing in and relying more on algorithm-based risk management techniques to select high-risk individuals for interview selection *and* on probabilistic sampling strategies

to increase or decrease the frequency of screening for low-risk applicants.

For the Department of Homeland Security:

- Continuing to invest the necessary diplomatic and physical capital to expand the airport locations in which the entire inspection function can be completed before a traveler gets on a plane to fly to the US.
- Enhancing the criteria for admission into the visa waiver program, including requiring all participating countries to fully cooperate with the sharing of terrorism-related intelligence.
- Creating an office of assistant secretary for immigration policy reporting to the new undersecretary for policy in DHS.

For the State Department and the Department of Homeland Security:

- Eliminating the new DHS Visa Security Officer program and merging its functions with similar programs in the State Department.
- Returning the oversight of consular performance evaluations from DHS to the State Department.
- Encouraging the State Department and the DHS to share best practices in training.
- Making security check results available to all relevant agencies by using secure, reliable, fully integrated, and technologically interoperable systems.

I. INTRODUCTION

In the pantheon of American constitutional principles and governance values, none ranks higher than “liberty” or “freedom.” American governments since the beginning of the republic have been accordingly steadfast—and successful—in defending and promoting these values. The terrorist attacks of September 11, 2001, challenged both the US government and US society in ways that, arguably, had no historical parallel. Among the myriad of responses that the US government has undertaken since that date, the lion’s share have focused on defending our homeland from being infiltrated by foreigners who may wish us ill.

The effort to weave a new, finer, and more vigilant web of policies that prevent such persons from entering US space has taken place along three deeply intertwined sets of activities. All three use traditional and nontraditional, public and not-so-public, obvious and not-so-obvious combinations of technology, human intelligence, and systems to achieve a much more robust protection of the US homeland than ever before. The first two sets of activities focus explicitly on US borders and have been discussed in two Migration Policy Institute companion reports. Rey Koslowski (*Real Challenges for Virtual Borders: The Implementation of US-VISIT*) has looked at and evaluated the technology behind the US-VISIT program, while Deborah Meyers has focused on the integrated inspection regime the United States now employs to protect its borders (*One Face at the Border: Behind the Slogan*).

This report completes the trilogy of evaluations by looking at the reforms to the system through which foreigners travel to and seek entry into the United States. It focuses on changes both to how we issue visas and to the infrastructure that supports that function both at the State Department and the Department of Homeland Security.

Not all the changes highlighted in this report are necessarily the result of September 11, although the timing and speed with which they were implemented were deeply affected by the attacks. As a result, changes already

in the pipeline were expedited, while new innovations were introduced to fill gaps and address previously underappreciated vulnerabilities.

Almost overnight, security—of identities, of visas, of documents of all types—became the only lens through which to evaluate the programs and processes that allow people to gain access to the United States. As a result, the pendulum swung away from other core principles—such as the openness that epitomizes what noted public intellectual Ben Wattenberg has called “the first universal nation”—toward a posture of zero tolerance for any ambiguity that might have security implications. The swing lasted for approximately two years. During that time, the costs to personal freedoms, to America’s image abroad, and to American economic interests increased exponentially, and uncompromising vigilance trumped openness every time. Thereafter, key policymakers, including the secretaries of state and homeland security, began to make public statements that have gradually reintroduced a sense of balance, proportion, and intelligent flexibility to our efforts to protect the homeland. While these changes may not be always obvious—the pendulum slows down dramatically at either point closest to its apogee—the signs are encouraging and this report will note those most relevant to its mandate.

This is not meant to imply that America’s effort to defend itself is by any means complete, particularly as the visa system is but one of the many mechanisms to protect the nation’s security. The function itself can only be as effective as the information on which decisions are made, the quality of the infrastructure that supports it, and the quality and preparation of its frontline people—the consular corps. Yet, on balance, America’s frontline agencies, those that issue visas and admit people, are now much better prepared to balance vigilance with openness and truly facilitate the entry of legitimate travelers while stopping those who wish us ill.

The laxness of procedures for obtaining US visas and the border inspection process and infrastructure, which lacked the tools to stop travelers with questionable or illegitimate reasons for entry, were identified as the Achilles’ heels of homeland security immediately after

the September 11 attacks. The 9/11 Commission Report found that the hijackers’ ability to travel freely without raising red flags was a key ingredient in their success. Of the twenty potential hijackers, only one was refused a US visa, even though at least five carried passports with indicators of Islamic extremism linked to Al Qaeda or evidence of visa tampering. Some of the hijackers also lied on their visa applications, overstayed the expiration date of their visas, and/or otherwise violated the terms of their visas.¹

The US government has changed its visa application and issuance procedures in a variety of ways since September 11, 2001. New legislation has been enacted and implemented; the Department of Homeland Security (DHS) has taken over virtually all of the responsibilities of the former Immigration and Naturalization Service (INS) and now sets visa policy in all but a few exceptional instances; visa management systems have been improved, and new systems have been put in place; the intelligence behind visa decisions is stronger; and the technology used to screen visa applicants has been enormously improved.

How well do the new policies, mechanisms, and procedures accomplish the goals of visa policy? So far, no comprehensive study of these changes and their effectiveness has been undertaken. This report attempts to fill this gap.

A. Visa Policy Goals

On March 14, 2003, then Secretary of State Colin Powell defined the goals of the US visa program as “Secure Borders, Open Doors.”² These goals existed long before Secretary Powell first articulated them, if only in different language. Simply put, the visa process is an effort to manage and facilitate the flow of persons wishing to travel to the United

¹ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel* (Washington, DC: National Commission on Terrorist Attacks Upon the US, August 21, 2004): preface.

² “Noteworthy,” *Interpreter Releases* 80, no. 13 (April 1, 2003): 487; Colin L. Powell, “Secure Borders, Open Doors,” *The Wall Street Journal*, April 21, 2004, <http://www.state.gov/secretary/rm/31634.htm>.

States by efficiently screening for their admissibility against the many criteria found in the Immigration and Nationality Act (INA), while also considering other policy priorities, most notably national security concerns. Discharging the visa function well, then, requires managing flows with an “open mind” (so as to advance important US interests) while denying access to persons that might wish us ill. In this report, each set of functions is examined in turn.

Managing Flows with an “Open Mind”

The efficient and timely granting of visas to legitimate immigrants and visitors to the United States achieves a number of important policy goals, some of which are often at odds with each other:

- It delivers numerous economic benefits, including (1) enabling American corporations to successfully conduct their business in the global economy; (2) allowing talented persons to join US educational, cultural, and corporate institutions; and (3) making the United States one of the most profitable tourist destinations in the world.
- It allows the United States to achieve important humanitarian and social goals, including reuniting families and meeting our international obligations to help refugees, asylum seekers, and other persons in need of protection.
- It conveys to the world in the most direct and visible way the US commitment to the value of openness, to respecting international obligations that are derived from reciprocity-based trade and exchange agreements, and to upholding a commitment to nondiscrimination on the basis of country of origin, ethnicity, or race.
- It helps promote numerous foreign political and economic policy goals and allows citizens of other nations to be exposed to American society. The openness these contacts and relationships imply and reinforce may help to quell the anger directed at our country and palliate some of the root causes of terrorism.

On the last point, visa policy affects not only the individuals who apply for visas, but also the countries from which they come. This is “public diplomacy” at its most sensitive. Some countries equate American diplomacy at least in part with visa facilitation and believe that the

relative access of their citizens to the United States is one measure of the strength of their bilateral relationship. For instance, the Saudi Arabian government was one of the closest US allies before September 11, and the level of visa facilitation available for its citizens reflected that fact. Yet, this became a great vulnerability exploited by the terrorists, all but two of whom were Saudi. Additionally, some countries may apply true reciprocity on visa policy. In other words, if the United States restricts visitors’ visas from a foreign country, US citizens may face similar restrictions when they travel to that country.³

Screening Visa Applicants to Secure Our Borders

The successful delivery of the visa function requires screening visa applicants to ensure that they are not excludable or otherwise undesirable. There are many reasons to refuse an applicant a visa, including criminal histories, contagious diseases, and, most frequently, the suspicion that the applicant seeks to travel to the United States and remain there (i.e., that the applicant is an “intending immigrant”). In the post-September 11 environment, however, a reason that has always received priority has jumped to the top of the list: national security. The fact that facilitation, rather than meticulous screening for national security purposes, may have dominated the pre-September 11 culture of the consular corps in Saudi Arabia made a sharp and visible change in procedures a priority. Accordingly, the visa process is now demonstrably the first full screen for national security. A set of tools that includes both general and specialized databases as well as various forms of risk analysis are used to determine whether an applicant’s admission will compromise the security or safety of the United States and its citizens. This screen has been extensively tweaked in response to the September 11 attacks, but it must also constantly adapt to “threats” that go beyond radical Islamists.⁴

The screening process is not nearly as transparent as many observers and “constituents” may prefer. However, the reasons for secrecy are

³ This is infrequent because most countries value the economic benefits of American tourists and make every effort to facilitate their travel.

⁴ Porter Goss, *Current and Projected Threats to National Security*, US Senate Committee on Intelligence, February 16, 2005, <http://intelligence.senate.gov/0502hrg/050216/witness.htm>.

(to a certain extent) understandable as part of the effort to protect sources and methods from applicants who might exploit that information for nefarious purposes.

Linking Flow Management and Effective Screening

The successful implementation of the visa function requires balancing the worlds of flow management and effective screening. At first glance, these two goals appear to conflict: as screening increases, efforts to facilitate the arrival of persons who have a legitimate reason to travel to the United States have often suffered. Examples of such an inverse relationship abound. For instance, lengthy security checks for some students from certain countries and in certain technology fields have prevented many applicants from being able to start their studies on time. This, in turn, has diverted many talented students—who are also capable of paying full academic fees—to educational institutions in other countries.

This relationship need not hold true for long, and there is evidence that changes toward a wiser balance between the components of the visa process are taking hold. As better screening systems are developed, more appropriate levels of resources are applied, the next generation of screening tools become available, and line officers gain experience and confidence in delivering what is expected of them, measures that strengthen the security side of the equation can also improve facilitation. For example, the use of machine-readable passports and electronic visas, while designed with a security purpose in mind, may eventually allow speedier border crossings.

In some cases, facilitation may also improve security. Border crossing programs that prescreen frequent travelers—such as NEXUS and SENTRI—allow officials to treat low-risk and frequent travelers with expedience and focus on unknown travelers or those with unusual travel patterns who may pose greater security risks. Moreover, by applying a lighter but more accurate hand in screening visa applications, legitimate travelers can come to visit, study, work, conduct their business, or live in the United States more easily. As a result, these visitors gain greater

knowledge of and experience with US society that may refute many stereotypes that circulate overseas.

Of course, a greater balance between security and facilitation relies in large part on the capabilities of the available systems. Only a visa process that has clear goals, is sensitive to those goals, and is consistent in its implementation can achieve the mutual gains described above.

B. Research Outline and Methodology

This report seeks to identify and improve the understanding of changes in visa policy and procedures since September 11. It then offers a preliminary assessment of how the US implementation of the visa function meets US security interests and facilitates legitimate travel. It identifies places where national security policies are impeding facilitation, where facilitation processes may be hurting domestic security, and where the US government might find positive-sum solutions—solutions that both improve national security and visa facilitation.

This report neither engages in the larger debate of whether US visa policy and execution delivers US immigration policy goals effectively, nor does it thoroughly evaluate whether current visa policies are consonant with the many domestic and foreign policy goals of the United States. Finally, the report makes no attempt either to judge the adequacy of the US immigration system to meet US policy priorities or to evaluate whether the broader policies of the Departments of State and Homeland Security advance or impede such priorities.

The report is divided into the following subsections:

- Part II and Appendixes A and B trace the evolution of reforms to visa issuance procedures, providing a factual basis for this analysis.
- Parts III-VI discuss the four key components of the visa process as experienced by the applicant: (1) the visa petition process, (2) the visa adjudication process at a consular office, (3) the inspection performed at ports of entry, and (4) the revalidation and revocation

processes. These sections also reflect upon staffing and personnel changes in the delivery of the visa function.

- Part VII describes and contextualizes relevant security-related changes.
- Finally, Part VIII provides a summary of key recommendations and draws practical conclusions for government policy.

Each of the subsections of the body of this report (Parts III through VII) closes with a discussion of key findings and recommendations. These recommendations are no less important than those at the conclusion of the report, but are located after each major section for the convenience of the reader.

In performing the research, we undertook a comprehensive review of available literature on visa procedures, including government reports and Web sites, journal articles, newspaper articles, *The 9/11 Commission Report* and subsequent staff reports, Congressional testimony, and other public statements. From November 2004 to March 2005 we also performed about three dozen lengthy interviews on a not-for-attribution basis with the most appropriate government officials in the Departments of State and Homeland Security, foreign government officials, nonprofit organizations, immigration attorneys, and other stakeholders. The findings and recommendations of this report are based on the knowledge and insights gained from these exercises.

One final note is also necessary. This report considers visa policy from both a narrow legal perspective and the broader perspective of the policy's consonance with important national goals. The Departments of State and Homeland Security must, by necessity, follow the narrower definition, one that implements the goals and objectives set out in legislation, generally in the form of administrative regulations and departmental guidance. The operational realities of this implementation and the technological infrastructure that support the program are related but distinct entities. This report intentionally goes beyond this narrower definition of visa policy—by including all statutes, goals, guidance, procedures, and technological capabilities therein—and asks the question of whether the United States' broader "Visa Policy" is fully consonant with and enhances the nation's long-term security and other crucial economic, social, cultural, and political goals.

II. VISA PROCEDURES BEFORE AND AFTER THE SEPTEMBER 11 ATTACKS: A CHRONOLOGICAL SUMMARY

Security was a priority well before September 11, 2001. The 1993 World Trade Center attacks had already called attention to vulnerabilities in the US visa and border systems and had led to numerous security-related changes to visa procedures.⁵ Even so, the consular mission remained more or less intact. In the openness that characterized the 1980s and 1990s, the facilitation of travel—that is, the processing of ever more visas more expeditiously without a commensurate increase in resources—was the priority. The core of the consular corps ethos continued to focus first and foremost on the consular officer's traditional priority of identifying and ferreting out "dual intent" applicants—temporary visa applicants with the intent to immigrate. The streamlining of application procedures for visitors from friendly countries or countries of particular economic and geopolitical interest occupied center stage in this policy milieu.

Post-September 11 changes to the visa process followed two simultaneous tracks: a change in the program's goals and priorities and a corresponding effort to reform visa procedures to meet those goals and priorities. In the immediate aftermath of September 11, the government faced a new policy challenge for the visa process—how to develop and implement systems that virtually eliminated security risks from those traveling to the United States. Doing so in a public way—both to reassure the US public that the government was taking all necessary steps to protect the homeland *and* to send a message to would-be terrorists that the United States was prepared and capable of stopping them from entering through the "front door"—would be a critical, if somewhat ancillary, goal of the new measures. The result was to intensify the scrutiny of visa applicants, typically with little

⁵ These changes include establishing Visas Viper, a security advisory opinion that improved interagency communication about persons on terrorist watch lists, and giving the State Department the ability to retain fees from the issuance of nonimmigrant visas. See National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 80 (see n. 1).

regard to the effect on travel by legitimate travelers. It is only in the last year or so that there has been a noticeable effort to balance these two policy priorities in ways that protect America more effectively and keep the US tradition of openness—and the many benefits of that openness—firmly in mind.

The process by which visas are issued today is not dramatically different than it was before the terrorist attacks. This is probably the result of numerous factors. These include the high level of professionalism and esprit de corps that characterizes the State Department’s Bureau of Consular Affairs and its robust management practices as well as the decision to apply more resources to what had been traditionally a cash-starved agency. For the most part, neither the purposes behind each visa class nor the visa classes themselves changed. Nor have the visible components of the major consular processes for approving or denying visa applications changed much. Applicants still must have a US petitioner for certain categories of visas, make an application at a consular office, and, if successful, travel to and undergo an inspection at a US border.

There are two main areas in which substantial transformations have occurred: post-September 11 legislative changes with regard to visas and changes in operational policies. Technological innovations are also notable. All such changes are geared toward a single goal: increasing US security. The section below describes the main steps required to obtain a US visa before September 11 and the major changes to those steps resulting from post-September 11 visa procedure reforms. Appendixes A and B provide additional detail on the visa application procedure and a concise chronological summary of changes, respectively.

A. Visa Adjudication Procedures

There are two major classes of US visas: immigrant (permanent) and nonimmigrant (temporary). (See Appendix C for a chart of major visa categories.) Many applicants need to first file a petition with the Department of Homeland Security (DHS) to demonstrate their eligibility

for a particular visa category. Once that petition is approved, individuals who are overseas take that approval notice to a US embassy or consulate to have the appropriate visa issued. The majority of applicants do not need to file a petition; they can go directly to a US embassy or consulate to apply for a visa. A third set of people seeking to enter the United States do not require a visa at all. This set includes persons from Visa Waiver Program (VWP) countries staying for ninety days or less and Canadian citizens entering the United States for less than six months.⁶

A visa allows an individual to travel to the US border and seek entry into the United States. Holders of visas and visitors from VWP countries are not guaranteed automatic admission to the United States. Inspectors at the border have always had the ultimate discretion to permit or deny entry.⁷

The outcome of a nonimmigrant visa application can vary across posts and visa-issuing consular offices due to individual officers’ discretion—although it probably varies much less today than it did before September 11. All visa applicants must present a completed visa application, a passport, and a photograph to a consular officer and pay a nonrefundable fee. Most nonimmigrant visa applicants also must demonstrate to the satisfaction of the consular officer that they do not intend to live permanently in the United States.⁸ Since 1995 consular officers have also been required to perform a mandatory name check using the Consular Lookout and Automated Support System (CLASS), a name-based watch list system that draws from a number of government data sources. If CLASS reveals an applicant’s potential ineligibility, the officer must request a security advisory opinion (SAO) before approving the case. Before September 11, consular officers were also supposed to

⁶ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel* (see n. 1).

⁷ Border officials, known as Customs and Border Protection (CBP) officers since the passage of the Homeland Security Act, discharge a variety of functions from immigration and customs controls to agricultural and health inspections. Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, *Immigration Law and Procedure, Part 2: Institutions of Immigration Law* (New York: LexisNexis Matthew Bender, 2005): § 61.04.

⁸ See *Immigration and Nationality Act* (INA), § 214(b), 8 USC 1184(b); General Accounting Office, *Border Security: Visa Process Should Be Strengthened as an Antiterrorism Tool*, GAO-03-132NI, October 2002.

interview visa applicants, but the requirement for certain applicants could be waived at the officer's discretion.⁹

An approved applicant receives a visa in the form of a secure paper foil attached to his/her passport. The visa itself has been modified over time to include additional security features and a digitized photograph. Visas became machine-readable in the mid-1990s. If the applicant is denied a visa, the reason for denial is noted in the CLASS system.¹⁰ Consular officers are required by law to consider a number of reasons for inadmissibility to the United States. These are listed in section 212(a) of the Immigration and Nationality Act (INA). (See Appendix D for a list of relevant categories.) Applicants who are considered to be inadmissible under these categories (for example, a person convicted of a crime of moral turpitude) must apply for a waiver of inadmissibility for their status to be resolved. While more than fifty grounds for denial are recognized, the most frequent reason for denying a nonimmigrant visa application—both before September 11 and today—is the person's failure to satisfy the consular officer that he or she has no intention of staying permanently in the United States. Of the five September 11 terrorists who failed to obtain a visa at any point, none was denied because he was a potential terrorist; rather, each was believed to be a risk as an intending immigrant or because documents to support the visa application were missing.¹¹

⁹ A personal appearance waiver was specifically authorized for children under fourteen; diplomats; airline crews; certain US government-financed exchange visitors; and applicants for B-1 (tourist), C-1 (transit), H-1 (skilled worker), or I (journalist) visas. Applicants for other categories of visas also could obtain a waiver if a consular officer determined that it was warranted "in the national interest or because of unusual circumstances, including hardship to the visa applicant." *Immigration and Nationality Act*, § 222(e), 22 CFR § 41.102 (2001 edition only).

¹⁰ If a visa application was successfully adjudicated before September 11, 2001, the reasons for approving the visa were not noted in CLASS. This means that an applicant could apply twice for the same purpose without the consular officer's knowledge. For example, September 11 terrorist Hani Hanjour received a visa to attend the same educational institution in 1996 and 2000 and lied in 1997 about whether he had previously visited the United States. The consular officer, had he or she known about Hanjour's travel history, might have been less willing to issue another student visa. The Department of State now records the reasons for visa approval and notes that the visa itself is attached to the person's passport, meaning that as long as the individual travels on the same passport, the previous entry would be visible to the border adjudicator.

¹¹ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 34 (see n. 1).

Upon arrival at a US border, all persons undergo a screening at the port of entry to determine the identity, purpose, and duration of their visits and the validity of their visas. As with visa application denials at US consulates, the inspectors must determine whether the person is allowed to enter under a number of US laws, including the INA. Before the creation of the Department of Homeland Security, this primary inspection was performed at airports by immigration officials, who reported to the Immigration and Naturalization Service (INS) in the Department of Justice. US Customs officials, who reported to the Department of the Treasury, performed their inspections separately. At land ports of entry, immigration officials split primary inspection responsibilities with US Customs officials; both were trained to determine the need for a more thorough inspection in either area of responsibility. At primary inspection before the September 11 attacks, inspectors also checked the National Automated Immigration Lookout System (NAIS) database, a system that did not contain all the entries from the State Department's CLASS system. Land border inspections were always much "looser" than what is described here.

If the primary inspector is uncertain about an applicant's admissibility, is otherwise suspicious, or if there is a hit on a watch list, the applicant is referred to a secondary inspector. The secondary inspector has fewer time constraints as well as access to a number of additional databases and other resources such as translators. From an immigration perspective, if the person is found to be inadmissible during either the visa issuance or the admissions process on any grounds set forth in INA § 212(a) and does not qualify for a waiver of inadmissibility, he or she is not allowed to enter the country.

B. The Relevant Law

The parameters of the visa program are defined by law and were implemented by the Secretary of State and those he or she designated until 2003. Since early 2003 the State Department and DHS share responsibility for implementation. The INA (as amended) is the primary law defining visa policy. Title II of the INA defines immigration

procedures (including the selection system), admissions criteria, required entry documents, and the process of inspection, apprehension, and removal. It also provides mechanisms for the adjustment of status of persons from nonimmigrant to immigrant status.¹²

A number of laws since September 11 have amended the INA with respect to visa procedures. These include:

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, signed on October 26, 2001,¹³ authorized additional funding for a student tracking system and required national compliance with the system by January 30, 2003. It also advanced to October 1, 2003, (from 2007) the deadline for participating countries in the Visa Waiver Program (VWP) to have passengers submit machine-readable passports. This deadline was later postponed to 2004, and border inspectors were authorized to give one-time waivers to passengers without machine-readable passports from most VWP countries until June 2005.

The Enhanced Border Security and Visa Entry Reform Act (EBSVERA), signed on May 14, 2002,¹⁴ required consular officers to transmit electronic versions of visa files to INS and to immigration inspectors at ports of entry in the United States. The law also restricted the ability of persons from “state sponsors of terror” to come to the United States and mandated that machine-readable, tamper resistant entry and exit documents be in use by October 1, 2004, complete with photographs and fingerprints. Visa waiver countries were required to provide machine-readable passports with biometric indicators by 2004, and to report stolen blank passports in order to continue to participate in the VWP. Finally, EBSVERA required commercial vessels and flights en route to the United States to provide immigration officials with identity data about each passenger and expanded training for visa-issuing consular officers.

¹² *Immigration and Nationality Act*, § 245, 8 USC 1255 (see n. 8).

¹³ Public Law 107-56, 107th Cong., 1st sess.

¹⁴ Public Law 107-173, 107th Cong., 2d sess.

The Homeland Security Act of 2002, signed on November 25, 2002, established the Department of Homeland Security (DHS).¹⁵ The law abolished INS and divided its functions into two agencies, the Bureau of Citizenship and Immigration Services (reporting to the deputy secretary for homeland security) and the Bureau of Border Security (reporting to the undersecretary for border and transportation security).¹⁶ The Homeland Security Act authorized DHS to participate in six major visa-related functions, including assigning DHS employees to diplomatic and consular posts to promote national security, developing homeland security training programs designed for consular officers, and helping to develop performance standards for consular employees.

The Intelligence Reform and Terrorist Prevention Act of 2004 was signed on December 17, 2004 in response to the recommendations of the September 11 Commission.¹⁷ The bill mandated and expanded the by-now administratively required visa interview to all persons between the ages of fourteen and seventy-nine, made the revocation of a visa a deportable offense, and granted the State Department the authority to hire an additional 150 consular officers over the next four fiscal years (2006-2009).

C. Visa Procedures after September 11

The State Department and (since early in 2003) DHS are charged with implementing immigration law and ensuring that the visa process meets the goals intended by Congress. The agencies implement the law by publishing federal regulations, changing instructions in various internal procedures manuals, and negotiating memorandums of understanding between federal agencies. Not all the resulting documents (particularly the departments’ operating procedures) are public.

¹⁵ Public Law 107-296, 107th Cong., 2d sess.

¹⁶ This bureau was later split into two bureaus: Customs and Border Protection (for border enforcement), and Immigration and Customs Enforcement (for interior enforcement).

¹⁷ Public Law 108-458, 108th Cong., 2d sess.

Changes in visa procedures occur fairly infrequently. Immediately following the September 11 terrorist attacks, the State Department issued a cable stating that no change had been made in departmental guidance regarding visa processing as a result of the attacks, though consular posts were required to review and closely adhere to special processing guidelines and instructions for security checks.¹⁸ In the nearly four years since, a number of changes to visa procedures and relevant intelligence-gathering have been made. (For full details, including comprehensive citations for this section, see Appendix B.) These include the following:

Changes in Visa Petitions

While the petition process itself has changed little, some stakeholders note that petitions for particular visa categories processed by U.S. Citizenship and Immigration Services (USCIS) are now more frequently denied and that administrative appeals are taking longer than before. In addition, since April 2002, B-1 and B-2 nonimmigrants (temporary visitors for business or pleasure) require prior approval to change their status to F or M (academic or vocational) nonimmigrants before beginning a course of study. This requirement is intended to ensure that the individual has undergone the appropriate security check before beginning a course of study.

Changes in Applications at Consular Posts

Required Documentation. Since January 11, 2002, all male visa applicants between the ages of sixteen and forty-five and female applicants at some posts have been required to fill out a new form (the DS-157 Supplemental Nonimmigrant Visa Application). The form requires a more detailed history of current or past affiliations with military, charitable, educational, and work-related institutions as well as a comprehensive travel history. The State Department also began requiring section chiefs of consular posts to

spot-check approved nonimmigrant visa applications. Previously, only denials were checked.

Interviews. On July 15, 2002, the State Department ended the so-called “Visas Express” program in Saudi Arabia, which allowed applicants to submit their visa applications through prescreened travel agencies without visiting a consular office. Subsequent to that date, all applicants from Saudi Arabia between the ages of twelve and seventy were required to undergo visa interviews. On May 21, 2003, the State Department issued a cable requiring consular officers to begin face-to-face interviews for all visa applicants, with only a few exceptions (notably diplomats, workers from certain international organizations, and persons below the age of fourteen or above the age of seventy-nine). This interview policy was expanded and codified into law by the Intelligence Reform and Terrorist Prevention Act of 2004.

Travel Facilitation. Aware that these and other security-related initiatives resulted in visa processing delays, the United States has also attempted to develop procedures that facilitate travel. Beginning in 2003 the State Department invested in automated systems to expedite certain security-related functions. Over the past three years the agency has hired 350 additional consular officers.¹⁹ In the summer of 2004 several State Department cables instructed posts to facilitate business and student visas.

Creation of DHS. The Homeland Security Act consolidated INS, the Customs Service, and nearly two dozen other security-related agencies and functions into one cabinet-level department and assigned to DHS a number of visa-related functions. On September 30, 2003, the secretaries of state and homeland security published a memorandum of understanding (MOU) to clarify each agency’s visa responsibilities. Under the MOU, the State Department retained visa adjudication and

¹⁸ US Department of State, *Recent Terrorist Attacks and Nonimmigrant Visa Processing and Searches of Visa Records*, Unclas State 161332, September 19, 2001, reprinted in *Interpreter Releases* 78 no. 37 (September 24, 2001): 1496.

¹⁹ The Intelligence Reform and Terrorist Prevention Act of 2004 authorizes the State Department to hire 150 additional officers a year. However, for the FY2005 budget the State Department only requested sixty-eight new consular officers. The year before it requested sixty-three. If these positions are filled, this means that the consular corps will increase at about a ten percent rate.

issuance, but DHS received final responsibility over visa policy. DHS also created a Visa Security Unit and planned to send personnel abroad to selected consular posts. As of mid-2005, only posts in Saudi Arabia have been staffed with such personnel.

Changes at the Border

Border Inspections. A new program called “One Face at the Border” has combined former customs, immigration, and agricultural inspectors into a new corps of Customs and Border Protection (CBP) officers that performs both primary and secondary inspections. These officers now receive additional counterterrorism training. Visa travelers at many ports of entry are also subject to the US-VISIT program. US-VISIT, a national entry-exit reporting system, requires certain foreign travelers to the US to provide their fingerprints and photographs. The program may expand to include other biometric identifiers. (See the section below on biometric identifiers for a description of the program’s expansion.)

Reducing Non-Visa Entry Vulnerabilities. In the immediate aftermath of September 11, the Visa Waiver Program (VWP) was identified as a serious domestic security vulnerability. The United States reviewed several VWP member countries for vulnerabilities and removed Argentina and Uruguay from the program in 2002 and 2003, respectively. As a result of the reviews, Belgian citizens are now required to present a machine-readable passport to be admitted under the program. Another review has been under way since late 2004.

Another area of post-September 11 concern was transit passengers. Before September 11, passengers in transit through the United States to a destination in another country used the Transit without Visa (TWOV) and International to International (ITI) programs. Accordingly, they were not required to obtain a visa before entering the United States, though they were required to undergo inspection at the border. These programs, which relied on airlines to provide security escorts and take responsibility for the passengers’ passports and other travel documents, were targeted as vulnerabilities and

suspended on August 2, 2003.²⁰ Since then, passengers who would normally require a visa to enter the United States must also obtain a visa while passing through the United States.²¹

Special Registration Programs: NSEERS and SEVIS. On October 1, 2002, INS began the National Security Entry-Exit Registration System (NSEERS), whereby certain foreign nationals from Middle Eastern and Asian countries were required to personally report their whereabouts to INS. Over 177,000 persons were registered in NSEERS through September 30, 2003, nearly half of whom registered at ports of entry. Of those registered, over 2,000 persons were detained; 143 were criminals.²² The NSEERS rules for automatic thirty-day and annual registration policies were suspended in December 2003 and the program is being phased out in favor of the US-VISIT program, which is more universally applicable.

The fact that one terrorist entered the United States as a student and two others changed status once in the United States to become students also sparked renewed interest in tracking the entrance, exit, and status of F-1, J-1, and M-1 nonimmigrant students. The USA PATRIOT Act authorized additional funding for a student visitor information system that had been first mandated in 1996. The Interim Student Exchange and Authentication System began on September 11, 2002. National compliance with the subsequent Student and Exchange Visitor Information System (SEVIS) has been required since January 30, 2003.

²⁰ US Department of Homeland Security, “Homeland Security and Department of State Take Immediate Steps to Make Air Travel Even Safer: Special International In-Transit Programs Suspended,” Law Offices of Rajiv Khanna, PC, August 2, 2003, <http://www.immigration.com/newsletter1/airtravelsaferpressrelease.html>.

²¹ At the time, a number of carriers, including Hong Kong’s largest airline, rerouted flights to avoid landing in the United States. See Marjorie Valbrun and Jonathan Karp, “Visa Changes Snare Travelers,” *Wall Street Journal*, September 11, 2003.

²² Department of Homeland Security Immigration and Customs Enforcement, *Fact Sheet: Changes to National Security Entry/Exit Registration System*, December 2003, <http://www.ice.gov/graphics/news/factsheets/nseersFS120103.htm>.

Intelligence and Security Measures

Intelligence Gathering. The content of watch lists expanded significantly in the post-September 11 era. The CLASS database was expanded in 2002 to include more than seven million criminal records from the FBI's National Crime Information Center (NCIC). In addition, all terrorist watch lists are being consolidated at the Terrorist Screening Center, which provides terrorist-related information to CLASS. The Intelligence Reform Act created the position of a national intelligence director to oversee intelligence-related functions, including the terrorist watch list consolidation.

A number of screening processes have also changed for visa applicants. On November 14, 2001, the State Department introduced new security checks for visa applicants at US embassies, including a mandatory twenty-day waiting period for males aged sixteen to forty-five from many Asian and Middle Eastern countries. The wait period was phased out in October 2002, presumably because these persons became subject to Visas Condor checks, a new security advisory opinion (SAO) created by an interagency process in 2002 to screen persons from twenty-six countries of "security interest" to the United States. The State Department also began giving more scrutiny to Visas Mantis SAOs, a type of background security check designed to protect against sensitive technology transfers and address nonproliferation concerns. Changes to the SAO process and a significant increase in the Visas Mantis caseload caused considerable processing backlogs until mid-2004, as the State Department, the FBI, and other concerned agencies made changes to their SAO procedures. Since then, new resources have become available to help process these cases more quickly.

Biometric Identifiers. Several of the September 11 terrorists traveled on passports and visas that had been stolen or contained fraudulent travel stamps. EBSVERA required machine-readable, tamper-resistant entrance and exit documents to be in use for admission to the United States by October of 2004. The State Department implemented the biometric visa (biovisa) program, with the required submission of two index fingerprints, over the course of 2004. All 207 consular posts have

participated fully in the biovisa program since October 26, 2004. On July 13, 2005, DHS announced it would require a one-time, ten-fingerprint capture for enrollment in US-VISIT, followed by two-print verification during later entries. It is unclear how this requirement will impact the biovisa program. The State Department has been piloting a facial recognition program since 2003, which may be extended as a secondary biometric check to all visa applicants in late 2005.

VWP countries were expected to provide biometric passports by October 2004, but this deadline was extended to October 26, 2005, after many VWP countries were unable to pilot and produce these passports in time. VWP countries that produce machine-readable passports with digital photographs will be considered to meet the required 2005 standard. These countries will have to provide passports with an integrated circuit chip and the ability to hold digital fingerprints by 2006.

D. Results

In fiscal year (FY) 2001, the State Department issued nearly 7.6 million nonimmigrant visas (NIVs). In FY2003, two years after the September 11 attacks, the overall number of NIVs issued had dropped 36 percent to nearly 4.9 million. That number increased in FY2004 to just over five million, still one-third lower than in FY2001.²³ Most of that drop can be attributed to lower demand for nonimmigrant visas. For instance, the number of applications for NIVs dropped 35 percent between FY2001 and FY2003.²⁴ (During the same time, the NIV refusal rate increased by about 2.5 percent.)²⁵

²³ US Department of State Consular Affairs, *CA Fact Sheet: October 1, 2003—September 30, 2004*, September 30, 2004, authors' copy.

²⁴ *Ibid.*

²⁵ Part of that decrease can be attributed to a decrease in the issuance of Mexican border crossing cards (BCCs) after 2001. Before that date, BCC holders were rushing to replace their old-style card with a new biometric version; the old cards became invalid at the end of FY2001. Because BCCs are valid for ten years, many fewer have been issued since. US Department of State Visa Office, *Report of the Visa Office 2002* (Washington: Department of State, 2002): 13, http://travel.state.gov/pdf/visa_office_report_2002.pdf.

Reported Nonimmigrant Visas Processed²⁶

Fiscal Year	Applications	NIVs Issued	Refusals Not Overcome	Adjusted Refusal Rate
FY2001	10,097,393	7,588,778	2,508,615	24.8%
FY2002	7,921,633	5,769,437	2,152,196	27.2%
FY2003	6,528,943	4,881,593	1,647,350	25.2%
FY2004	6,620,344	5,049,082	1,571,262	23.8%

While some of the drop in applications was related to the fear of travel and terrorism immediately after September 11, a large part of the overall decrease in visas issued can be attributed to two additional factors: (1) the *perception* that visa procedures have become stricter, and (2) the fact that certain countries or types of applicants are refused visas more frequently because of higher security thresholds.

Visa Refusals and Delays

Taking the second case first, certain groups of applicants (both by geography and by visa type) have been more affected by the increase in refusals, though the overall distribution of NIVs has not changed substantially. It is difficult to obtain detailed statistics about refusals because refusal rates are reported by reason of refusal, not by visa category or country issued. And whatever data are publicly available are typically outdated.²⁷ As a result, detailed evaluations of visa issuance programs are difficult for outside organizations to perform.

The origin of NIV applications by region has not changed substantially. Nonimmigrant visa applicants from Asian and North American countries still comprise two-thirds of all visa applicants (66.8 percent in 2002; 67.5 percent in 2000). In absolute terms, all regions of origin have seen a decrease in NIV issuance between 2000 and 2002 except Africa, which saw a slight increase. The top ten NIV-receiving countries have remained

largely the same between 2000 and 2002, with Mexico, South Korea, India, and China remaining the top recipients.²⁸ The origin of immigrant visa applications by region has also remained fairly constant, with South America being the only region to register an increase since 2000.

Nevertheless, certain countries have experienced a much greater decrease in visa issuance than the overall 36 percent drop would lead one to expect. Nationals of Saudi Arabia received only 14,126 nonimmigrant visas in FY2002, compared to 60,508 visas in FY2000, a 77 percent drop. Other Arab and Muslim countries, including Syria, Kuwait, Pakistan, and Qatar, saw the number of nonimmigrant visas issued to their nationals drop by over 50 percent, while the United Arab Emirates experienced a nearly 83 percent drop.²⁹ Part of this decrease clearly occurred because of a decrease in applications submitted, as Muslims perceived that they were no longer welcome as visitors. An increase in refusal rates is also a large factor. One news report citing government sources indicated that since September 11, 90 percent of Saudi applicants have been admitted. This represents a 10 percent refusal rate, compared to the 1 to 2 percent rate before September 11. According to these same sources, other Arab nations have experienced refusal rates of three to five times that amount.³⁰

Another trend that may have impacted the decrease in visa applications is the increased frequency of applications for which the grounds of inadmissibility must be waived or overcome. In other words, these are applications that required additional scrutiny or processing. Since September 11, 2001, the percentage of applications that has been waived/overcome has increased substantially. In the largest visa category, B-1/B-2 visitors for business or pleasure, the proportion of applications waived/overcome doubled from 4 to 8 percent between 2001 and 2003. As a result of the additional processing required for such cases, many of the applicants whose petitions were waived/overcome may have experienced delays in receiving their visas.

²⁶ Consular Affairs, *CA Fact Sheet* (see n. 23).

²⁷ The Visa Office's most recent report was released in December 2004 but reports data for FY2002.

²⁸ Visa Office, *Report of the Visa Office 2002*, 12 (see n. 25).

²⁹ *Ibid.*, 130.

³⁰ Joel Mowbray, "US Visa Policy," *Washington Times*, August 10, 2004, <http://www.washingtontimes.com/op-ed/20040810-100236-6175r.htm>.

Student visas—which are separated into the F (academic), J (exchange), and M (vocational) visa categories—have received particular scrutiny since September 11. International enrollment dropped for the first time in three decades in the 2003-04 school year, and both applications and visas issued have decreased every year since 2001. A large part of this drop is due to substantial declines in applications, but visa refusals have also increased. (The F-1 student visa rejection rate increased nearly 7 percent between 2000 and 2002, though it has since fallen.)

The large backlog of student visa applications that occurred beginning in 2002 has also taken a toll on the number of student visas issued each year.³¹ These backlogs occurred at least partially because of the increase in cases that had to be waived or overcome. The number of F-1 visas waived or overcome increased from about 18,000 visas in 2000 (6 percent of all F-1 applications) to almost 44,000 (20 percent) by 2003. In 2004, over 28,000 F-1 visa applications (13 percent) were waived or overcome, a substantial improvement from the previous year but still not approaching pre-FY2001 numbers. In a sense, then, the backlogs have amounted to refusals, because students are on strict timelines to begin their programs. Many of these processing delays thus led to visas being issued to students too late for them to begin their programs on time. (For more information on the student visa process, see Appendix E.)

The Deterrent and Other Effects of Procedures on Visa Applications

Given these problems, some visa applicants are likely to have concluded that the United States is no longer a desirable destination for them. The mere decrease in visa applications, however, does not allow one to calculate with precision the effect of more stringent or cumbersome visa procedures on prospective applicants relative to other factors. These factors many include concerns about (discriminatory) treatment by US authorities once they reach their destinations, or, for that matter, personal safety in the event of future terrorist attacks. However, it also includes simply a reluctance to participate in the US visa program,

even though many of the post-September 11 challenges to making visa applications have since been rectified.

It is entirely possible that this new perception of visa policies may be deterring exactly those people that they are intended to deter—“known” potential terrorists. It is even clearer, however, that they also deter many persons from whom the United States has traditionally benefited—top students and scientists, business persons, artists, visitors, and other individuals for whom seeking a US visa is no longer an attractive option. The extent and long-term implications of some of these losses must not be underestimated. Leading universities abroad have benefited so greatly by the lessened interest in studying at US universities that the five largest European Union Member States—France, Germany, Italy, Spain, and the United Kingdom—agreed on July 5, 2005, in Evian France, to increase “considerably” the number of top students receiving scholarships under the Erasmus Mundus program and open the program to doctoral students.³²

Such an outcome inevitably affects American economic and diplomatic efforts—two of the main goals of the visa program. In fact, US businesses claim that shifts in visa policy have hurt their ability to remain competitive in the global marketplace. This assertion seems to be supported in a recent Organization for Economic Cooperation and Development report that finds a substantial drop in foreign direct investment in the United States from \$72 billion in 2002 to \$40 billion in 2003. While there is no widely-recognized methodology to estimate the proportion of this drop that may be attributable to US visa policy changes, the National Foreign Trade Council claims that visa delays alone may have cost US exporters \$30.7 billion in lost contracts. Firms doing business with the Middle East have been particularly hard hit, losing an estimated \$1.5 billion per year in contracts, tuition, and tourism from the region.³³ The US travel and tourism industry has also

³² Embassy of France in the United States, *Meeting of the Ministers of the Interior of France, Germany, Italy, Spain, and the United Kingdom—Operational Conclusions*, July 5, 2005, http://www.ambafrance-us.org/news/statmnts/2005/g5_evian070805.asp.

³³ Evelyn Iritani, “Border Net Has Become a Noose, US Firms Say,” *Los Angeles Times*, October 16, 2004.

³¹ Spencer Ante, “Keeping Out the Wrong People,” *Business Week*, October 4, 2004.

seen the number of foreign visitors for pleasure entering the United States plummet by over 10 million (from 30.5 million to 20.1 million) from 2000 to 2003, representing an estimated \$22.5 billion dollars in lost revenues.³⁴ While many of these industries gained ground in 2004, visa issuances have not returned to pre-September 11 levels.

Post-September 11 visa policies also appear to have affected US foreign relations, particularly with Arab and Muslim countries. Nearly every ambassador to the United States from such countries has raised the matter of visa policy changes with the State Department, and nationals from countries labeled as state sponsors of terror under EBSVERA are required to demonstrate that they do not pose a threat to the safety or national security of the United States.³⁵ Some Arab states such as Qatar also claim to perceive no difference in the visa treatment of citizens of state sponsors of terror and Muslim states that cooperate with the United States.³⁶ The perception that US visa policy targets Arabs in turn discourages them from applying for visas and makes many of them more likely to oppose the United States and its policies. Finally, US visa policy has also affected diplomatic relations with traditional allies, particularly the European Union. (See the sidebar on page 97 for more information on how the EU and the United States have disagreed on security-related measures.)

³⁴ U.S. Citizenship and Immigration Services, *2003 Yearbook of Immigration Statistics* (Washington: U.S. Citizenship and Immigration Services, 2003): Table 22, <http://uscis.gov/graphics/shared/statistics/yearbook/index.htm>.

³⁵ The state sponsors of terror are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria; Iraq was removed in late 2004. George Lester, "Change in Automatic Visa Revalidation Creates Risk for Third Country Nationals Traveling to a US Consulate in Canada or Mexico to Apply for a Visa," *Immigration Daily*, March 21, 2002, <http://www.ilw.com/lawyers/articles/2002,0321-Lester.shtml>; Public Law 107-173, 107th Cong., 2d sess., § 306.

³⁶ This perception was voiced before the United States began having the Visa Security Office review all Section 306 cases from state sponsors of terror. John Paden and Peter Singer, "America Slams the Door (on Its Foot): Washington's Destructive New Visa Policies," *Foreign Affairs*, May/June 2003.

E. Looking Forward

Robust security measures are essential tools in preventing terrorists and other undesirable persons from entering the United States. Yet, such measures must always demonstrate that their costs (in speed, efficiency, and capital) do not exceed the intended benefit. The Departments of State and Homeland Security have already recognized that many of the visa processes imposed after September 11 may not have been cost-effective regarding what, at that time, mattered most: raising dramatically the quality of visa application decisions relative to security requirements. Nearly four years later, both agencies claim that many of the bottlenecks in visa processing have been cleared. Ambiguities in the law have been clarified, an interdepartmental memorandum of understanding has given each agency a distinct role in the development of visa policy and procedures, and staffing expansion plans are under way. Nevertheless, stakeholders claim that substantial problems remain. For example, attorneys feel that there is not enough guidance or transparency to allow them to successfully facilitate their clients' visa applications, and universities claim that student visa processing problems are still not fully resolved.

The sections that follow discuss the major changes to visa procedures, staffing, and the augmentation of security following the September 11 attacks, assessing the relative effectiveness of each against the stated goals of the visa program: Secure Borders, Open Doors.³⁷

³⁷ A State Department spokesperson, when asked about the goals of the visa program, referred us to Secretary Powell's enunciation. Powell, "Secure Borders, Open Doors" (see n. 2).

III. VISA PETITIONS

U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security must approve a petition for all immigrant visa classifications and many nonimmigrant visa categories before a person can apply for a visa. This often overlooked component of the visa process has also been affected by the growing focus on homeland security.

A. Visa Petition Adjudications

Visa petitions are typically sent to regional USCIS processing facilities. As part of its petition review process, USCIS checks the backgrounds of applicants through law enforcement databases, something not always done before September 11.³⁸ To do that, the agency uses the Interagency Border Inspection System (IBIS), rather than the CLASS database used by consular officers. USCIS also sometimes requires noncitizens to provide fingerprints or other biometric identifiers for the purposes of verification.

The name check process, while adding an additional layer of security, has been sometimes criticized. (See Part VIIA for more details on watch lists.) Multiple agency databases, including the FBI, CIA, and other government databases, are involved in the security check process. If a “hit” occurs, the agency usually must do additional file-checking to “clear” it. Prior to September 11, if the agency that was asked to perform the name check failed to respond within a certain number of days, the application was allowed to go forward. However, petition adjudicators now require an affirmative response

from all agencies before a petition can go forward, helping to create the often-criticized backlog in petition processing. Delays were exacerbated by the fact that government database watch lists were not fully coordinated or automated. In particular, INS found after September 11 that checks used by the FBI were incomplete and inaccurate as a result of that agency’s failure to search multiple databases. As a result, all pending petition applications were run through an additional check.³⁹

The information contained in the databases used by USCIS may also limit its ability to check individuals effectively. While IBIS contains some data categories that CLASS does not, it does not include warrants, criminal arrests, or facial recognition. Nor does it have the algorithmic capability of the CLASS system to check variations in names.⁴⁰ Thus, USCIS adjudicators have access to less overall information than that which is available to consular officers.⁴¹ While checking a name more than once during a process that lasts several months can lead to greater security (because lists are constantly updated), this practice has greatly added to the processing delays that have become endemic at USCIS. Until the data systems become fully interoperable and decisions by one agency can be accepted by another, this redundancy in name checking is not achieving its full potential.

³⁸ James Ziglar, *INS’s March 2002 Notification of Approval of Change of Status for Pilot Training for Terrorist Hijackers Mohammed Atta and Marwan Al-Shehhi*, House Committee of the Judiciary, Subcommittee on Immigration and Claims, March 19, 2002, http://www.globalsecurity.org/security/library/congress/2002_h/hju78298_0.htm&e=10040.

³⁹ Alexander Aleinikoff, “Immigration,” reprinted in Century Foundation, *The Department of Homeland Security’s First Year: A Report Card* (Washington: Century Foundation, March 3, 2004).

⁴⁰ General Accounting Office, *Information Technology: Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322, April 2003.

⁴¹ Kathleen Campbell Walker, “Creating a Virtual Border: The Manifest Destiny of US Border Security,” American Immigration Lawyers Association (AILA) Midsouth Conference, November 11-13, 2004.

⁴² *Ibid.* “The post-September 11 culture among the immigration officials has clearly favored denials of applications where any doubt at all exists.”

Even if the USCIS name check does not produce any hits, some immigration observers note that many cases that the USCIS would have approved before September 11 are now being denied. Some claim that petition adjudicators adopted a “culture of denial” after September 11,⁴² which was reinforced after INS sent change of status notifications to two of the then-deceased September 11 terrorists six months after the attack.⁴³ INS Commissioner James Ziglar in fact issued a “zero tolerance order” requiring INS employees to follow department policy guidance to the letter.⁴⁴

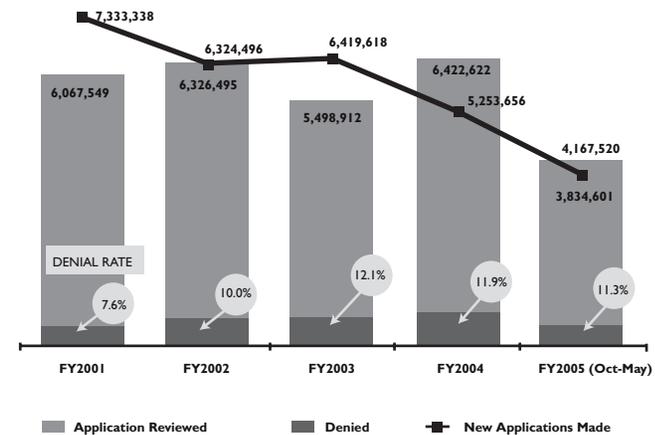
While the order was rescinded in late 2003, the “better-safe-than-sorry” attitude continues today. It is evident in the more frequent use of background checks and the apparent greater likelihood for USCIS to require additional proof or to be more restrictive with regards to applications in general.

While the burden of proof has always been on the applicant to prove his/her eligibility for the immigration “benefit” sought, some believe that the burden has become higher for particular cases. For example, some USCIS processing centers are now requiring additional proof of an applicant’s ability to finance their stay in the United States. Other centers no longer accept certain equivalent degrees for work-based green card applicants. In some cases, attorneys claim that the job described in the petition has been changed by the immigration officer, thus setting the stage for the application to be denied.

⁴³ As Mr. Ziglar points out, no new visas were issued to the terrorists in question; they were only notified of a change in their status that had been approved before the attacks. See Ziglar, *INS’s March 2002 Notification* (see n. 38).

⁴⁴ Aleinikoff, “Immigration” (see n. 39).

USCIS Immigration Benefits⁴⁵



Few data are publicly available to determine whether denials of certain types of immigration petitions are occurring more systematically at the USCIS since September 11. Immigration benefits (including applications for temporary protected status and permanent residency adjustments, among others) are grouped together in the *Immigration Monthly Statistical Report*. However, denials for all benefits have grown by about 50 percent since the September 11 attacks.⁴⁶

⁴⁵ USCIS Benefits Data:

	FY2001	FY2002	FY2003	FY2004	FY2005 (Oct-May)
Applications Made	7,333,338	6,324,496	6,419,618	5,253,656	3,834,601
Pending	4,083,052	4,383,154	5,370,248	4,144,324	3,851,187
Approved	5,606,705	5,690,938	4,833,017	5,658,131	3,698,052
Denied	460,844	635,557	665,895	764,491	469,468
Percentage Denied	7.6%	10.0%	12.1%	11.9%	11.3%

See Immigration Benefits sections of US Citizenship and Immigration Services, *Fiscal Year End Statistical Reports*, 2001-2004, <http://uscis.gov/graphics/shared/statistics/publications/index.htm#monthly>.

⁴⁶ The average denial rate between FY1997 and FY2001 was 7.8 percent, hitting a low of 6.9 percent in 2000. Between FY2002 and FY2005 (to date) the average denial rate was 11.3 percent. *Ibid.*

B. Waivers of Inadmissibility

Waivers of inadmissibility allow persons who would otherwise be excluded from entering the United States to nonetheless be admitted. The Admissibility Review Office of CBP, created in January 2005, is taking responsibility for adjudicating waivers of inadmissibility under INA § 212(d)(3), providing boarding letters for persons with missing documents, and dealing with other situations where immigrants require special attention at the border. Other waivers, particularly those related to green card applications, are still being processed by USCIS, though they and CBP are in negotiations to help refine the responsibilities of each agency.

There is disagreement as to how long these waivers are taking to process. Prior to September 11 attorneys allocated four to six months for processing; now, they can take over a year, even for persons who had previously been granted waivers. Presumably, these delays are occurring due to additional security checks and more frequent consultations with other government agencies. Government officials report that the processing time for inadmissibility waivers has been reduced in certain locations to three to six weeks. However, a change in personnel, as opposed to institutional change, may be responsible for the recent improvements in response time.

Recommendations

A greater level of diligence in deciding visa petitions is warranted in the post-September 11 environment. While the available evidence is not by itself proof that the issuance of visas has been made more restrictive, the lack of guidance provided to applicants and attorneys about changes is troublesome—unless the government can *demonstrate* that a national security interest is at stake.

In addition, the USCIS role in visa adjudication might be improved in several ways:

End Unnecessary Security Check Duplication. Three main changes could improve the security check process at USCIS:

- While name checks should be performed during all parts of the visa application process, DHS should have the same tools available to it that are provided to the State Department in the CLASS database.
- If an agency such as the FBI runs a name check on an applicant for USCIS, that information should be made electronically available to the State Department and merely updated during the visa application process.
- Given the delays for security checks at the consular level and the large backlog of benefits applications,⁴⁷ Congress should appropriate a dedicated increase in USCIS staffing levels to help expedite the petition process. Such an increase in human resources will have other important spillover effects. Most notably, it would reduce the size of the illegally resident population in the United States by the number of those waiting for an immigration benefit for extended (multiyear) periods of time.⁴⁸

Follow the Letter of the Law. There are concerns that USCIS adjudicators are still caught up in a “zero tolerance” mentality that leads them to be unnecessarily restrictive. To prevent this from continuing to delay or deny legitimate benefits:

- DHS and the State Department should draft interagency guidance to ensure that consular and USCIS officials have the same understanding with respect to the legal criteria for eligibility and inadmissibility.
- The DHS inspector general should review USCIS benefit adjudication decisions, focusing on the length of time it takes each USCIS office to decide certain kinds of cases and on whether there are large variances in adjudication times or percentages denied among USCIS offices for each type of application. Based on that review, the USCIS should take steps to reduce such discrepancies. This will improve the perception that the US immigration system is working efficiently.

⁴⁷ While the backlog for USCIS benefits applications decreased by over one million people from FY2003 to FY2004, much of this decrease is due to a revision in the way the backlog is counted.

⁴⁸ David A. Martin, “Twilight Statuses: A Closer Examination of the Undocumented Population,” *Policy Brief: Independent Task Force on Immigration and America’s Future* (Migration Policy Institute), no. 1, June 2005.

IV. VISA ADJUDICATION

Since September 11 a number of procedures have been instituted to enable consular officers to process visas with much closer attention to security. The State Department has made changes to (1) electronic forms, (2) programs to facilitate travel, (3) interviews, and (4) security checks. Technology has been front and center in this effort.

The first section looks at the process of obtaining a visa from the applicant's perspective, considering both the procedure of obtaining a visa and the possibilities for retaining (or losing) that status thereafter. The second and third sections consider the visa process from the consular official's perspective, first looking at the influence of the creation of the Department of Homeland Security on the consular process and then considering changes to the way consulates are staffed.

A. Visa Issuance Procedures

Application Forms and Filing

Every visa application begins with an application form. Since September 11 there have been a number of changes to the application forms, new forms have been created, and facilitation programs have been instituted.

The first step in protecting the United States from the entry of individuals who might cause it harm or are otherwise inadmissible is the visa application. In strengthening the "transactionally focused US security perimeter," or the outward-most circle (or layer) of US security, the questions asked of visa applicants and the answers applicants give are highly important. They give a consular officer the first sense of an applicant's overall profile. That information is now captured for most nonimmigrants in an electronic form, DS-156. This form is preferred by many consular posts because it generates a bar code that allows them to

scan data directly into the computer and thus reduces the risk of human error.⁴⁹ This form, however, has certain weaknesses that confuse applicants and provide inadequate information to the consular officers.⁵⁰

The State Department also requires a new nonimmigrant supplemental form, DS-157, of all males between the ages of sixteen and forty-five as well as any other person asked by a consular officer to complete the form. This form seems to add value to areas in which DS-156 is weak. However, attorneys and their clients have expressed confusion over some of the questions' requirements.⁵¹

Personal Appearance Interviews

Before September 11, US consular posts had broad discretion to establish policies for waivers of personal appearance (otherwise known as interview waivers.) Such waivers were routine in low-risk, low-fraud cases. Travel Agent Referral Programs (TARPs), in which carefully vetted travel agents could submit applications on behalf of their clients,

⁴⁹ Tien-Li Loke Walsh and Bernard Wolfsdorf, "Negotiating Through the Maze of Security Checks: Issues Affecting Consular Processing in 2004," Wolfsdorf Law Corporation, 2003.

⁵⁰ For example, question 29 on the DS-156 form, which asks whether the person has ever been in the United States before, only allows disclosure of one date on the electronic form. Questions 30 and 31 each have only one place to list all past US visas, both granted and refused, which confuses applicants. The limitations of the form make it difficult for a consular officer to gain all relevant information regarding the applicant's travel history and to double-check the information available through consular databases. The State Department has been aware of this problem since 2003 but has not changed the form as of July 2005. American Immigration Lawyers Association (AILA), "AILA's Questions and the Visa Office's Responses for the AILA-VO Liaison Meeting," October 13, 2004.

⁵¹ For example, question 14 on this form asks applicants to list "Any Specialized Skills or Training." The question was designed at least in part to screen for persons who need to undergo Visas Mantis security advisory opinions (SAOs), the security background checks to identify persons who may be using certain sensitive technologies in the United States. However, the question was purposely designed to be vague, and little guidance has been given to define what constitutes a "special skill." As a result, immigration attorneys have erred on the side of caution, reporting a laundry list of skills that have nothing to do with technology and writing detailed explanations that have led to processing delays. On the one hand, the vagueness of the question may be intentionally designed, as the laundry lists may produce useful information. However, extensive answers may also make it more difficult for a consular officer to determine during a short interview whether the person has skills of real interest to US authorities.

and other visa referral programs were created to improve efficiency and address workload/resource issues. Many visa applicants, particularly those working with TARPs, were thus never interviewed in person until they arrived at a US port of entry.

The State Department, through a cable sent to embassies and consulates in May 2003, issued a new policy requiring consular officers to begin face-to-face interviews with most visa applicants. Exemptions from the new policy included diplomats, persons working for certain international organizations, persons under the age of sixteen or over the age of sixty, and certain applicants for visa reissuance.⁵² The 2004 Intelligence Reform Act requires a visa interview and expands the applicable ages to all persons ages fourteen to seventy-nine.⁵³ The age requirement for personal appearances was driven by the US-VISIT program, thus ensuring that persons who must give biometric indicators for visa applications also receive interviews and vice versa.

Unless there is an obvious security concern or unless the visa category allows for dual intent (i.e., the applicant need not prove that they have no intention of remaining in the United States), most interview questions still focus on the statutory requirement under Immigration and Nationality Act (INA) § 214(b) to determine that the applicant does not intend to stay in the United States beyond the expiration of his or her visa.

Some stakeholders, as a result, argue that the in-person interview appears perfunctory at best and is better suited to keeping out potential immigrants than protecting homeland security. The fact that interviews are already short and that backlogs pressure officers to make them even shorter gives further legitimacy to the overall concern about whether requiring interviews of everyone is a sensible policy with the potential for a substantial security payoff. The policy also creates staffing problems, as foreign service

⁵² Colin Powell, *Border Security—Waiver of Personal Appearance for Nonimmigrant Visa Applicants—Revision to the Regulations*, State Unclas 136100, May 21, 2003.

⁵³ David McGlinchey, “Congress Moves to Add 600 Consular Officers,” *Government Executive*, December 16, 2004, <http://www.governmentexecutive.com/dailyfed/1204/121604d1.htm>.

Visa Interviews

A typical interview is expected to last five to six minutes, including background and name checks. During the interview, the consular officer is responsible for assessing the person, their mannerisms (including eye contact and nervousness), and their responses to questions to determine if they should be admitted. Typical questions include the following:

- Why are you going to the United States?
- What are you planning to do there?
- Where is your family located?

Consular officers have also obtained additional “analytic interview” training under new training regimes. Interview training has been lengthened to more than two days. Contractors have been hired to present interview techniques to identify fear and deceit based on body language and speech changes. The statutory burden of proof is on the applicant under section 214(b). Thus, consular officers sometimes deny a visa based on a broad “gut feeling” that the person should not be admitted.

officers are often pulled from their other duties to work on the visa interview line.⁵⁴ Ultimately, this requirement may impede the ability of officers to identify high-risk travelers due to the “white-noise” effect of having to interview everyone.⁵⁵ Indiscriminate interviews also adversely impact the travel decisions of legitimate applicants. For example, the long distances some must travel to get visa interviews can lead them to abandon their potential trips to the United States.⁵⁶

To help deal with the increased workload that results from the new interview policy, the State Department has expanded the practice of

⁵⁴ The problem of overwork may lead consular officers to not use all the information made available to them. In fact, elaborate preparations of supporting documentation on the part of the applicant are ignored at times or not considered by the officers, presumably due to time constraints. Iritani, “Border Net” (see n. 33).

⁵⁵ One State Department employee stated that the chances of identifying a security risk purely on the basis of a visa interview is “like a crap shoot.”

⁵⁶ One applicant cancelled his trip to the United States after he discovered his fiancé would have to pay \$300 for a flight to Sao Paulo for the interview. Valbrun and Karp, “Visa Changes Snare Travelers” (see n. 21).

advance scheduling of appointments, mostly through the Internet or call centers.⁵⁷ The State Department now provides three umbrella contracts for the development of regionally based call centers around the world. The American Immigration Lawyers Association, having examined the program, has found that “call center staff are often unaware of current and updated scheduling information at posts and of other pertinent post policies”⁵⁸ and that applicants therefore have trouble obtaining appointments. Certain European call centers are thought to be particularly weak, while those in Canada are considered a “best practice” by State Department officials. Internet sites are also useful, but can only be used in places where the Internet is widely available.

Security Checks

In addition to an interview, consular officers must electronically verify that the visa applicant has undergone a name and background check against the CLASS system. The applicant must also provide digital biometric fingerprints for the US-VISIT program, a process that has enormous space and workload implications, especially during the busy summer season.

If a “hit” appears in the CLASS system, the consular officer must file for a security advisory opinion (SAO) and await a response before issuing the visa. SAOs are required for applicants from certain countries or anyone working in specific technology areas. They must also be requested if the applicant’s name matches one on a terrorist watch list (Visas Viper, Visas Bear, and Visas Donkey are all telegram codes for suspected terrorists.) In some cases, SAO delays have occurred as a result of the implementation of new background check procedures. For example, even though male applicants from selected countries were already subject to a “twenty-day hold period” over the summer of 2002, applicants from those countries experienced extensive delays during that time. As a result, critics claimed that US consular officers were far too conservative and bureaucratic and might be

employing racial/religious profiling techniques (the countries were mostly Muslim). The State Department terminated the “twenty-day hold period” program by October of that year, claiming that additional security measures made it obsolete.⁵⁹ (See Part VII on security-related visa changes for more on SAOs.)

Consular officers sometimes also consult with other agencies, including the CIA, FBI, and DHS, during visa adjudications. DHS has a number of overseas officers stationed around the world who have access to databases that consular officers do not (IDENT and IBIS, the fingerprint databases, for example). DHS officers also handle locally filed immigration petitions, though waivers will now be processed through the CBP’s Admissibility Review Office.

Visa Facilitation before and after September 11

The methods used to facilitate the visa process have changed substantially since the September 11 attacks. Before September 11, 2001, applicants could seek help from Travel Agent Referral Programs (TARPs) to have the application process explained to them and for help in filling out their applications.⁶⁰ However, as noted earlier, these programs came under heavy criticism, particularly the “Visas Express” program in Saudi Arabia, which was halted in July 2002.⁶¹ With the new requirement that almost all visa applicants appear for in-person interviews, TARPs no longer exist as facilitation mechanisms.⁶² Nonetheless, many posts continue to work closely with travel agencies that provide supplemental preparation of visa applications, and fraud

⁵⁹ George Lester, “Survey of Post-9/11 Security, Travel, and Visa-Related Changes in US Immigration Law and Procedure,” *Immigration Daily*, 2003, <http://www.ilw.com/lawyers/articles/2002,1206-lester.shtml>.

⁶⁰ US Department of State Office of Inspector General (IG), *Review of Nonimmigrant Visa Issuance Policy and Procedures*, ISP-1-03-26, December 2002.

⁶¹ The Visas Express program was established under the presumption that most Saudis apparently overcame the presumption of INA section 214(b) and had a very low refusal rate. National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, (see n. 1).

⁶² Seoul in the Republic of Korea, for example, abandoned its TARP with the implementation of the new interview requirement effective July 21, 2003. United States Embassy at Seoul, Republic of Korea, *US Embassy Seoul Announces New Non-Immigrant Visa Procedures*, press release, July 15, 2003, <http://seoul.usembassy.gov/www4501.html>.

⁵⁷ Posts have the discretion to create their own appointment systems and do so in a variety of ways depending on consular demand and local legal requirements.

⁵⁸ AILA, “AILA’s Questions” (see n. 50).

units closely monitor such agencies to identify trends and problems arising from particular agencies. Though travel agencies no longer accept and prepare applications for US visas, many other countries still accept visa applications of US citizens via travel agencies.

Applicants also facilitated their visa applications before September 11 through “visa referrals.” Embassy officers were permitted to refer “well and favorably known” personal contacts for a US visa. The travel of such persons was presumptively in the national interest, and they were frequently waived from personal appearance interviews.⁶³ In fact, such “referred” applicants assumed that a nonimmigrant visa was assured. After visa procedures grew more restrictive in 2002, requests for visa referrals began to increase.⁶⁴

Some referrals, however, were apparently not known to the referee. In one instance, the US Consulate General in Ciudad Juárez, Mexico, revoked 497 referral visas in an investigation that resulted in the indictment and conviction of an employee there. Concerns about program abuse and the resulting compromises in security led to substantial changes in the visa referral program to prevent individuals from making excessive referrals and to require posts to track referrals. The new universal requirement for personal appearance interviews has further decreased the ability of applicants to use visa referrals as a mechanism for expediting visas.⁶⁵

As pre-September 11 facilitation programs were eliminated, the State Department established a number of new programs to facilitate the issuance of visas. Every post was required to establish a process for expediting certain visa applications. Innovations ranged from formal programs for expedited appointments and processing to time blocks set aside for business travelers. In addition, the State Department issued departmental guidance giving priority scheduling to student and exchange visitor visa applicants. Posts are frequently reminded to post

⁶³ Kathleen Walker, “The Tale of the CONDOR and Security-Related State Department Developments Post 9/11,” *Bender’s Immigration Bulletin* 8, no. 2 (January 15, 2003): 16.

⁶⁴ State Department IG, *Review of Nonimmigrant Visa Issuance*, 6 (see n. 60).

⁶⁵ Walker, “Tale of the CONDOR” (see n. 63).

updated and clearer information on their Web sites.⁶⁶ At one post in India, the business executive and student visa liaison programs focus on communications and set priorities for interview appointment times. None of these facilitation programs, however, give applicants an advantage for visa approval; their focus is only on the speed of adjudication and on making the application process more convenient.

The treatment of certain countries in the visa process has also changed as a result of new facilitation programs. For example, China has been tagged as a “problem country” as a result of severe delays in the issuance of student visas.⁶⁷ The importance of the Chinese market to US firms and the high number of visitors from China led the United States to extend the validity of tourist and business visas from China to one year (from six months) and thus freed up consular resources to keep up with visa demand in a more timely manner.

Recommendations

Many reforms in visa procedures have already increased the security of the visa process appreciably. The sharing of best practices and the use of technology to aid consular officers are but two obvious examples of this. Furthermore, certain unnecessary delay-causing programs like the “twenty-day hold period” for certain applicants have been ended. However, a number of improvements would aid the facilitation of the process for applicants, with no loss in security. These include:

Make the Visa Application Process Easier to Understand.

For consular officers to identify potential security risks, they must weed through a haystack of legitimate travelers. To assist both consular officials and applicants:

- Visa application forms should be revised periodically to make certain that visa issuers obtain only information relevant to their

⁶⁶ Colin Powell, *Non-Immigrant Travel Initiative*, Unclas State 170771, August 2004; Colin Powell, *Facilitation of Business Travel*, Unclas State 225608, October 20, 2004, http://travel.state.gov/visa/laws/telegrams/telegrams_1446.html.

⁶⁷ Maura Harty, *Remarks to University Students, Beijing University, Beijing, People’s Republic of China*, March 2, 2004, http://travel.state.gov/law/legal/testimony/testimony_2142.html.

decision and that they are easy for applicants to use. Because Visas Mantis and inadmissibility waivers require so much extra information, separate forms with more specific questions may help handle these special cases more effectively and help consular officers better focus on high risk or fraudulent applications.

- The effectiveness of visa appointment systems should be regularly evaluated, particularly with a view to improving the inefficiencies and problems resulting from the current umbrella contracts. Once such problems are resolved, posts should be strongly encouraged to adapt “best practices” from other posts to their own circumstances and implement them as appropriate.
- Applicants should be provided with general guidance on the criteria for successful visa applications. This can be done in a way that leads to more predictable outcomes without compromising security. For example, the updated Technology Alert List for Visas Mantis cases need not be publicly released. But the State Department should draft guidance to assist applicants in filling out applications accurately and properly; doing so will also lead to productivity gains.

Emphasize Interview Quality, Not Quantity. Applicants and consulates alike recognize that the chances of identifying someone of potential security interest from among legitimate travelers and intending immigrants is slim—although it can and does happen. But the opportunity cost of tying up consular resources with low(est)-payoff procedures (such as 100 percent personal interviews) can amount to compromises, not increases, in security, particularly when employees are overworked. The biometric visa program requirements have driven the interview requirements, but as more individuals enroll in the biovisa program, interviews can be tailored to better identify security risks:

- The visa interview process should be evaluated post by post to ensure that interviews are not perfunctory and provide ample chance to identify and pursue security risks. Within physical infrastructure limitations, additional consular officers should be assigned to posts that have a fifteen-day or more wait period on key visa applications to help reduce delays.
- While visa interviews should remain mandatory for all first-time visa applicants, Congress should amend the 2004 Intelligence Reform Act to allow the State Department to design and implement (with

DHS) a facilitation program that offers waivers of personal appearance for low-risk applicants who have been approved for a visa in the previous two years and have already submitted biometric identifiers such as fingerprints (as long as those identifiers can be electronically transmitted to and confirmed at the border). Full data system integration and interoperability should be a prerequisite to doing so. The program can be modeled on the NEXUS and SENTRI programs at the border.⁶⁸ This will allow consular officers to concentrate on new applicants and have more time to focus on security risks.

- In light of the need to refocus resources on security, Congress should reconsider whether INA § 214(b), whereby applicants must demonstrate that they have no intent to immigrate permanently to the United States, should continue to apply to certain immigrants, including graduate students. The policy has no appreciable security implications and draws interview resources away from where they are more urgently needed.
- Where interviews may still be required, the State Department should continue to encourage the use of creative but closely managed facilitation programs for categories of visas and posts that experience structural and persistent delays. The extension of visa validity for travelers from China and the efforts to facilitate business and student applicants from India are but two examples worth applying more widely.

Develop a Secondary-Inspection-Like Visa Adjudication

System. To help better target security risks, all posts should give much greater attention to individuals with particular characteristics—such as being born in particular countries, having first-time passports, having been previously denied a visa, having peculiarly little information about past activities, etc. In such an adjudication system:

- Consular officers should be able to refer certain individuals to experienced career officers to perform a more thorough examination (similar to secondary inspection at the border). Such officers—a sort of

⁶⁸ NEXUS (at the Canadian border) and SENTRI (at the Mexican border) are travel facilitation programs in which the process of crossing the border is simplified for previously vetted frequent travelers.

“master” visa officer (MVO)—should be given all necessary security clearances and all the training to perform their job at the highest possible level. This function should be performed in close cooperation with the visa security officers (VSOs) discussed in the next section.

- To help consular officers identify individuals for this additional screening, the State Department should develop a “self-correcting” risk-management algorithm for interview selection. The algorithm would use up-to-the-minute security information to identify travelers with high-risk profiles for more thorough examination.
- This algorithm-based additional screening should be supplemented with a probabilistic sampling strategy that increases or decreases the frequency of additional screening for low-risk applicants in accordance with a variety of criteria of variable “hardness” (i.e., likelihood of terrorist threats based on international intelligence).⁶⁹

B. The Role of the Department of Homeland Security

The previous section considered visa policy at consulates from the applicant’s perspective. However, the creation of DHS and the assignment of certain visa responsibilities to the new agency have also affected the visa adjudication process—though so far in name more than in fact.

The Creation of DHS and the DHS-State Department Memorandum of Understanding

The creation of the Department of Homeland Security (DHS) was perhaps a logical if overly broad reaction to the September 11 attacks. The purpose was to bring together under one authority the agencies and systems that were either implicated in the September 11 attacks and/or could help prevent or respond to further attacks and their aftermath.

⁶⁹ A good example of this strategy is used at the land border between Mexico and the United States in Douglas, Arizona. The port uses sophisticated algorithms to switch inspectors between lanes and change targets for inspection. These changes occur at random intervals and use a secure communication system to direct inspectors. See William H. Robinson, Jennifer E. Lake, and Lisa M. Seghetti, *Border and Transportation Security: Possible New Directions and Policy Options*, Congressional Research Service, RL32841, March 29, 2005.

Although the State Department has retained its authority to process visas, the focus of and the way in which visa policy is made (and somewhat less so, implemented) became a responsibility of the newly created Department of Homeland Security.

Though the legal authority and policy guidance of the Justice Department had always been central to decisions on visas, prior to September 11, 2001, in practical terms, visa policy was set by the State Department. A senior government official noted that the White House, stung by what it saw as an unfocused and inconsistent visa adjudication process before September 11, insisted that visa policy fall under the new department in the aftermath of the attacks. In subsequent negotiations over the Homeland Security Act, the secretary of state fought to retain consular authority in the State Department for two main reasons: (1) to avoid a disruption of the chain of command in embassies and consular offices, and (2) to retain the use of visas as an instrument of foreign policy.

In the final version of the Homeland Security Act, the secretary of state retained all of his authority under the law and also retained authority over visa processing. However, Section 428 of the act gives the DHS secretary the authority to “issue regulations with respect to, administer, and enforce the provisions [of law] relating to the functions of consular officers of the United States in connection with the granting or refusal of visas,”⁷⁰ though such “authorities shall be exercised through the

⁷⁰ The Homeland Security Act (Public Law 107-296, November 25, 2002) Section 428(b) provides “(b) Notwithstanding section 104(a) of the Immigration and Nationality Act (8 USC 1104(a)) or any other provision of law, and except as provided in subsection (c) of this section, the Secretary [of Homeland Security]—

(1) shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provisions of such Act, and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State), which authorities shall be exercised through the Secretary of State, except that the Secretary shall not have authority to alter or reverse the decision of a consular officer to refuse a visa to an alien; and

(2) shall have authority to confer or impose upon any officer or employee of the United States, with the consent of the head of the executive agency under whose jurisdiction such officer or employee is serving, any of the functions specified in paragraph (1).”

Authors’ emphasis added.

Secretary of State.”⁷¹ Section 428 transferred the oversight of certain aspects of the *consular function* from the Justice Department to DHS,⁷² while leaving the functions of the *secretary of state* in the State Department, a difficult line to draw. Moreover, it does not define what exactly is entailed in the administration and enforcement of the visa process.

Section 428 also gives DHS authority over six specific visa-related responsibilities:

- 1) Assigning DHS employees to Saudi Arabia to review visa applications⁷³
- 2) Developing programs of homeland security training for consular officers⁷⁴
- 3) Ensuring that DHS employees and consular officers are given appropriate training (as needed) in languages, interview techniques, and fraud detection techniques⁷⁵

⁷¹ The Secretary of State also has additional authorities. According to Section 428(c), “

(1) Notwithstanding subsection (b), the Secretary of State may direct a consular officer to refuse a visa to an alien if the Secretary of State deems such refusal necessary or advisable in the foreign policy or security interests of the United States.

(2) Nothing in this section, consistent with the Secretary of Homeland Security’s authority to refuse visas in accordance with law, shall be construed as affecting the authorities of the Secretary of State under the [a number of previously enumerated] provisions of law.”

⁷² According to Section 428(f): “Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.”

⁷³ According to Section 428(i): “Notwithstanding any other provision of law, after the date of the enactment of this Act all third party screening programs in Saudi Arabia shall be terminated. On-site personnel of the Department of Homeland Security shall review all visa applications prior to adjudication.”

⁷⁴ See note 68.

⁷⁵ According to Section 428(e)(6):

(A) The Secretary [of the Department of Homeland Security] shall ensure, to the extent possible, that any employees of the Department assigned to perform functions under paragraph (2) and, as appropriate, consular officers, shall be provided the necessary training to enable them to carry out such functions, including training in foreign languages, interview techniques, and fraud detection techniques, in conditions in the particular country where each employee is assigned, and in other appropriate areas of study.

- 4) Designing performance standards for consular officers to be used by the State Department⁷⁶
 - 5) Studying the role for foreign nationals in the granting and refusing of visas⁷⁷
 - 6) Assigning DHS employees to posts where visas are issued.⁷⁸
- However, the statute only gives DHS the “authority” to handle these responsibilities; it does not explicitly require the agency to do so.

The ambiguities of Section 428 led DHS and the State Department to negotiate a memorandum of understanding (MOU) between the departments over the course of six months. It was, by all accounts, a difficult process. The MOU would impact, after all, long-held State Department practices and procedures and would affect the consular corps’ esprit. Less directly, perhaps, it would affect the self-image and spirit of foreign service officers across the board, since nearly all of them issue visas early in their career.

⁷⁶ According to Section 428(e)(3): The Secretary of State shall evaluate, in consultation with the Secretary, as deemed appropriate by the Secretary, the performance of consular officers with respect to the processing and adjudication of applications for visas in accordance with performance standards developed by the Secretary for these procedures.

⁷⁷ According to Section 428(e)(7):

(1) The Secretary of Homeland Security shall conduct a study of the role of foreign nationals in the granting or refusal of visas and other documents authorizing entry of aliens into the United States. The study shall address the following:

- (A) The proper role, if any, of foreign nationals in the process of rendering decisions on such grants and refusals.
- (B) Any security concerns involving the employment of foreign nationals.
- (C) Whether there are cost-effective alternatives to the use of foreign nationals.

⁷⁸ According to section 428(e):

(1) The Secretary [of Homeland Security] is authorized to assign employees of the Department to each diplomatic and consular post at which visas are issued, unless the Secretary determines that such an assignment at a particular post would not promote homeland security.

(2) Employees assigned under paragraph (1) shall perform the following functions:

- (A) Provide expert advice and training to consular officers regarding specific security threats relating to the adjudication of individual visa applications or classes of applications.
- (B) Review any such applications, either on the initiative of the employee of the Department or upon request by a consular officer or other person charged with adjudicating such applications.
- (C) Conduct investigations with respect to consular matters under the jurisdiction of the Secretary.

But an MOU was needed nonetheless. Both departments believed that the language of Section 428 was internally inconsistent and operationally confusing and thus required clarification. A senior government official notes that DHS originally had a rather “grandiose” concept of how to reform the issuance and management of visas, but gradually became more realistic given the new agency’s “institutional inefficiencies.”

According to the statement of purpose, the MOU aimed to allow both departments to “create and maintain an effective, efficient visa process that secures America’s borders from external threats and ensures that our borders remain open to legitimate travel to the US.”⁷⁹ The core of the MOU, at least as it has been interpreted to date, is its assignment of visa policy to DHS. The MOU states that “the Secretary of Homeland Security will establish visa policy, review implementation of that policy, and provide additional direction as provided by this memorandum, while respecting the prerogatives of the Secretary of State to lead and manage the consular corps and its functions, to manage the visa process, and to execute the foreign policy of the United States.”

Giving DHS responsibility for visa policy may appear to give DHS broader authority than the language of the statute implies. This is partly because to date this statutory responsibility has been interpreted very narrowly. Thus, while the MOU confirms the six responsibilities delineated in Section 428, it seems to return much authority to the State Department. In acknowledging the need for the State Department to maintain control over decisions of a foreign policy nature and over officers in the State Department chain of command, the MOU maintains the secretary of state’s responsibility over many visa decisions, including those related to foreign affairs and the evaluation of consular officers. In making this distinction between DHS and the State Department, the MOU has drawn a clear line between visa

⁷⁹ Department of State and Department of Homeland Security, *Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002*, September 30, 2003, <http://www.mnllp.com/DHSMOUsep030903.pdf>.

policy (in the narrow sense—the course of guiding action for the visa system) and visa processes and operations.⁸⁰

Inevitably, the MOU has found supporters and critics inside and outside of government. Some believe that the State Department retains too much power. Those critics worry that the State Department’s other responsibilities may lead it to lose its focus on the mission of security. For them, giving DHS complete authority over the function is a superior outcome because DHS does not have competing priorities of diplomatic relations and reciprocity.⁸¹ Other analysts, however, consider the MOU to be the best possible outcome given the ambiguity of the statutory language and believe it plays to the strengths of both agencies. Both sides acknowledge that the DHS-State Department relationship is still in its infancy and will require amendments over time.⁸²

Visa Policymaking in DHS

Notwithstanding the lack of complete clarity on who has ultimate control over visa policy (writ small), it is clear that DHS has a crucial role to play throughout the visa process. While the State Department’s Consular Affairs Bureau continues its long-established functions and supervises consular work, DHS organized itself in a rather complicated way to support the MOU’s terms. The office of the DHS assistant secretary for border and transportation security policy and planning was given primary responsibility for the development of visa policy. This has been a less than optimal way to carry out the function. In a recent report, the Heritage Foundation found that the DHS policy structure lacks “a high-level policy officer with the staff, authority,

⁸⁰ This is a narrower interpretation than Visa Policy (writ large), which encompasses the manifold national purposes to which the issuance of visas can be put as well as the relevant statute, regulations, processes and operations.

⁸¹ Ruth Ellen Wasem, *Visa Policy: Roles of the Departments of State and Homeland Security*, Congressional Research Service, RL32258, March 4, 2004.

⁸² Maura Harty, *Visa Issuance: Our First Line of Defense for Homeland Security*, Senate Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship, September 30, 2003, <http://www.state.gov/r/pa/ei/otherstmy/25930.htm>.

and gravitas to articulate and enforce policy guidance.”⁸³ Only a small number of persons employed in DHS are assigned to policy functions, and several are leaving or have left their positions for other DHS or outside positions.

The DHS structure to deal with international issues within the Directorate on Border and Transportation Security (BTS) is also unsatisfactory. The Office of International Affairs (OIA) reports directly to the DHS secretary and advises on international issues, while the Office of International Enforcement (OIE) in BTS reports to the BTS undersecretary and advises BTS on international issues. The OIE was initially designated as the office responsible for all oversight of Section 428. However, on October 31, 2003, DHS reorganized its international activities, reducing the role of OIE and shifting the visa security program to yet another international office within the Immigration and Customs Enforcement division of BTS, known as the Visa Security Unit (VSU).⁸⁴ In spite of (or perhaps as a consequence of) this policy shift, our interviews made clear that some confusion still exists over who has direct responsibility and oversight for the Visa Security Officer (VSO) program. A number of other DHS divisions, including the Coast Guard and the Transportation Security Administration, also have their own international offices.

Concerned that inadequate information-sharing between international office branches and the OIA made it difficult to perform effective oversight and concerned with the broad problems posed by a decentralized “policy shop,” DHS Secretary Michael Chertoff proposed on July 13, 2005, the creation of a new Directorate of Policy headed by an undersecretary for policy. While the position must be approved by Congress, the directorate would address many of the coordination problems within the DHS policy structure, in part by creating the position of assistant secretary for international affairs to coordinate

⁸³ David Heyman and James Jay Carafano, “D.H.S. 2.0: Rethinking the Department of Homeland Security,” The Heritage Foundation, December 13, 2004.

⁸⁴ US Department of Homeland Security Inspector General, *An Evaluation of DHS Activities to Implement Section 428 of the Homeland Security Act of 2002*, OIG-04-33, August 2004.

international policy. Still missing, however, according to DHS’s planned “end-result” organizational chart, is an assistant secretary for immigration policy or any other lead person on DHS-wide immigration policy.⁸⁵

Implementation of Section 428—The Reality and the VSO Program

In terms of the operational implementation of the visa process, the MOU assigns the State Department day-to-day control over the visa process more generally, with DHS retaining oversight in key areas. For example, DHS has the authority to determine documentary requirements for visa issuance, the appropriate place for visa applications, and the use of personal appearance waivers. DHS claimed in recent congressional testimony that it “has final authority over State Department-initiated visa guidance involving the following: noncitizen admissibility and any applicable waivers, visa classification and documentation, place of visa application, personal appearance/interviews, visa validity periods, and the Visa Waiver Program.”⁸⁶

Even so, in practice, the responsibilities of State Department officials have changed little since DHS was given oversight of visa policy. The MOU states that the State Department may “propose and issue visa guidance subject to DHS consultation and final approval” and states that “all visa regulations shall be published by the Secretary of State in 22 C.F.R. using State Department procedures,” a right which the State Department fought to retain by arguing that it would be more efficient

⁸⁵ Among the other major changes to DHS structure, the plan would eliminate the Directorate for Border and Transportation Security. Instead, Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services all would directly report to the deputy secretary and secretary for homeland security. See US Department of Homeland Security, Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security, press release, July 13, 2005, http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0703.xml.

⁸⁶ Elaine Dezenski and Thomas Walters, *Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on Terrorist Travel*, Senate Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship and Subcommittee on Terrorism, Technology and Homeland Security, March 14, 2005, http://judiciary.senate.gov/print_testimony.cfm?id=1414&wit_id=4066.

at first response. Thus, while regulations are issued jointly, State Department officials have primary responsibility for drafting them. The State Department also continues to evaluate security advisory opinions. Even in places where DHS has a legislative mandate under Section 428, such as the development of homeland security training materials and performance evaluation criteria, little progress has been made. (See the staffing section on page 60 for more details on this issue.) Considering that visa policy is determined by the statute and most operations continue to be implemented by the State Department, the post-MOU role of DHS in setting policy has remained modest so far and, in many ways, unclear. The situation, nonetheless, is still fluid because the legislative mandate strongly favors DHS.

Among the major responsibilities given to DHS in Section 428 was the placing of DHS officers in Saudi Arabia to oversee and provide input into the security aspects of the visa adjudication process. Accordingly, in that country, one visa security officer (VSO), drawn from among former special agents, border patrol, and other senior law enforcement personnel, was to be present at post at all times in order to help screen applications and make security-related recommendations. Several months after the VSOs were successfully placed at Saudi posts, the DHS inspector general (IG) criticized the duplicative nature of the VSO function, which largely consisted of entering records into DHS databases, even though the information was already available in State Department databases. The IG also commented on the lack of training and foreign language skills of the temporary VSOs assigned abroad.⁸⁷ Given these weaknesses, the inspector general recommended that “before the visa security operation expands to other countries, DHS and [the State Department] should explore ways to automate the database queries and free the VSOs for greater priority duties.”⁸⁸

The DHS Visa Security Unit, which oversees the VSO program, has made a number of changes to the program in Saudi Arabia since it was

first reviewed by the DHS inspector general. The process of data entry has been improved by automating system entries, thus reducing the amount of required data entry from sixteen hours to five minutes daily. With the increased time available to VSOs, they are now able to use their law enforcement training and background to perform investigations and interview applicants of interest. They continue to check 100 percent of visa applications in Saudi Arabia,⁸⁹ but now have the capability to prescreen applicants by looking at their applications in advance and assessing potential security risks. Working together, VSOs and consular officers have exposed instances of visa fraud (including a case that led to an investigation of a “storefront” business in the United States) and security risks. They have also used their access to immigration databases to provide security officers at post with relevant information.

Limited resources and infrastructure have impeded the implementation of Section 428 and the staffing of the Visa Security Unit (VSU). In the absence of dedicated funds to start the VSU, DHS drew from existing staff and temporary detail employees. Even in Saudi Arabia, the number of VSO staff has shrunk. Because of safety concerns, nonemergency personnel—including some VSOs—were ordered to depart the country as of April 15, 2004. As a result, the remaining VSO staff are extremely overworked. Despite these challenges, the VSO program in Saudi Arabia is thought to be successful. DHS reports that the US ambassador there intends to request an increase in VSO staff as soon as the ordered departure ends. The ambassador has also shared positive aspects of the program with other US embassies that are considering bringing VSOs to their posts.

VSOs have not been deployed to sites outside Saudi Arabia in large part due to funding constraints. The second phase of deployment, planned for the latter part of 2005, envisions five regional hubs covering twenty-three countries. Indonesia and Pakistan have already been selected,⁹⁰ and other possible locations include Egypt, the United

⁸⁹ Dezenski and Walters, *Strengthening Enforcement and Border Security* (see n. 86).

⁹⁰ Chris Strohm, “Outgoing Homeland Security Official Cautions Against Citizen Board Guards,” *GovExec.com*, February 28, 2005, <http://www.govexec.com/dailyfed/0205/022805c1.htm>.

⁸⁷ DHS IG, *DHS Activities to Implement Section 428* (see n. 84).

⁸⁸ *Ibid.*, 23.

Arab Emirates, and Morocco.⁹¹ However, funding constraints have not been the only obstacle to expansion. Under National Security Decision Directive 38 (NSDD-38), developed under President Reagan, the approval of the chief of mission is required for changes in staffing at consular posts.⁹² Thus, negotiations with State Department officials at the relevant posts have taken a long time, particularly in Pakistan. The development of a cable defining the relationship between the Bureau of Diplomatic Security in the State Department and ICE (the parent body for the VSU) has apparently also caused delays. Job announcements for both posts are expected to occur during 2005.

To prepare for this expansion, DHS has developed an academy-based VSO pre-deployment training program. Working with the Federal Law Enforcement Training Center (FLETC), the training program for VSOs includes counterterrorism training, interview techniques, information about various databases (such as the Treasury Enforcement Communications System), and legal training (such as law enforcement charges for terrorists and enemy combatants). The program directors are considering adding hands-on training such as defensive driving in an armored vehicle. The clear intention is for trained VSOs to impart this knowledge to consular officers at posts.

Even though the inspector general report mentioned earlier provoked extensive improvements in the VSO program and has enabled VSOs to take on more security-related responsibilities in Saudi Arabia, it is not clear that new VSOs will have the training or subject matter expertise to effectively take on those responsibilities.⁹³ DHS intends to deploy personnel mostly from Immigration and Customs Enforcement to these posts. These individuals may not be sufficiently steeped in immigration law and counterterrorism, and none of those selected (as of early 2005)

were proficient in Bahasa, the official language of Indonesia—the first country outside Saudi Arabia to which VSOs are expected to be deployed.

The inspector general also has recommended that DHS study long-term personnel options such as the “foreign service model” to help maintain “a robust, professional, and international posture involving many DHS elements.” However, the VSU has no intention of creating a long-term, foreign service-style cadre, believing that law enforcement officers require periods of retraining in the United States to get up to date on law enforcement tactics and to maintain their law enforcement status. Also, while recent DHS testimony states that the VSU is in the process of “selecting permanent VSOs” (current officers are still on temporary duty), it is unclear how DHS will continue to effectively train and staff these positions if turnover is expected every three to four years.⁹⁴

Recommendations

DHS clearly has greater authority than it currently wields and could choose to exert that authority were it administratively and financially capable of doing so. The agency’s failure to take a proactive approach—and the lack of sufficient numbers of experienced staff on these issues—suggests that the “forced marriage” in visa policy may be hurting, rather than helping, homeland security. Section 428 of the Homeland Security Act has created two concurrent problems: It does not define visa policy, and DHS lacks the funds, staff, and expertise to support the programs the act requires it to support. Certain actions can help resolve this disconnect at the national level:

Determine What Visa Policy Means and Who Has Principal Responsibility For It.

The statute gives DHS responsibility for regulating and overseeing key components of the visa process. The MOU gives it explicit responsibility over visa policy. Yet no one in either DHS or the State Department is able to articulate what that means beyond implementing the various statutes that define who

⁹¹ C. Stewart Verdery Jr., *Post 9/11 Visa Reforms and New Technology*, Senate Foreign Relations Committee International Operations and Terrorism Subcommittee, October 23, 2003.

⁹² President Ronald Reagan, *NSDD-38: Staffing at Diplomatic Missions and their Overseas Constituent Posts*, June 2, 1982, <http://www.fas.org/irp/offdocs/nsdd38.htm>.

⁹³ Though the program now seems to be operating smoothly, it took the VSOs in Saudi Arabia a substantial amount of time to contribute meaningfully to the visa adjudication process.

⁹⁴ Dezenski and Walters, *Strengthening Enforcement and Border Security* (see n. 86).

should be given (or denied) a visa and some of the operational circumstances under which decisions are made. Is the MOU's assignment of agency responsibilities best able to accomplish former Secretary Powell's conception of visa policy, as articulated by "secure borders, open doors?" And, if so, where do State Department operations fit within these parameters?

Nearly three years after the creation of DHS, and considering the importance of its mission, it should no longer be acceptable that the agency performs only some of its assigned functions and performs others unevenly. Nor can DHS hide behind inexperience for its lack of real progress in this regard. While the State Department has done a good job continuing visa operations with or without DHS guidance, it probably lacks the expertise and resources to handle all the relevant homeland security challenges that today's environment generates. Therefore:

- Taking into consideration the staffing profile and resources of both agencies, DHS and the State Department should reconsider the MOU to clarify the aspects of Visa Policy (writ large) for which each agency should have lead responsibility. One way to do this would be to ask the National Academy of Sciences to impanel and convene a task force, which should be composed of relevant representatives from within DHS and the State Department, senior congressional staffers, experts, and leading users of the relevant programs. The task force should allocate responsibilities on the basis of each agency's experience, human resources' profiles, comparative advantages, opportunity costs, and realistic expectations about future resources that can be dedicated to the effort. It should also be asked to define the basic purpose, direction, and priorities of US Visa Policy, or the "fundamentals." (See Part VIII for a more detailed description of our recommendation on this point.) While we suspect that the State Department will be found to be best equipped to perform this function under any circumstances and that a thorough and independent review would return responsibility for visa policy to the State Department, the task force would certainly come to its own conclusions. The task force's recommendations should become the basis for legislation to amend Section 428 of the Homeland Security Act, as appropriate.

- In the interim, Congress should support DHS efforts to centralize its policymaking function within a properly staffed and resourced office of an undersecretary for policy with responsibility for national and international policy.
- DHS should also create an assistant secretary for immigration policy reporting to the new undersecretary for policy. With the nation about to engage in a comprehensive immigration reform effort that will likely last for the most part of a decade (from legislation to implementation), a senior political appointee whose sole responsibility is immigration policy must oversee the effort at DHS.⁹⁵

Reconceptualize the VSO Program. The VSO program, while much improved since its inception, appears to be ineffective at achieving national security goals. Its strength to date lays in the law enforcement capabilities of its officers rather than in the broader homeland security expertise envisioned by lawmakers. While consular officers believe that additional national security expertise would be helpful at posts, the VSO program in its current form is not providing that help with predictability outside Saudi Arabia.

A number of alternatives to the VSO program exist. These include creating a foreign-service-like branch at DHS with a specially trained cadre of security and law enforcement personnel, or creating a specialized corps of consular officers trained in evaluating security needs. The proper solution would provide additional counterterrorism expertise at posts without a commitment of new resources that is prohibitive.

The goal of the VSO program is to add significant expertise on counterterrorism, terrorist travel indicators, and fraud. However, today's VSOs likely do not have those skills, although they do provide consular posts with additional law enforcement assets. Additionally, the VSO

⁹⁵ Unlike the Transportation Security Administration or the Coast Guard, in which one director is charged with the division's operations, immigration responsibilities are divided among the commissioners for CBP and ICE and the director for CIS. An assistant secretary for immigration would help ensure that a unified immigration policy is established and implemented across the department.

program duplicates to a large extent two existing State Department functions: (1) the designation of a fraud prevention manager (FPM) from the consular staff at every visa-issuing post (some are part time), and (2) the assistant regional security officer–investigator (ARSO-I) division of the State Department’s Diplomatic Security program.⁹⁶

At this time, there appears to be a great degree of overlap and outright duplication between the VSO program and the FPM/ARSO-I capabilities. The ARSO-I’s have law enforcement capabilities and use investigative techniques to shut down fraudulent document rings and investigate links to terrorism (among other responsibilities). The FPMs collect and analyze data and trends, while also specializing in tools and techniques for detecting fraud. While some of this duplication may be a useful, even initially necessary “strategic redundancy,” at some point it becomes too expensive and can lead to confusion, unacceptable opportunity costs, and bureaucratic inefficiencies. While the VSO program appears to have been successful in Saudi Arabia, part of that success is due to the fact that nonemergency employees are not on site and functions are therefore less likely to be duplicated.

Others share our concerns. At the State Department, VSO roles are under much discussion and negotiation as the plans for program expansion continue. Unnecessary duplication is one of the important issues. Therefore:

- Congress should amend the statute to end the VSO program and transfer its counterterrorism functions to the ARSO-I and FPM programs, which should be funded aggressively. To do so, the State Department fraud officer program in the Bureau of Consular Affairs should be expanded to become a counterterrorism and fraud (CTF)

⁹⁶ State Department fraud prevention managers deal with fraud in visa and passport cases by visiting local businesses to confirm their existence or the nature of their businesses, checking with host country officials to confirm documents such as birth certificates and marriage licenses, visiting neighbors and relatives of visa applicants to determine the bona fides of claimed relationships, and so on. When fraud is discovered, the fraud prevention manager turns over actionable leads to diplomatic security officers working on visa and passport fraud (known as ARSO-I’s). There are twenty-five ARSO-I’s in posts known to have high rates of fraud.

unit, with FPMs becoming fraud and terrorism prevention managers (FTPMS). Because fraud is a vulnerability that can be—and has been—exploited by terrorists, officers in post-specific antifraud units should receive substantial CTF training, and additional senior State Department staff should be deployed to posts with the greatest fraud and security problems. Current antifraud units should be retrained as necessary, particularly to become better versed in terrorist travel indicators. These steps have the advantage of requiring relatively modest additional investments or infrastructure, while providing counterterrorism expertise at posts where the need is immediate and most pronounced, particularly in the twenty-six countries for whom the twenty-day hold was enacted after September 11.⁹⁷ The State Department should be required to expand its programs (particularly the ARSO-I for law enforcement capabilities) to additional posts as part of this realignment of responsibilities, and FTPMS should be given access to all relevant databases and resources needed to successfully do their job.

- The CTF program (or its replacement) might also be used to implement the much closer screening of certain applications recommended in the previous section. The FTPMS could serve as a “secondary inspection line” in that model.
- If the VSO program is retained, the State Department and DHS should evaluate the program’s role at consular posts with an eye toward giving VSOs specialized homeland security training, especially in document identification techniques and post-specific languages. Once trained, VSOs should be assigned to a single post long enough to understand the basics of the local culture and build institutional memory.
- Furthermore, if the VSO program is retained, DHS should reconsider its decision not to establish a cadre of DHS “foreign officers.” It is indispensable to the visa function to have a class of agile, well-trained, and deeply experienced “master” counterterrorism officers that are stationed at key consular posts and can be

⁹⁷ The twenty-six countries are Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen.

temporarily dispatched where they may be needed. The generalist model—whether at DHS or DOS—is no longer adequate to meet the deep and ever-changing challenge that terrorism presents.

- Once the establishment of counterterrorism specialists (VSO or otherwise) is rethought, the lead agency should expand the program strategically and with deliberate speed to other locations. Congress must weigh in, in this last regard, through its appropriation powers and should specifically exempt the program from the NSDD-38 requirements in order to avoid bureaucratic delays.

C. Staffing and Personnel

The staffing, training, accountability mechanisms, and management of visa-adjudicating consular officers have all been modified at consular posts since September 11. State Department staffing has received particular attention. A State Department inspector general (IG) report recommended a number of changes to the structure of foreign service officer (FSO) positions. Under the Department’s Junior Officer Rotational Program, junior foreign service officers typically spend two years at a location. Many junior foreign service officers serve one year in a consular section at that post and then spend a second year in another section of the embassy that corresponds to the officer’s intended career track. That means that of their first four years, many FSOs spent only one year performing consular work. This program neither builds consular expertise nor facilitates the development of institutional memory on visa adjudications.

Senior consular officers say that experience is the key to becoming more efficient and accurate at their jobs. Because of the amount of training required to become a successful consular officer and the small number of experienced mid-level consular officers, the IG recommended that the department assign each junior officer to a two-year consular tour (thereby discontinuing many Junior Officer Rotational Programs). The IG also recommended that noncareer officers with language qualifications be hired and allowed to hold consular positions on a limited basis.⁹⁸

Neither recommendation has been implemented to date, despite support for the former from the Bureau of Consular Affairs. In fact, noncareer officers are now even less involved with consular work despite the need for additional consular support, thus overloading existing staff further.

More specifically, several programs designed to augment staffing numbers for the consular function have been cut back since September 11. Consular associates (spouses or adult family members of FSOs) were being hired as of the mid-1990s to help consular staff adjudicate visa decisions. In most cases, these consular associates were authorized to adjudicate visas once they completed the full consular training course. The State Department has found that consular associates are no more statistically likely to make mistakes or become corrupt than any other staff members. Yet, as of the end of 2004, consular associates no longer have visa adjudication privileges, though they can have other post-related responsibilities, including prison visits and SAO processing (they can view the name check results, but cannot perform the interviews themselves). The State Department made this change to ensure that visa adjudication rested solely in the hands of career FSOs.

Similarly, foreign service nationals (FSNs) were previously employed at posts for data entry and other clerical responsibilities related to visa applications and could view watch list results and other sensitive information. To limit FSN access to potentially sensitive watch list information, the State Department has restricted FSN access to security-related features, including watch list query results. FSNs can still prepare initial drafts of SAO requests, but a consular officer must now approve the document.

The State Department employs (as of December 2004) 1,081 consular officers, 350 of which joined the department since 2001.⁹⁹ However, given the change in job responsibilities for FSNs and consular associates, demands have increased since September 11 on consular officers. One post reports that two or three officer positions have recently been filled, but that before 2004 there were several vacancies. Despite these

⁹⁸ US Department of State IG, *Review of Nonimmigrant Visa Issuance* (see n. 60).

⁹⁹ McGlinchey, “Congress Moves to Add 600 Consular Officers” (see n. 53).

staffing problems, consular officers were directed to “implement the new interview requirements using existing resources” and not to “use overtime to deal with additional workload requirements.”¹⁰⁰ This problem has recently lessened; ninety-three new consular positions were added in FY2004, and additional hires are planned for FY2005. However, consular officers fear these additions may not be sufficient to handle the workload, particularly during the high-traffic summer months, and some posts continue to require junior officers to spend extra time on “the line” throughout the work week.

Training

Improved training is another way to make the staff more productive and efficient, the process more efficient, and decisions more robust. Better training can also identify and prevent security gaps in consular officer screening techniques. In its post-September 11 review of training procedures, the State Department found that consular officers frequently did not have adequate native language or local culture training. Nor did they have sufficient interview training to identify potential security risks.¹⁰¹ The twenty-six-day Basic Consular Course (ConGen) used to devote seven days to NIV training, but only four hours to training on identifying fraudulent and counterfeit visas. A new one-hour session with security officers was added in 2002.¹⁰² In 2003 the overall training course was lengthened by five days, with added focus given to visa security, counterterrorism awareness, and analytic interview techniques. It now also includes a half-day program on counterterrorism. Training was also increased for ambassadors, deputy chiefs of mission, and principal officers on their supervisory roles for visa processing.

¹⁰⁰ US Department of State, “Outgoing Telegram, Border Security-Waiver of Personal Appearance for Nonimmigrant Visa Applicants—Revision to the Regulations,” May 2003, in *America at Risk: Closing the Security Gap*, Jim Turner et. al., Democratic Members of the House Select Committee on Homeland Security, February 2004.

¹⁰¹ US Department of State IG, *Review of Nonimmigrant Visa Issuance* (see n. 60).

¹⁰² Jessica Vaughan, *Shortcuts to Immigration: The ‘Temporary’ Visa Program is Broken*, Center for Immigration Studies, January 2003.

However, consular officials who are already in the field are not benefiting from this additional training. It is understandably difficult, particularly given limited resources, for the State Department to train individuals stationed at posts abroad. Instead, these officers mainly receive on-the-job training.¹⁰³ One consular officer at a high-volume post reported receiving “a brief presentation by two FBI agents who knew little about immigration law and were unable to give much useful advice,” though he cautioned that programs may have improved since he was last trained.

Section 428 of the Homeland Security Act authorized DHS to establish homeland security training for State Department officers.¹⁰⁴ DHS claims that it has implemented “informal” training programs via the interactions with on-post visa security officers (VSOs), though VSOs are only present in Saudi Arabia. DHS has also been developing a formal training program in conjunction with the ICE Office of Training since September 2004.¹⁰⁵ (The plan was mentioned again in congressional testimony in March 2005.)¹⁰⁶ The intention appears to be for VSOs to undergo formal training and to receive additional training in order to pass on the knowledge they have gained to consular officers. This, in effect, tacks on a “train the trainers” component to the VSO training regime. In the interim, the VSU has addressed graduating classes from the Basic Consular Training Program and has also made presentations at State Department regional conferences.

Accountability

Since the mid-1990s, consular officers have been held increasingly accountable for their decisions. The Foreign Relations Authorization Act

¹⁰³ This is particularly disconcerting because at the time the OIG report was completed, some officers who had not previously completed a consular tour were assigned to one-person consular sections. US Department of State IG, *Review of Nonimmigrant Visa Issuance* (see n. 60).

¹⁰⁴ DHS IG, *DHS Activities to Implement Section 428* (see n. 84).

¹⁰⁵ C. Stewart Verdery, Jr., *Creating Secure Borders and Open Doors: A Review of DHS-State Collaboration on US Visa Policy*, House Government Reform Committee, September 9, 2004, <http://reform.house.gov/UploadedFiles/DHS%20-%20Verdery%20Testimony.pdf>.

¹⁰⁶ Dezenski and Walters, *Strengthening Enforcement and Border Security* (see n. 86).

for FY1994 and 1995 requires consular officials to certify their use of watch lists that contain information about the excludability of noncitizens. A consular officer's failure to follow procedures can negatively affect his or her performance review and cause an accountability review board to convene.¹⁰⁷ Officials report that consular officers have become more cautious as a result of these procedures. Consular officers have paid even greater attention to this visa liability rule since September 11. Additionally, the State Department created a Vulnerability Assessment Unit to analyze consular data, systems, and procedures. This unit has a permanent staff set up to scroll consular data trends for vulnerabilities in the visa issuance process and spot instances of carelessness, consular malfeasance, and internal corruption.¹⁰⁸

Technology has also made officers more accountable, as name check results and the individual reviewing them are recorded in automated audit trails. Officers must electronically record why each visa was approved or denied. A consular officer cannot digitally approve a visa application until the computer registers that the computer screen has scrolled to the very bottom, displaying all name check results. These new requirements were not without their predictable frustrations. When the system was first implemented, officers sometimes were unable to use the name check information to correctly adjudicate the visa application. Furthermore, when the databases were in the process of being consolidated, hits of common names, without birth dates or other common identifiers, were more common than busy consular officers had expected. This led to frequent requests for additional security checks on persons who should otherwise have been approved. These problems have largely been resolved as the data systems have improved and consular officers have become more familiar and comfortable with them.

Section 428 of the Homeland Security Act gives DHS the lead role in setting performance standards and evaluating consular officers. The text

of the MOU dilutes that responsibility so that DHS “*may* develop performance standards” (our emphasis), but is not required to do so. As a result of the MOU, DHS views its role as that of an “auditor” of the State Department’s own evaluation practices. As a result, it has declined to influence performance standards so far, in part because it lacks a “sophisticated understanding of basic consular officer training, of how consular officers currently are evaluated, and of operating practices and skill sets at multiple posts.”¹⁰⁹ It plans to rely on the VSOs as well as on sending staff from the Visa Security Unit to consular training to help develop the performance standards in FY2005. However, as only one country is currently staffed with VSOs, and DHS only intends to place VSOs in five additional countries by the end of the year (at best), it seems that the FY2005 deadline for performance standards is unlikely to be met.

Management

Consular management practices have also evolved since September 11. The management systems at consular posts and embassies reflect the unique balancing act between security concerns and facilitation of travel. For ambassadors in particular, there is pressure to implement policies that facilitate the travel of a foreign country’s citizens to the United States. Visa processing is often considered to be a top foreign policy issue between foreign governments and the United States and is seen as a symbol of the state of the relationship between the governments. With the shift in US policy toward more security-conscious visa procedures and the increase in post-September 11 frustration of consular officers about the lack of clear guidance on visa processing and security referrals,¹¹⁰ consular management has become a much more difficult but important task. Managers now have more oversight over visa adjudication and must spot check a certain number of visa issuances.

To help facilitate this process, the Bureau of Consular Affairs developed Consular Management Assistance Teams (CMATs) in February 2003, which visit, assess, and guide posts on consular

¹⁰⁷ *US Department of State Authorization Act*, 140 Public Law 103-236, 103rd Cong., 1st sess.

¹⁰⁸ Joe Morten, *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives*, House Judiciary Committee, May 18, 2004, <http://www.state.gov/m/ds/rls/rm/32567.htm>.

¹⁰⁹ Dezenski and Walters, *Strengthening Enforcement and Border Security* (see n. 86).

¹¹⁰ General Accounting Office, *Border Security: Visa Process* (see n. 8).

management practices.¹¹¹ The teams conduct operational reviews with a particular focus on management controls, resource allocation, and the implementation of standard operating procedures (SOPs). They also provide informal guidance and advice. Established on an ad hoc basis and led by active duty or recently retired senior consular officers, these teams have visited sixty-five posts since the program's inception. Sufficient information to evaluate the effectiveness of CMATs in improving management practices was unavailable for this report. However, DHS intends to add representatives to the CMAT teams in order to better understand and evaluate officer training.

Recommendations

Staffing at consular posts remains a critical issue. Many of the post-September 11 decisions regarding staff were made without deliberate eye to securing the visa process in the long term. Overworked officers and ad hoc and haphazard training programs may actually make visas less secure.

The following recommendations can improve the human resource aspects of the visa process:

Fully and Appropriately Staff All Posts. It is not clear that career FSOs on short-term assignment to the consular section are better at adjudicating visas than properly trained, managed, and monitored consular associates or any other person who spends extensive time with the visa function. Thus:

- The State Department should create a two-year consular rotation for junior consular officers in order to develop institutional memory and encourage specialization in the consular function. Under this extended rotation, foreign service officers should be given additional responsibilities and be offered incentives to become career consular officers.

- As long as noncareer consular staff is vetted for security and closely monitored, the State Department should reinstitute programs that reintegrate them into the visa adjudication process—albeit with much greater levels of supervision and security scrutiny.¹¹²

Return to the State Department Oversight for Training and Evaluation, Particularly on the Job. While consular training for new officers has improved dramatically, on-the-job training for current officers has been slow, and new performance evaluation standards have not been developed. A large part of this inertia is due to the fact that Section 428 gives DHS these authorities, but DHS has yet to wield them. Considering DHS plans for VSOs—which are for very limited deployment—it is disconcerting that VSOs should be relied upon for training and evaluation purposes.

The focus on “homeland security training” may also inadvertently deemphasize other key goals of the visa adjudication process. Accordingly, training for consular officials should also emphasize that other categories of inadmissibility are important and require attention as well. For these reasons:

- Congress should amend Section 428 to remove DHS oversight of consular performance evaluations. The State Department is better equipped to handle consular performance evaluations and as a practical matter has continued to do so.
- DHS should evaluate the CBP antiterrorism training that is in the process of being implemented and determine if it is relevant to consular officers. If it is, consular officers should be cross-trained along with CBP officers. If it is not, DHS personnel should limit themselves to the role of “instructors” during the relevant parts of the consular training and to roving

¹¹¹ Janice Jacobs, *Bureau of Consular Affairs Accomplishments in FY2002-2003*, July 15, 2003, authors' copy.

¹¹² This recommendation is limited to US citizens. Foreign service nationals should not have access to sensitive watch list and security information.

retraining visits to posts. Congress should get out of the way of the minutiae of the process by amending Section 428 as appropriate.

- The State Department and DHS should evaluate current training programs to ensure that “homeland security” training adequately emphasizes elements of homeland security *beyond* terrorism prevention.

Given the improvement in State Department training for new officers, the State Department and DHS should focus primarily on training officers on the job at high-fraud, high-volume, and high-terrorist risk posts.

V. BORDER INSPECTIONS

The procedure upon arrival at ports of entry has changed significantly for most visa holders and Visa Waiver Program entrants. This section describes that process in more depth.

A. Inspection Procedures

Whereas consulates only process visa applications, inspectors at the border process passengers under many different classes of admission. Visa-exempt Canadians and Mexicans with border crossing cards alone comprise over 150 million annual border crossings. However, with the exception of more stringent document requirements, entry processes for these travelers have changed little since September 11. In contrast, VWP passengers and visa holders comprised only about 10 percent of the approximately 430 million border crossings in FY2004, but they have been substantially affected by the September 11 attacks.

Border Inspections

Upon arrival, persons with approved visas, VWP travelers, and most other noncitizens undergo name and background checks performed by CBP officers. CBP officers are the new amalgam of former customs, immigration, and agricultural inspectors.¹¹³ To facilitate these checks, CBP officers have access to data from a number of sources. Officers also inspect the passport and visa of the visa holder. Before September 11, a cursory glance often sufficed.

CBP officers now typically inquire about the individual’s citizenship and the length and purpose of stay. Eye contact and demeanor play a role in the inspector’s decision. Those who do not convince the inspector

¹¹³ See Deborah Meyers, *One Face at the Border: Behind the Slogan*, Migration Policy Institute, June 2005.

Trade NAFTA (TN) Visas

Certain types of visas, such as TN visas for persons traveling under the terms of the North America Free Trade Agreement (NAFTA) and L-1s for Canadians, can be adjudicated at the border. Free Trade Officers that adjudicate such claims at the border appear to have less discretion since September 11. Yet, security and terrorism concerns do not seem to have materially affected trade among NAFTA partners.

While these adjudications have remained relatively stable, they now may take upwards of half an hour, double the average time required before September 11, 2001. One reason is that, although all TN border applicants were supposed to undergo security checks before September 11, it did not always happen as a practical matter. There is no longer any leeway with regard to security or background checks.

are sent to secondary inspection, where officers have access to additional resources, including the full Consular Consolidated Database. As of December 31, 2004, visa-holding visitors at the fifty busiest land ports of entry must go to secondary inspection to record their biometric data for the US-VISIT program (see below for more information). By the end of 2005, the US-VISIT program is slated to expand to all land ports of entry.¹¹⁴ Visa holders not required to participate in US-VISIT do not always undergo a name check at the port of entry, nor do Canadian citizens, permanent residents, or other travelers.¹¹⁵

Unlike the visa expiration date, which is determined at the consular office, the duration of a person's stay in the United States is determined at the port of entry. Since the mid-1980s, the length for B-2 tourists

(the majority of all travelers) has been a maximum of six months.¹¹⁶ The policy was established to help reduce the workload on INS for "extension of stay" applications, which made up a substantial proportion of the INS district office workload and were almost always granted. In March 2005 Congress held hearings to consider whether to reduce the maximum stay for B-2 visitors. While some argued that reducing the length of stay for visitors would enhance national security, most believed that this move would have negligible security payoffs at great cost to the tourism industry.¹¹⁷

In the airports of certain countries, including Aruba, the Bahamas, Bermuda, and Canada, full CBP inspection is performed before individuals board their planes. In Ireland, CBP immigration inspection is performed abroad, though customs and agricultural inspections occur upon arrival.¹¹⁸ This preinspection process avoids the disadvantages of in-flight screening and allows CBP to prevent passengers who potentially pose a security risk from arriving in the United States.¹¹⁹

Assessing the effectiveness of border inspections is difficult. One General Accounting Office (GAO) report from August 2003 determined that "inspectors can experience difficulties in verifying the identity of travelers, traveler inspections were not always done consistently and according to policy, and inspectors did not always receive the training

¹¹⁶ INS had proposed regulations to reduce the stay from six months to thirty days in the spring of 2002 but never issued a final rule.

¹¹⁷ Doris Meissner, *The 9/11 Commission Staff Report on Terrorist Travel*, Senate Committee on the Judiciary Subcommittees on Immigration, Border Security and Citizenship, and Terrorism, Technology and Homeland Security, March 14, 2005, http://www.judiciary.senate.gov/testimony.cfm?id=1414&wit_id=4065.

¹¹⁸ Robert Jacksta, *Testimony before the House International Relations Committee Subcommittee on Terrorism Nonproliferation and Human Rights*, House International Relations Committee Subcommittee on Terrorism Nonproliferation and Human Rights, June 16, 2004, http://www.house.gov/international_relations/108/jac061604.htm.

¹¹⁹ The process of negotiating preinspection sites at foreign airports is somewhat controversial because the United States must enter in diplomatic negotiations with host countries and invest a significant amount of resources before preinspection can be set up. Lisa M. Seghetti, Jennifer E. Lake, and William H. Robinson, *Border and Transportation Security: Selected Programs and Policies*, Congressional Research Service, RL32840, March 29, 2005, 7.

¹¹⁴ For more detailed information on US-VISIT, see next section of this report as well as Rey Koslowski, *Real Challenges for Virtual Borders: The Implementation of US-VISIT*, Migration Policy Institute, June 2005.

¹¹⁵ Visa holders are currently not required to go to secondary inspection unless they are participating in US-VISIT. Additionally, government officials informed us that at primary inspection at land borders, some non-US-VISIT travelers only undergo a license plate check. At the discretion of the CBP officer, their passports may be scanned and name checks may be performed. And in one author's personal experience, neither documentation nor a declaration of citizenship was requested at the port of entry.

they needed.” The report also criticized the inefficiency of technology; the lack of equipment standardization; and the lack of time, training, and procedures for the use of intelligence information.¹²⁰ However, because the report was marked for “limited official use,” its details, and efforts made by CBP to resolve these problems, are classified.

Some public information is available, however, about the success of recent CBP efforts to improve border inspections and prevent fraud. CBP officers reportedly continue to have problems identifying fraudulent documents and terrorist indicators.¹²¹ These difficulties are exacerbated by the fact that databases like the Consular Consolidated Database (CCD) and the lost and stolen passport archive of Interpol (the International Criminal Police Organization) are available only at secondary inspection. In addition, sample fraudulent documents exist only in paper form, meaning that primary inspectors do not have much-needed tools at their disposal on the line.¹²²

In part to help improve the process of identifying fraudulent documents, a new unit was added to CBP in January 2005 to help improve the border inspection process. The Fraudulent Document Analysis Unit (FDAU) intercepts fraudulent documents (starting with passports, but eventually including visas) and is charged with identifying and analyzing travel patterns of persons presenting fraudulent documents. Its responsibilities include preparing tactical intelligence information, maintaining statistics of document use/abuse, and developing a database search engine that will allow all information regarding fraudulent document seizures and encounters to be linked and

analyzed.¹²³ CBP is also developing plans to place officers dedicated to fraudulent document inspection at key ports of entry. These officers would coordinate port activities and ensure that all primary line officers are aware of current trends and specific information that may become available regarding the use of fraudulent documents.

US-VISIT and Entry/Exit¹²⁴

Another major addition to the US border inspection regime since September 11 is the US-VISIT program. As of January 2005, over seventeen million foreign visitors have participated in the US-VISIT program.¹²⁵ The program requires individuals to submit a machine-readable travel document, a digital photo, and fingerprints of both index fingers.¹²⁶ Before US-VISIT, or in places where the program is not yet implemented, many passengers (including those with visas) only had their documents inspected in a cursory manner. This was particularly the case at land borders.

Now all Visa Waiver Program visitors must be enrolled in US-VISIT. All visa travelers at air and sea ports of entry and travelers at the fifty busiest land ports of entry are also enrolled in the program, and all other land crossings will be phased in by the end of the year. The main obstacles to enrolling all visa travelers are the technology available at ports of entry, which must be upgraded to operate US-VISIT, and the lack of space and related human resources and other infrastructure.¹²⁷

¹²⁰ General Accounting Office, *Land Border Ports of Entry: Vulnerabilities and Inefficiencies in the Inspections Process*, GAO-03-1084R, August 18, 2003, 2.

¹²¹ In June 2003 a 9/11 Commission staff member showed an immigration inspector a passport with a terrorist indicator from a hijacker she had admitted three years earlier. The inspector could not identify any problem with the document, presumably in part because the information about those indicators had not been declassified. See Janice Kephart, *9/11 Commission Report on Terrorist Travel*, Senate Judiciary Subcommittees on Immigration, Border Security and Citizenship, and Terrorism, Technology and Homeland Security, March 14, 2005, http://www.judiciary.senate.gov/testimony.cfm?id=1414&wit_id=4067.

¹²² *Ibid.*

¹²³ DHS already had a Forensic Document Lab located in Immigration and Customs Enforcement (the interior enforcement arm of the Bureau of Transportation and Security in DHS) to determine whether a document was fraudulent. This lab will continue to perform forensic examinations of questionable documents and provide expert identifications and training related to fraudulent documents. While it is too soon to evaluate the effectiveness of the new Fraudulent Document Analysis Unit, there are likely to be questions regarding the roles of each unit and their placement under different parts of DHS.

¹²⁴ For more on the technological and intelligence aspects of the US-VISIT biometric collection program, see page 97 of this report. See also Koslowski, *Real Challenges for Virtual Borders* (see n. 114).

¹²⁵ Associated Press, “US Fingerprints Foreigners at 50 Land Crossings,” *MSNBC.com*, January 3, 2005, <http://msnbc.msn.com/id/6783020/>.

¹²⁶ *Ibid.*

¹²⁷ Campbell Walker, “Creating a Virtual Border” (see n. 41).

Yet, as of the middle of 2005, no systematic exit system has been implemented at most ports of entry, although Accenture—a company awarded a \$10 billion contract to establish US-VISIT and related technologies—has been piloting exit procedures at thirteen airports.¹²⁸

Before the US-VISIT rollout at land borders on December 29, 2004, visa holders were not required to undergo secondary inspection. As a result, some border officials feared that the infrastructure and staffing at land ports were insufficient to handle the increased traffic into the buildings for secondary inspection, where US-VISIT is performed. However, since only a very small proportion of land border crossers (6.3 million persons in FY2002, or 1.3 percent) carry visas, there have been no major disruptions to traffic flows.

Of course, the wait times in secondary inspection to register for US-VISIT have been substantial.¹²⁹ However, border officials had already been required to expand secondary inspection capacity for the NSEERS program. As long as NSEERS is operating, its registrants (who for the most part will also enroll in US-VISIT) must pull over to secondary inspection upon entering or exiting the United States.

Visa Waiver Program

The Visa Waiver Program (VWP) was identified in the aftermath of the September 11 attacks as a security vulnerability of particular concern. While the September 11 hijackers did not use the VWP, Saudi Arabia (the country of origin for seventeen of the nineteen hijackers) met the criteria to become a VWP country. The country did not have VWP status, however, because of its unwillingness to observe the principle of reciprocity and offer Americans visa-free travel to Saudi Arabia. Additionally, Mounir El Motassadeq, the only man convicted in the

September 11 attacks, was a Moroccan-born German citizen and thus eligible to enter the United States without a visa.¹³⁰

As a result of these vulnerabilities, the VWP program came under attack from several members of Congress. Several senior White House, INS, and FBI officials also supported its elimination. The concern grew into a congressional request for a GAO report on the implications of eliminating the VWP. The report was inconclusive on the national security impact of its cancellation. However, it determined that eliminating the program would likely adversely affect US foreign relations and tourism and that it would stretch State Department resources abroad enormously. The report estimated that the department would incur between \$738 million and \$1.28 billion of additional costs in the year following the program's termination alone.¹³¹ There was an intense nonpublic effort to preserve the VWP, during which State Department officials were able to convince Congress and White House officials that the program was necessary if visa operations were to continue without large new investments in infrastructure, staff, and resources.

As part of the security-oriented changes that ensured the program's continuation, VWP applicants now must participate in the US-VISIT program and present a machine-readable passport.¹³² VWP countries were also expected to be producing biometric passports by October 2004, but that deadline was extended after difficult negotiations between the White House and the Congress until October 26, 2005. Many individuals, including VWP governments, believed that the statute required them to produce “e-passports” with an integrated circuit chip capable of storing the biographic information from the data page, a digitized photograph, and other biometric information by October 2005. However, after it was found that the technology was not

¹²⁸ US Department of Homeland Security, *US-VISIT Frequently Asked Questions*, http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0440.xml.

¹²⁹ See also Koslowski, *Real Challenges for Virtual Borders* (see n. 114).

¹³⁰ His conviction was overturned on appeal in 2004. See “9/11 Suspect's Case Gets Boost,” *CBSNews*, August 11, 2004, <http://www.cbsnews.com/stories/2002/10/22/terror/main526452.shtml>. Most of the attackers from the July 2005 London bombings also had direct access to US borders because they were British citizens and thus could participate in the Visa Waiver Program.

¹³¹ General Accounting Office, *Border Security: Implications of Eliminating the Visa Waiver Program*, GAO-03-38, November 2002.

¹³² Kathleen Campbell Walker, “Creating a Virtual Border” (see n. 41).

ready for VWP countries to produce such documents, DHS recently reinterpreted the statutory requirement to allow VWP countries that produce machine-readable passports with digital photographs to meet the required standard for 2005.¹³³ The revised date for “e-passports” is now set for October 26, 2006.¹³⁴

In addition, DHS has been reviewing the continued eligibility of all VWP countries to continue participation in the program. Previous reviews had led to the removal of Argentina and Uruguay. Italy and Portugal have already received passing grades in the most recent DHS review, which has singled out several countries with a disconcerting number of lost and stolen passports.¹³⁵ DHS has also suspended discussions with other countries interested in joining the program.

Recommendations

Although a number of changes have taken place that improve border inspections at ports of entry, the process for admitting visitors at the border continues to be a security vulnerability. Suggestions for improvement include:

Reconceptualize Borders. The United States must come to think of borders as any place where there is a one-on-one transaction between a prospective traveler and a relevant US official. By thus pushing the “borders” away from the physical border, we show that we understand better a fundamental principle of homeland security: The closer unwanted individuals get to US soil, the more likely they are to be able to enter it. Thus, more robust measures

overseas that control the start of a person’s journey are needed to better protect the homeland.

- Given the risks posed by terrorists traveling to the United States, CBP should expand overseas inspections at airports to as many other countries with direct access to US airports or land borders as possible. Mexico and key EU airport hubs (such as Frankfurt, Brussels, Paris, and London) should receive priority in US negotiations.¹³⁶
- CBP should ensure that all travel documents are at least visually checked and that name checks are performed through the IBIS database on all non-US citizens entering the United States. Because such a requirement could cause backlogs at border entry points, this proposal should be phased in gradually. It should also be continuously tested to see if the benefits to security outweigh inconveniences to travelers.
- DHS must continue to expand its capacity to identify fraudulent documents, both through additional training and expertise at the border and by giving CBP officers timely access to relevant information. Forensic document expertise must become a valued and rewarded career with DHS, and such experts must be available at all times in each major US border crossing. DHS and the State Department—and the FPM program in particular—should also share “best practices” in fraudulent document identification.
- DHS should continue its pilot of exit procedures through the US-VISIT program and use them—for security reasons—to identify visa overstayers and individuals leaving the US. Exit procedures will always be less reliable than those for entry. There are many reasons for that, and some relate to the nature and quality of incentives. Given limited resources, preventing undesirable individuals from entering US territory will always trump expending resources on exit systems, given the latter systems’ more “mundane” administrative purposes. Nevertheless, because terrorist financiers and other supporters of terrorism, as well as terrorists themselves, may try to exit the country following a terrorist attack, exit procedures can prevent their departure or otherwise allow the United States to provide other countries with information regarding their whereabouts.

¹³³ The statute states that passports should contain a biometric identifier that meets international standards. US Department of Homeland Security, *DHS to Require Digital Photos in Passports for Visa Waiver Travelers*, press release, June 15, 2005, <http://www.dhs.gov/dhpublic/display?content=4542>.

¹³⁴ Belgium is the only country that has completed the rollout of an e-passport with a biometric chip and is working on developing USB-based and mobile passport readers. Rudi Veestraeten, *The Belgian e-passport: Part of an Integrated Security Approach*, US House of Representatives Committee on the Judiciary, April 21, 2005, <http://judiciary.house.gov/OversightTestimony.aspx?ID=352>.

¹³⁵ Dezenski and Walters, *Strengthening Enforcement and Border Security* (see n. 86).

¹³⁶ Preinspection from Canadian airports is already in place.

Visa Waivers Serve Important US Interests. The Visa Waiver Program is central to US diplomatic relationships as well as to international business and commercial interests. In a competitive world, treating the citizens of one's allies and economic partners as potential terrorists will exact a cost. That cost is measurable, and over time it will increase as economic partners get into the habit of conducting their business with competitors. Hence there is an urgent need to recognize the shortsightedness of some of the measures put into place so far, invest in better information and rationalized systems, make strategic investments in human resources and physical infrastructure, place much greater emphasis on good intelligence, and begin to project an image to visitors and prospective visitors that conveys a clear message of how much we value them. Therefore:

- The VWP program should be maintained, but with the high level of reassurance that comes from the full cooperation of VWP member countries. Any member country that does not fully cooperate with the sharing of terrorism-related intelligence and related information should be removed from the VWP program. Overseas inspections, if implemented, will greatly help to prevent unwanted individuals from arriving on US soil.
- The criteria for eligibility to participate in the VWP, particularly those that focus on visa denial rates and overstay rates, need augmenting. Available intelligence to identify particular terrorist threats and reasonable cooperation with US authorities on relevant matters should also be used to determine the eligibility of particular countries.
- If a country meets *relevant* criteria (once those are determined), membership negotiations for new VWP participants should begin. The DHS Office of Policy and Planning (or its successor) should be given the resources necessary to vet new countries and review all VWP countries' continuing adherence to VWP program requirements.

B. Staffing and Personnel¹³⁷

The face of the border has changed dramatically since September 11, resulting in unified port management and the presence of new

¹³⁷ This section is not intended to be a detailed overview of CBP's staffing and personnel practices. For a full discussion of these topics, see Meyers, *One Face at the Border* (see n. 113).

technologies and inspectors. Approximately 18,000 border inspectors from US Customs, the Animal and Plant Health Inspection Service (APHIS), and the Immigration and Naturalization Service were combined in the Department of Homeland Security under the One Face at the Border initiative in September 2003. They are now known as Customs and Border Protection (CBP) officers.¹³⁸ CBP officers perform both primary and secondary inspection at ports of entry. Over 2,000 new hires have undergone integrated basic training and now staff the border without having served in one of the legacy agencies.

In addition to being cross-trained in the basics of the three legacy missions in a staged manner, CBP officers are undergoing additional on-the-job training as a result of their new role in US-VISIT. In addition, CBP officers are receiving antiterrorism (AT) training. Given limited resources, the AT training program has been rolling out to land border locations since May 2004 (nearly 6,000 CBP officers and agriculture specialists had received the training through July 2005) and was piloted for air and seaports in Seattle and San Francisco in May 2005.¹³⁹ "Train the trainer" sessions will begin in August 2005.

Finally, CBP has developed training in behavioral analysis as a stand-alone course (the second part of AT training) under the title "Deception Detection and Eliciting Responses." This program, in addition to analyzing the unintended signals sent off by individuals, focuses on cultural awareness and eliciting information from possible terrorist subjects.¹⁴⁰ The program takes three classroom days and is designed as a scenario-based exercise that relies heavily on role playing.

¹³⁸ Not all border officials are included in One Face at the Border. The Border Patrol, whose agents work between ports of entry, is not included in the program and follows a different chain of command than do CBP officers. In addition, the position of CBP agricultural specialist was created as a scientific specialty. Those inspectors do not staff primary lanes and are not law enforcement officers. Rather, they are technical specialists who are responsible for agriculture inspection of passengers and cargo and analysis of agricultural imports.

¹³⁹ US Customs and Border Protection, *Migration Policy Institute Briefing*, March 3, 2005, authors' copy.

¹⁴⁰ Nicole Gaouette, "Gut Instinct Gets Scientific on Border," *Los Angeles Times*, June 26, 2005.

There are concerns that CBP officers today are less experienced in primary passenger inspection (and are making inconsistent decisions), that they continue to lack access to all necessary information, and that former customs inspectors have not been adequately trained in the technical intricacies of immigration law. Immigration law is very detailed, with a body of regulations that is comparable in complexity to that of the Internal Revenue Code. As a result, expertise grows with experience. Yet, such experience is being lost at alarming rates as immigration officers retire or move on and as more former customs inspectors and new CBP hires are staffing primary passenger inspection lanes.¹⁴¹ The fact that the management at CBP largely comes from legacy Customs Service exacerbates the challenge and contributes to the exodus of immigration specialists. In view of the fact that the consular function and its purpose have been relatively stable since September 11, greater DHS-State Department cooperation in the training of CBP officers will assist them in their new immigration-related functions.

Recommendations

Because CBP is an amalgam of three substantively and institutionally distinct agencies, each with its own culture, and because of the large scale of new hiring programs, the integration of its personnel must remain a priority for some time to come. The following initiatives can enhance CBP integration and improve the border inspection process.

CBP and the State Department Should Exchange Good Practices in Training as Part of an Integrated Cross-Training Program. The agencies should coordinate to establish an integrated cross-training program to enable CBP and consular officers to become well versed in analytic interview techniques, the details of US immigration and customs law, and the US-VISIT program requirements. The focus of such cross-training should be visa procedures and document inspection techniques for CBP officers and homeland security/antiterrorism training (based on the VSO program efforts) for consular officers.

Deep Expertise on Immigration Law and Practice Must Be Valued and Expanded. To be effective, CBP management must begin to represent the corps' diverse composition and demonstrate through its hiring, promotions, and training practices that immigration expertise is valued and will be rewarded. The establishment of the CBP officer position has "devalued" the development of specialization, particularly immigration expertise. The effectiveness of the One Face at the Border program should be evaluated on an ongoing basis to ensure that the requisite specific knowledge is on hand at every port of entry and that an "institutional culture" is nurtured that can attend to all functions that CBP must perform.¹⁴²

¹⁴¹ Meyers, *One Face at the Border* (see n. 113).

¹⁴² Meyers made a similar recommendation in *One Face at the Border* (see n. 113).

VI. RETENTION AND REVOCATION OF STATUS

The previous sections have focused on the process to obtain a visa, from the petition to the application at a consular post to admission at a port of entry. This section focuses on retaining, adjusting, or losing immigration status.

Some visa holders have started to encounter problems retaining their legal status as a result of changes since September 11. In some cases, the length of stay (determined at the port of entry) exceeds the visa's date of expiration (determined at consular offices), causing problems when the person attempts to reenter the United States after a brief departure. In other cases, nonimmigrants who used to be able to get their visas reissued within the United States are no longer able to do so. And in still other cases, persons with revoked visas are now deportable from the United States, even if they are not otherwise inadmissible.

A. Visa Revalidation and Reissuance

Effective April 1, 2002, the State Department no longer allows the automatic revalidation of expired visas for nonimmigrants returning from short visits to contiguous territories and adjacent islands.¹⁴³ Previously, nonimmigrant visa holders who traveled outside the United States to Canada, Mexico, or one of several Caribbean islands for less than thirty days could reenter without a new visa by using an unexpired I-94 form (an arrival-departure form used at ports of entry that specifies an individual's duration of legal stay). In such cases, visa holders with an expired visa in their passport could reenter the US so long as they had proof of an approved extension of stay or change of status by INS.

¹⁴³ US Department of State, "Documentation of Nonimmigrants Under the Immigration and Nationality Act, As Amended: Automatic Visa Revalidation," *Federal Register* 68, no. 159 (August 18, 2003): 49351, http://www.usdoj.gov/eoir/vll/fedreg/2002_2003/fr18aug03a.pdf.

The State Department has made two changes in this regard. First, if a person applies for a new visa in a contiguous territory and is denied that visa or is awaiting the results of a security check, they must return to their home countries to obtain a visa or continue to wait for the security check results in the contiguous territory (even if their current status is still valid). Second, the United States no longer allows automatic visa revalidation for nationals from the six countries (Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria) identified as state sponsors of terror (Iraq had been on this list but was removed in late 2004).¹⁴⁴

While these new procedures are intended to close gaps in national security, many revalidation candidates not targeted in the new regulations have been affected by this change in policy nonetheless. For instance, revalidation has become more difficult to obtain for those entering contiguous territories by air because, according to anecdotal reports, some airlines have begun to "lift" the I-94 cards from noncitizens. In other words, these airlines have apparently made it a requirement for nonimmigrant visa holders to give up their I-94 card to board the plane, even though automatic revalidation rules require the I-94 for readmission.¹⁴⁵ There has also been speculation that DHS, which under the MOU with the State Department has responsibility for automatic revalidation, may terminate the program altogether.¹⁴⁶

Other nonimmigrant visa holders can no longer have their visas reissued within the United States. Under the visa reissuance program, nonimmigrants in the C, E, H, I, L, O, and P categories used to be able to get their visas reissued through the State Department in Washington, DC, rather than having to travel to their home countries to get a new visa. The State Department discontinued the visa reissuance program in July 2004 due to the legislative requirement that US visas contain

¹⁴⁴ George Lester, "Change in Automatic Visa Revalidation Creates Risk for Third Country Nationals Traveling to a US Consulate in Canada or Mexico to Apply for a Visa," *Immigration Daily*, March 21, 2002, <http://www.ilw.com/lawyers/articles/2002,0321-Lester.shtml>.

¹⁴⁵ Walsh and Wolfsdorf, "Negotiating Through the Maze" (see n. 49).

¹⁴⁶ *Ibid.*

Fictional Case Study: Visa Reissuances

Assume an Indian doctor is working in a medically underserved area on an H-1B nonimmigrant visa. The visa in his passport has expired, but his H-1B status is still valid for three more years, as USCIS has recently extended his status. He wishes to travel to London to attend a medical conference. In the past, the doctor could have his visa reissued through the State Department in Washington so he wouldn't have to spend extra time in London after his conference to obtain his H-1B visa there. Now he must apply in London for an H-1B visa, wait the (on average) nine days to get an appointment, and wait (on average) another three days for the visa to be issued. In addition, London has discretion to refuse to adjudicate the visa since he doesn't live in England. In that case he would have to return to India to apply for an H-1B visa there.

biometric identifiers, a provision it is implementing using technology that is only available at consulates and embassies overseas.¹⁴⁷ When it published the regulation, the State Department encouraged former visa reissuance beneficiaries to renew their visas either in their home countries or at a US consulate in Mexico and Canada (both of which had some capacity to accept nonimmigrant visa applications from stateside entries).¹⁴⁸ The State Department is currently looking for ways to reinstate this program by providing the biometric technology in the United States, but has not done so to date.

Recommendations

Revalidation and reissuance, when abused, can undermine the integrity of the immigration system. With the improvement of databases and more careful screening at consulates and borders, however, there is no security reason for these processes not to be streamlined with traveler facilitation fully in mind.

Allow Legitimate Revalidation Candidates to Reenter. The restrictions on automatic revalidation should continue for persons from state sponsors of terror and persons undergoing security checks. For the rest, revalidation for the length of stay authorized on I-94s should be honored. Furthermore, the Transportation Security Administration should instruct airlines that collect I-94 forms to stop doing so if there is no security reason for doing it. In the meantime, DHS should study the cost and feasibility of making the information on I-94 forms for non-VWP citizens electronically accessible to border inspectors.

Invest in Reissuance Technology. The end of visa reissuances in the United States is a problem of technology resources, not one of security. Investing in the technology that would allow the reinstatement of reissuances would lead to human resource savings at consular posts abroad and allow consular personnel to focus on new applicants that pose a potentially greater security risk. Specifically, all previously approved C, E, H, I, L, O, and P visa applicants with previously recorded fingerprints should not be required to report in person again unless there has been a change in the available intelligence that has security implications or unless additional information is required. Those who have not had their fingerprints taken previously should be able to do so in specified locations in the United States. This would require equipping these locations—such as certain State Department passport offices across the country—with the requisite technology and training to digitally fingerprint renewal applicants. The fact that these passport offices are likely to have to develop the capacity to take digital fingerprints for US passports gives a dual purpose to this investment in technology and training. Fees for the service would also lighten the cost to the government.¹⁴⁹

¹⁴⁸ US Department of State Public Notice 4747, “Discontinuation of Reissuance of Certain Nonimmigrant Visa Applications in the United States,” *Federal Register* 69, no. 120 (June 23, 2004): 35121.

¹⁴⁹ Ultimately, all documents used for travel to the United States are expected to include biometrics, and the United States is in the process of piloting its own passports with these features.

¹⁴⁷ Jack Chang, “Renewal Rules Change for Some Visa Holders,” *Contra Costa Times*, July 20, 2004.

B. Revocation

The visa revocation process, that is, the process of canceling a visa that has already been issued, has also changed substantially since September 11. Visa revocation, a State Department authority now carried out in close coordination with DHS and other agencies, occurs at the consular level but is frequently enforced by denials of entry at US borders. Visas can also be revoked after a person enters the United States. A number of reasons, including management review and the processing of a negative security advisory opinion (SAO), may lead the State Department to revoke a visa. From December 2003 to March 2004, fifty-six terrorism-related SAOs considered by the Terrorist Screening Center (TSC) resulted in visa revocations.¹⁵⁰

The GAO has published three separate accounts criticizing the visa revocation process. An October 2002 GAO report identified persons with revoked visas on terrorist grounds who may have remained in the United States.¹⁵¹ In June 2003 the GAO studied 240 visa revocations and determined that agencies were not notified of the revocations, names were not added to watch lists, and individuals whose visas were revoked on terrorist-related grounds had successfully entered the country. The GAO recommended a formal written policy for visa revocation, especially because while INS/CBP inspectors could lawfully deny entry at ports to someone whose visa had been revoked, visa revocation alone was not sufficient grounds for removal once the applicant was in the United States.¹⁵² A third GAO study showed that the adding of persons to watch lists and the processing of revocations were still occurring very slowly. Despite some improvements in these areas during the first six months of 2004, including written procedures for revocations and better coordination between the State Department

¹⁵⁰ William Krouse, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, Congressional Research Service, RL32366, October 21, 2004, 22. The TSC is described in more detail in Part VII of this report.

¹⁵¹ General Accounting Office, *Border Security: Visa Process* (see n. 8).

¹⁵² General Accounting Office, *Border Security: New Policies and Procedures are Needed to Fill Gaps in the Visa Revocation Process*, GAO-03-798, June 2003.

and DHS, these procedures were still not fully coordinated as of July 2004. Furthermore, the GAO found that strict timelines for information-sharing are still not adhered to, while legal and policy issues, particularly regarding visa revocation as grounds for removal, still remain.¹⁵³

Finally, Congress stepped in and made visa revocation a deportable offense through the Intelligence Reform and Terrorism Prevention Act of 2004, thus addressing the GAO's major concerns about visa revocation procedures. The new law not only makes it possible to put individuals in removal proceedings simply by revoking their visa, but also limits judicial review to cases in which the visa revocation is the only ground for removal.¹⁵⁴

The visa revocation process now appears to be having an impact at ports of entry. What follows are a few examples from September 2004 to January 2005:

Visa Revocations at Work: Selected Revocations, September 2004 to January 2005¹⁵⁵

On September 28, 2004, in Buffalo, New York, CBP inspectors encountered an Afghani native in a vehicle bearing an Ontario, Canada, license plate. The inspectors determined that the individual had been naturalized in Canada in August 2004 after obtaining refugee status there. During secondary inspection, CBP inspectors found out that in July 2002, the State Department had revoked the individual's US visa for possible

¹⁵³ General Accounting Office, *Border Security: Additional Actions Needed to Eliminate Weaknesses in the Visa Revocation Process*, GAO-04-795, July 2004.

¹⁵⁴ Public Law 108-458, 108th Cong., 2d sess., § 5304. While this statutory provision has received little attention, it makes it possible for the State Department and DHS to coordinate a visa revocation and removal even if there are no other grounds of inadmissibility.

¹⁵⁵ US Department of Homeland Security, *Homeland Security Operations Morning Brief*, September 27, 2004 – January 14, 2005, <http://cryptome.org/hsomb/hsomb.htm>. The briefings state: "This document may contain initial and preliminary reporting which may or may not be accurate or be supported by corroborative information." The specific report for each anecdote is listed.

terrorist connections. Thus, they found him to be inadmissible and returned him to Canada.¹⁵⁶

On October 12, 2004, in Champlain, New York, an Algerian national with Canadian citizenship sought admission in a commercial tractor-trailer bearing Arizona license plates. The CBP officer identified the individual as the subject of a TIPOFF record, a database that identifies persons with possible terrorist affiliations who present a possible threat if they enter the United States. The person was also the subject of a Department of State visa revocation lookout, which indicated that his nonimmigrant visa had been revoked for possible association with terrorism. CBP determined him to be inadmissible, and Immigration and Customs Enforcement (ICE) and the Joint Terrorism Task Force (JTTF) arrived to interview him. He eventually was returned to Canada.¹⁵⁷

On December 7, 2004, a Saudi Arabian native arrived at JFK International airport and requested admission as a nonimmigrant. CBP officers determined that he was a TIPOFF match because he had provided support to terrorists. His visa had been revoked on November 18, 2004, leading to a visa revocation lookout. The individual was also identified as belonging to a violent gang and terrorist organization. He was interviewed by ICE and JTTF, and was subsequently returned to Saudi Arabia.¹⁵⁸

On January 5, 2005, an Israeli national arrived from Lima, Peru, at the Los Angeles airport seeking admission as a visitor for pleasure. Counterterrorism Watch (the FBI's global command center for terrorism prevention operations) officials determined that the individual was in TIPOFF and was a "no-fly" list match, meaning that he was not supposed to be permitted to fly to the United States. Close interagency coordination resulted in the State Department revoking the individual's visa on the spot. As a result of this revocation, the individual was found to not be in possession of proper documents, was processed for an expedited removal, and apparently returned to Peru the same day.¹⁵⁹

Recommendations

Unlike much of the revalidation program, the revocation program appears to have been a weak link in the domestic security chain and required extensive post-September 11 changes. However, the revocation process as defined by the statute is no longer limited to persons inadmissible under the INA and should be refined further. Thus:

Use Revocations Responsibly and Discriminately. The State Department and DHS should continue to look for ways in which visas can be adjudicated more precisely so that revocations are very rare. Meanwhile, DHS must make every effort to locate and remove persons with revoked visas. However, the legislative mandate gives too much discretion to the executive branch to deport visitors. Some fear that visas may eventually be revoked in secrecy without any regard for the criteria for immigrant admissibility. This invites abuse, including racial profiling, discrimination, and the lack of a right of appeal. Thus, Congress should reconsider the lack of judicial review in visa revocation cases and instruct executive agencies not to use their new authority indiscriminately to remove visa holders from the United States outside the legal grounds of inadmissibility.

¹⁵⁶ Ibid., *CBP Morning Report*, September 29, 2004.

¹⁵⁷ Ibid., *BTS Daily Operations Report*, October 12, 2004.

¹⁵⁸ Ibid., *BTS Daily Operations Report*, December 9, 2004.

¹⁵⁹ Ibid., *BTS Daily Operations Report*, January 5, 2005.

VII. VISA SECURITY POLICIES

The previous sections of this report have focused on the “story” of the visa process, from the beginning of the application to the opportunities to maintain or lose status while in the United States. This section focuses on the security of the visa process itself, that is, those intelligence-reliant programs designed to give State Department and DHS officials the capacity to make decisions that enhance homeland security. These programs include database integration, biometric identifiers, and other security checks.

A. Name Checks and Watch List Consolidation

Before September 11, there were at least nine terrorist watch list databases and lookout lists to help intercept and exclude “undesirable” persons from entering the United States. For example, the State Department maintained TIPOFF, a watch list for terrorists, within its broader Consular Lookout and Security System (CLASS). INS used its own system, known as the National Automated Immigration Lookout System II (NAILS II), which included both noncitizens out of immigration status and terrorist-related information. Beginning in 1988, the US Customs Service maintained the Interagency Border Inspection System (IBIS), which allowed the State Department, INS, and Customs to share their watch lists.¹⁶⁰ Understandably, different databases emphasize different information. For example, since the State Department is only interested in foreign nationals, its database does not contain US citizens who may be suspected of terrorist connections.¹⁶¹

While there was not enough intelligence information on most of the September 11 attackers to place them on watch lists, at least two had been identified as known Al Qaeda operatives. These operatives were not intercepted in part because of inefficient information-sharing.

To put the point bluntly, intelligence agencies were unwilling to share information with each other. The lack of coordination among the agencies that controlled the various watch lists was highly criticized immediately after September 11, as was the incompatibility of the technologies used for each of the lists. Watch list sharing was further impeded by cultural differences among the agencies maintaining the lists and civil liberties considerations.

In response to these weaknesses, the administration undertook numerous initiatives to improve terrorist tracking after September 11. The most relevant to visa processing are the creation of the Terrorist Threat Integration Center (TTIC) and the Terrorist Screening Center (TSC). TTIC, which contains classified information and includes the State Department TIPOFF database, is an all-source database on known and suspected terrorists.¹⁶² As of December 2004, TTIC became the National Counterterrorism Center (NCTC), as required by the Intelligence Reform Act. The TSC, which was established by Homeland Security Presidential Directive 6 on September 16, 2003, and is administered by the FBI, is supposed to consolidate the various terrorist watch lists into a single terrorist screening database that immigration officials, law enforcement and intelligence agencies can query. Most of its information is an unclassified but sensitive version of what is maintained in the NCTC and at the FBI.¹⁶³ However, the unclassified version only contains the name of the person and indicates that the person is on the TSC list.¹⁶⁴

The TSC makes its consolidated database available to various agencies, including users of the IBIS system (now operated by DHS) and of the

¹⁶² US Department of Homeland Security Office of Inspector General, *DHS Challenges in Consolidating Terrorist Watch List Information*, OIG-04-31, August 2004.

¹⁶³ The FBI collects domestic terrorism information—defined as information about US persons with no connection to foreign intelligence, counterintelligence, or international terrorism—from US agencies. The NCTC obtains all other terrorist-related information. US Department of Justice Office of the Inspector General, Audit Division, *Review of the Terrorist Screening Center*, Audit Report 05-27, June 2005, <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

¹⁶⁴ Scot Paltrow, “Many Antiterror Recommendations Wither,” *Wall Street Journal*, April 26, 2005, A4.

¹⁶⁰ Krouse, *Terrorist Identification* (see n. 150).

¹⁶¹ *Ibid.*

State Department’s CLASS system. TSC also responds to the State Department Consular Affairs Bureau’s requests for security advisory opinions and has a call center through which CBP and StateDepartment officials can resolve hits more expediently.¹⁶⁵ The TSC and DOS have four fundamental forms of collaborative processes, including (1) visa SAO review, (2) visa revocation review, (3) nominations to CLASS used by visa consular officers, and (4) screening agreement implementation with certain foreign governments.¹⁶⁶

The establishment of the TSC has experienced many delays. For instance, former Representative Jim Turner was informed by the administration that the terrorist watch lists had not been consolidated by December 1, 2003, the date by which the Justice Department had promised the TSC would be operational.¹⁶⁸ Turner reported that less than 20 percent of records were available in the TSC system on that date and that federal agencies were not using the TSC as intended, including for checks of passenger flight lists. The DHS inspector general also criticized DHS in August 2004 for failing to oversee interagency data consolidation activities and for failing to create a strategic plan for watch list consolidation, problems DHS attributes to a lack of resources and appropriate infrastructure.¹⁶⁹

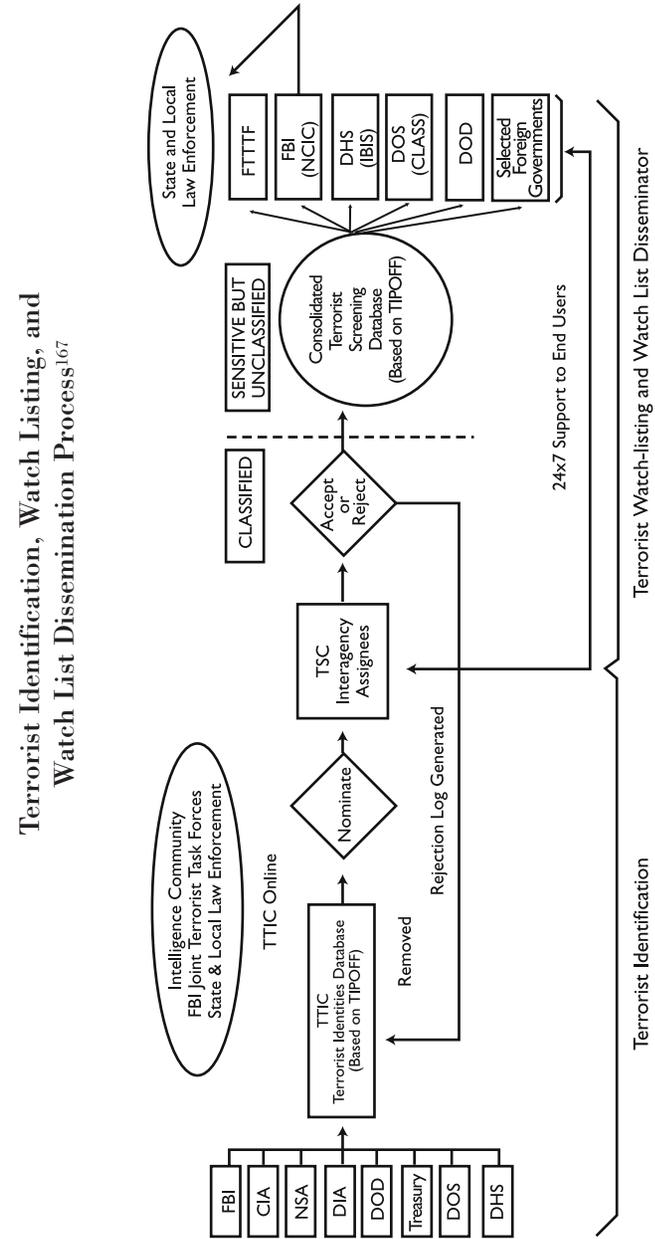
Officials describe the TSC as a funnel for information. Thus, it can only be as complete as the databases that feed into it. The NCTC, the TSC source for data on foreign terrorists, interfaces successfully with the TSC. However, there remain questions about whether paper files may still exist (particularly at the FBI) that have yet to be entered into NCTC. If that is the case, both databases would be incomplete. Furthermore, duplication still exists between persons who have the same name, and some categories of persons and types of information have not been placed on the list because of rules about classified

¹⁶⁵ Krouse, *Terrorist Identification*, 22 (see n. 150).

¹⁶⁶ Donna A. Bucella, *Passport Information Sharing with Department of State*, Senate Committee on Homeland Security and Governmental Affairs, June 29, 2005, <http://hsgac.senate.gov/files/BucellaTestimony.pdf>.

¹⁶⁸ Chris Stroh, “Congressman Blasts Bush on Terrorist Screening Efforts,” *GovExec.com*, January 13, 2004, <http://www.govexec.com/dailyfed/0104/011304c1.htm>.

¹⁶⁹ DHS IG, *DHS Challenges* (see n. 162).



Source: Adapted by the Congressional Research Service from a Department of State presentation.

¹⁶⁷ Note that TTIC has since become the NCTC. Adapted from Krouse, *Terrorist Identification*, 18 (see n. 150).

information and agency restrictions on what sorts of information they can keep or share.¹⁷⁰ A recent Justice Department inspector general report noted that while the terrorist watch lists have been consolidated, individual records were missing or inaccurate, including the name of a known terrorist from the State Department's List of Terrorists under Executive Order 13224.¹⁷¹ The current watch list also cannot effectively handle the use of biometric data, though the TSC plans to determine biometric capabilities and needs in FY05.

Additionally, the TSC is still largely a phone-based operation. To resolve a hit, border officials must call the twenty-four-hour TSC call center; as the TSC database only indicates if the person is on an agency list, but not what can be done about it. In contrast, consular officers prepare an SAO (which is not processed as quickly as a phone call, but is required for terrorism-related name check hits). While State Department headquarters did not confirm it, TSC officials indicate that consular officers sometimes phone the TSC directly to resolve a hit.

The TSC is not expected to be capable of updating agency systems or allowing online queries of the TSC database until the completion of Phase Three of the TSC implementation, which originally was scheduled for December 2004 but has not yet been completed. (The first two phases established the TSC and developed the first version of the database.) The TSC still plans to develop real-time connectivity with participating agency systems; however, most of these systems cannot accommodate this type of connection and will need to be upgraded. The first segment of Phase Three—real-time connectivity with the FBI's National Crime Information Center (NCIC)—is expected to be completed by the end of FY2005.

In the interim, the State Department has attempted to engineer interagency data consolidation for consular purposes. NCIC records were added to the CLASS database system beginning in June 2002.¹⁷² The State Department is also considering technology that will allow a

screen capture of the CLASS database to appear in the Consolidated Consular Database (CCD), the agency's central repository for visa applications, digital photographs, and in some cases, fingerprints. It is also trying to put into place a new nonimmigrant visa system (NIV 4.03) to automatically search the CCD for hits (CLASS and IDENT, for example, already interface with the NIV system). Finally, the State Department is also in negotiations with numerous other agencies, including DHS and the TSC, to achieve "connectivity and internal distribution of [security-related] data." It took until December 2004 for the FBI name check unit to achieve full connectivity to the CCD.¹⁷³

However, even when the watch list becomes fully consolidated and available to all agencies, the same data may not be accessible at all posts and ports of entry. For example, CLASS has the most advanced algorithm system for name identification, a system that is not currently accessible through NAILS II or IBIS. NAILS II and IBIS both use a technology called Soundex for name recognition, a technology patented nearly 100 years ago.¹⁷⁴ This is clearly a security vulnerability. Accurate name recognition is crucial because of the variety of Middle Eastern and South Asian naming conventions as well as the use of the Muslim lunar calendar to record birth dates in some cases.¹⁷⁵ In addition, press accounts claim that the IBIS system used for primary inspection at ports of entry has spotty system availability and that it has been inaccessible at certain ports of entry for extensive periods.¹⁷⁶ Thus, while vast improvements have been made to the integration of watch lists, the effort to develop and implement a truly unified terrorist watch list is still lagging. The DHS inspector general recommends that because of the lack of centralized coordination among the State Department, FBI, CIA, and the Justice Department, DHS should establish an interagency task force to oversee information-sharing activities more thoroughly.¹⁷⁷

¹⁷³ Government Accountability Office, *Border Security: Streamlined Visas Mantis Program has Lowered Burden on Foreign Science Students and Scholars, but Further Refinements Needed*, GAO-05-198, February 2005.

¹⁷⁴ Krouse, *Terrorist Identification*, 30 (see n. 150).

¹⁷⁵ Paden and Singer, "America Slams the Door" (see n. 36).

¹⁷⁶ Alfonso Chardy, "Airport Terrorist Database Often Offline: Official Says Backups Are in Place to Prevent Disaster," *Miami Herald*, March 8, 2002, B-1.

¹⁷⁷ DHS IG, *DHS Challenges* (see n. 162).

¹⁷⁰ Paltrow, "Many Antiterror Recommendations Wither," (see n. 164).

¹⁷¹ US Department of Justice Office of the Inspector General, Audit Division, *Review of the Terrorist Screening Center* (see n. 163).

¹⁷² Walker, "The Tale of the CONDOR" (see n. 63).

Recommendations

With homeland security at the pinnacle of the policy and political agenda, the accuracy, ready accessibility to, and timeliness of name check information is essential to a secure visa issuance process and border inspection regime. But the usefulness of this information depends both on its accessibility and its accuracy. A single integrated system that includes all appropriate biometric information and is available “on-demand” to all authorized officers from each authorized agency is an essential prerequisite to security. To date the FBI lags far behind the other agencies in this area. The creation of the National Counterterrorism Center (NCTC) with a national intelligence director provides an opportunity to accomplish this.

Make the TSC Electronically Accessible. In keeping with the recommendations of the Department of Justice inspector general, the TSC database should be updated to ensure the completeness and accuracy of its records, and consular officials and CBP officers should have full access to the online unclassified database. This database should also contain sufficient information (such as birth dates) to allow consular officers to resolve hits themselves. In the interim, the State Department should consider revising departmental guidance so that consular officers can call the TSC to resolve relevant hits, particularly if there appears to be a case of mistaken identity.

Make Today’s Systems Truly Interoperable and Develop the Next Generation of Systems. Immense amounts of time and money have been expended in the coordination of watch lists and data collection and reporting systems, all in an effort to make key decisions more timely and secure. But some systems still must be made interoperable, and coordination between the major intelligence agencies needs to be improved.

- The intelligence community should invest in new technologies for name recognition. The NCIC records in the CLASS system should also be filtered so that offenses that do not make someone inadmissible, like minor shoplifting arrests, are at least annotated so that consular officers and border inspectors know the seriousness of the charge.

- Congress should hold oversight hearings in which the major intelligence agencies are queried about the quality and reliability of their watch lists, the compatibility between them, and the presence of any remaining paper files that have yet to be entered into the necessary databases and systems. Moreover, intelligence agencies should be asked to commit and adhere to a timetable for doing so, and agency managers should be held accountable for missing deadlines.
- The new national intelligence director should establish an interagency process for the development of new systems in order to guarantee that such systems will be secure and compatible. Every effort should be made to adopt a single technology for all US government watch lists and name checks, and basic technological compatibility with close allies should also be taken into account.

B. Biometric Identifiers

Biometric technologies use automated methods to recognize a person based on physiological characteristics such as fingerprints, irises, hand geometry, or facial structure. Numerous biometric programs are used to help secure the visa and international travel processes, including the US-VISIT program, fingerprinting databases, and facial recognition programs.

US-VISIT

The US-VISIT program is the main DHS effort to collect and use digitally recorded biometric data for visitors to the United States. As a tool for enhancing security further within US-VISIT, Visa Waiver Program participants will eventually be required to present biometric passports since they are not required to have a visa prior to traveling to the United States.¹⁷⁸ The biometrics stored in the passport would then be checked against the biometrics the passenger provides at the port of entry through the US-VISIT program.

¹⁷⁸ While technological obstacles have prevented VWP countries from implementing biometric passports, VWP participants are still subject to the US-VISIT program and must present machine-readable passports. See page 73 of this report for more detail on US-VISIT. See also Koslowski, *Real Challenges for Virtual Borders* (see n. 114).

EU/US Cooperation on Passports and Visa Policy

The United States insists that other countries cooperate with its campaign against terrorism, and it uses access to the United States as both a carrot and a stick in its effort to obtain their cooperation. The European Union (EU), which has been the focus of much of this effort, has struggled to meet many of the technological and standardization requirements such cooperation requires. This sidebar briefly covers EU/US relationships on passports and visa policy and lays out a number of policy questions that have yet to be resolved.

Major Policy Initiatives

Since September 11 the EU has made a number of security-related changes to its visa issuance and passport security programs that make these programs more sensitive to US security concerns. These include the symbolic renaming in 2004 of the European Commission's Directorate for Justice and Home Affairs, which includes the "migration" portfolio, as the Directorate for Justice, Freedom, and Security (a change reflecting the 1997 Amsterdam Treaty); the development of an EU-wide Visa Information System; the continuing focus on the need to enhance external border security, including the establishment of dedicated border agencies; and the phasing in of biometrics and advanced technological features on its visas and passports.¹⁷⁹ However, many of these policy areas, including the enhancement of passports and the actual issuance of visas, are primarily the domain of Member States rather than the European Commission. Thus, the attention paid to security concerns differs widely among EU Member States.

The EU and the United States, nonetheless, have a number of cooperative initiatives that aim to enhance the security of the visa function, many of

¹⁷⁹ Making progress on these initiatives were key items in the Hague Program, the EU agenda for the further development of policies on migration, drugs, police and customs cooperation, organized crime and terrorism issues from 2005 to 2010. Council of the European Union, *Presidency Conclusions*, Brussels European Council, November 4-5, 2005, http://www.eu2004.nl/default.asp?CMS_NOCOOKIES=YES&CMS_TCP=tcpAsset&id=4B51772AD49F4E0899013BB9FC5E85BCX1X52629X05; David Aaron et al., "The Post 9/11 Partnership: Transatlantic Cooperation against Terrorism," The Atlantic Council, December 2004.

which have proved to be controversial. A list of the most important of these initiatives follows.

Information-Sharing and Passenger Name Records: The EU and the United States reached data-sharing agreements in 2001 and 2002 to help improve US visa issuances and border inspections. The agreements allow law enforcement authorities to share both "strategic" and "personal" information.¹⁸⁰ However, the EU continues to express concern that US standards do not meet the EU's requirements for data protection, while the US would like the EU to accept (generally inferior) US data privacy standards as adequate for routine data transfers.

A hard-found "win" for the United States was the European Commission's agreement in May 2004 to provide US authorities with passenger name records within fifteen minutes of a flight's departure. However, this agreement has been widely unpopular in the EU and has been challenged by the European Parliament, which has lodged a case in the EU Court of Justice on the grounds that the accord compromises data privacy rights.¹⁸¹

Treatment of Visa Waiver Program Countries: The EU contends that all states that participate in the Schengen system of free movement of people should have the Visa Waiver Program (VWP) extended to them. Although the EU has a common visa policy, the United States does not consider blocs of countries for the Visa Waiver Program, and no countries have been added to the VWP since September 11, 2001.¹⁸² One senior foreign official has likened the US treatment of countries in the Visa Waiver Program as akin to the EU having different visa policies for different states in the United States.¹⁸³ Some European observers have suggested that the EU should invoke the principle of reciprocity or otherwise require visas of all Americans until the United States has a uniform policy for all EU countries—ideas that are more personal musings

¹⁸⁰ Kristin Archick, *US-EU Cooperation Against Terrorism*, Congressional Research Service, RS22030, January 19, 2005.

¹⁸¹ *Ibid.*

¹⁸² US Department of State, *US, EU Discuss Transportation, Border Security*, press release, April 26, 2003, <http://usinfo.state.gov>.

¹⁸³ This comparison is asymmetrical because EU Member States remain independent nations under the EU umbrella, but US states do not have such sovereignty.

than serious policy proposals. Nonetheless, the Europeans' argument for treating all Schengen countries equally has merit and is likely to receive the attention it deserves once the United States gains confidence in the systems it has in place and in the technology and policy pipeline. Greater EU-US cooperation on visa policy, particularly on how third countries enter or are removed from visa-free entry lists, will also make some of the policy disagreements moot.

Biometric Passports: Beginning October 26, 2004, all visa waiver travelers to the United States were to present a machine-readable passport with biometric identifiers—presumably a fingerprint.¹⁸⁴ However, Congress extended that deadline to October 26, 2005, to give EU countries an additional year to resolve the technical issues necessary for them to comply with the law.¹⁸⁵ The EU has adopted its own standards for biometric passports. An EU regulation requires passports to have an electronic facial photograph by mid-2006, and biometric “fingerprints in interoperable formats” by the end of 2007.¹⁸⁶ While the US deadline for biometric passports has not been officially extended, DHS, in recognition of the technical and financial challenges created by the requirement, has recently announced that machine-readable passports with digital photographs by the October 26 deadline will be sufficient to meet that standard.¹⁸⁷

Machine Readable Passports: Though the biometric identifier deadline was extended to 2005, all Visa Waiver Country passengers to the United States have been required to present machine-readable passports since October 2004.¹⁸⁸ However, in many cases passengers, particularly elderly ones, had not yet obtained a new passport because their old one had not yet expired. Originally, the United States had

¹⁸⁴ Public Law 107-173, 107th Cong., 2d sess., § 303.

¹⁸⁵ Public Law 108-299, 108th Cong., 2d sess.

¹⁸⁶ European Council, *Council regulation on standards for security features and biometrics in passports and travel documents issued by Member States*, Council Regulation No. 2252/2004, December 13, 2004.

¹⁸⁷ EU officials acknowledge that not all European Visa Waiver Program countries will be ready for the US-imposed October 26, 2005, deadline to begin issuing passports with fingerprints, although they believe that the EU will be ready to meet its own deadlines. See “President Signs Biometric Passport Deadline Extension,” *Interpreter Releases* 81, no. 32 (August 16, 2004): 1081-82.

considered creating a one-time waiver for persons with old passports as long as the person paid a \$60 entrance fee. The US pulled back from the fee requirement following intense EU lobbying, but nevertheless implemented the waiver. In June 2005 the Department of Homeland Security began enforcing the requirement that VWP travelers present a machine-readable passport to enter the United States without a visa.¹⁸⁹

Armed Air Marshals: In December 2003 the US required airlines to deploy air marshals on some transatlantic flights. European countries diverge on their policies regarding air marshals, and some countries oppose their use. In April 2004 the United States pledged to look into alternative measures to armed air marshals.

Looking Ahead

The EU and the United States are deeply engaged in a high-level dialogue on a range of issues related to border and transportation security, including biometric identifiers, a database for lost and stolen passports, and the use of sky marshals. As these policies continue to evolve and as the two sides struggle to not “surprise each other” and “be frank... about ideas in the early phases of their gestation,”¹⁹⁰ there are a number of rather obvious issues that must be addressed for both parties to engage in a mutually productive relationship.

The United States must continue to insist on robust antiterrorism efforts, but must also “stop dancing alone” in this regard. It is in the long-term security and other interests of the United States to work cooperatively with and recognize and respect EU interests and sensitivities. The terrorist attacks on London will make the EU and key EU Member States recognize the urgency and benefits of closer cooperation. In fact, the July 5, 2005, Evian meeting of the big EU-5 (dubbed the G-5) is a step in that direction. While that meeting took place before the attacks in London, the five

¹⁸⁸ 303 Public Law 107-173, 107th Cong., 2d sess.

¹⁸⁹ US Department of State Office of the Spokesman, *Machine-Readable Passport Requirements to Take Effect at US Borders on June 26, 2005*, press release, May 12, 2005, <http://www.state.gov/r/pa/prs/ps/2005/46138.htm>.

¹⁹⁰ US Department of State, *US, EU Discuss Transportation, Border Security* (see n. 182).

countries agreed to move in the direction of using biometrics for all identity documents, including drivers' licenses.¹⁹¹

All Schengen countries should be given special consideration for the US Visa Waiver Program as long as they meet the relevant and (ideally) dynamically adjusted criteria for membership. Considering the growing EU sense of vulnerability to terrorism—and as the United States makes progress in developing more robust intelligence and security systems and gains confidence in these systems—any current differences should become moot.

The United States must accommodate EU concerns that US data information-sharing and privacy policies are insufficient. As the US response to the September 11 attacks moves to a more mature state, European concerns will gain in relevance because the United States must also become more responsible—and more responsive to US civil society concerns—about privacy and civil liberties.

The EU must develop its own biometric identifiers in its passports and visas. It must do so as much for its own domestic security as for that of the United States. It is therefore smart, both politically and in terms of husbanding resources, to make the technologies and systems that each side develops fully compatible.

The ups and downs of the EU-US negotiations on security highlight the importance of “playing well” with each other on issues of mutual concern. Both sides can surely do better in that regard.

Fingerprinting and Facial Recognition

The main component of the US-VISIT program is the collection, comparison, and verification of the identity of persons using

¹⁹¹ The G-5 also indicated they would consider a US-VISIT-like program for Europe, paying greater attention to authenticating identification by placing greater emphasis on forensics, giving more systematic attention to document forgery, and studying further the pooling of consular resources. Embassy of France in the United States, *Meeting of the Ministers* (see n. 32)

biometric information. However, the coordination and implementation of watch lists containing biometric identifiers is riddled with obstacles, just as was the attempt to integrate terrorist watch lists in general. Before September 11 there were two major fingerprint-based watch lists, both operated by the Justice Department: the Integrated Automated Fingerprint Identification System (IAFIS) operated by the FBI, with 10-finger rolled prints, and the Automated Biometric Fingerprint Identification System (IDENT), operated by INS, with two flat prints. CBP officers and consular officials use the IDENT system, while many criminal databases are linked to IAFIS.¹⁹²

These watch lists give rise to two major concerns. First, the use of watch lists relying on fingerprints requires a substantial time commitment, given that only about one in 1,000 IDENT scans result in a hit. Because consular officers are behind bulletproof screens, they cannot aid persons in the fingerprinting process. GAO observed one woman who took ten minutes to follow the instructions of the consular officer directing the fingerprinting process.¹⁹³ Before 2005 the IDENT fingerprint system was easily disrupted by the angle of the finger and was only partially compatible with DHS software. Additionally, it can take IDENT up to half an hour to process an average applicant (the information is sent to DHS officials in Washington and is processed back to posts through the CCD). It takes about twenty-four hours to process applicants with a hit. Those applicants are often given a refusal under INA § 221(g),¹⁹⁴ which requires that consular officers not issue visas if there is reason to believe from the documents on hand that the applicant is ineligible for a visa under the law. The applicant would then most likely be asked to return the next day for a decision.

¹⁹² A rolled fingerprint captures the full finger image as it is rolled from one edge of the fingernail to the other. A flat fingerprint captures the image of only a single finger placed on the surface. Dr. Martin Herman, *Ensuring the Security of America's Borders through the Use of Biometric Passports and other Identity Documents*, House of Representatives Committee on Homeland Security Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity, June 22, 2005, http://www.nist.gov/testimony/2005/mherman_house_hs_biometrics_6-22.html.

¹⁹³ Government Accountability Office, *Border Security: State Department Rollout of Biometric Visas on Schedule, but Guidance Is Lacking*, GAO-04-1001, September 2004.

¹⁹⁴ *Immigration and Nationality Act*, 8 USC 1201(g).

Second, IDENT and IAFIS do not contain the same data. Only a small portion of IAFIS data is entered into IDENT, most of which is related to persons who have previously been apprehended for trying to enter the country illegally (immigration violators).¹⁹⁵ While searching the entire forty million fingerprints in the IAFIS database for each visa applicant may be unwieldy, the FBI has still not entered all the relevant entries into IDENT. So for the State Department to get a more thorough view of an individual, they must manually take ten rolled fingerprints (on paper at most posts, though a few in Mexico and El Salvador have “slap scanners” to perform the intake electronically) and send them to the FBI for processing. Even so, the rolled fingerprints are sometimes unreliable (particularly in paper form) and may be electronically unreadable.

Given these limitations, Congress in 2002 mandated the design and creation of an “interoperable data system” with “current and immediate access to information.”¹⁹⁶ However, progress has been slow. The Department of Justice inspector general reported in December 2004 that the Justice Department, DHS, and the State Department had serious disagreements regarding the required elements of an interoperable fingerprinting system (flat or rolled, two or ten prints). The biometric visa and US-VISIT programs use two flat prints, whereas the FBI data systems use ten rolled prints. Ten prints are thought to be more accurate for identification purposes, but take longer to obtain.

The Department of Justice has been employing an interim solution since 2003—a partially integrated fingerprinting system with workstations deploying IDENT and IAFIS together in real time. It is in place at all Border Patrol workstations and at a number of ports of entry. However, full deployment is not expected until 2008. Moreover, the programs do not interface well and produce frequent false

“hits.”¹⁹⁷ In any event, over 99 percent of US-VISIT participants are only checked against the IDENT system, as opposed to the more comprehensive IAFIS watch list.¹⁹⁸

On July 13, 2005, DHS Secretary Michael Chertoff announced that the department would require a one-time, ten-fingerprint capture upon enrollment (it is unclear if this will occur at consulates for visa applicants), followed by two-print verification during later entries.¹⁹⁹ However, the effectiveness of this verification system is uncertain, given concerns that the two-print and ten-print systems have difficulties interfacing.

Meanwhile, the State Department has been piloting biometric identifiers other than fingerprints. Furthermore, the department has established the capacity to capture electronic records of nonimmigrant visas—an essential step toward e-visas, itself essential to guaranteeing the integrity of visa decisions by making available through secure electronic means the record of that decision to all subsequent inspection points.²⁰⁰ Finally, the State Department has been piloting biometric facial recognition programs.²⁰¹ The program, which will presumably be used for the Visa Waiver Program beginning in October 2005, compares the picture submitted for the visa or passport against similar applicants for matches.

These programs are already in place at posts with high rates of fraud, and as of mid-2005 they were awaiting final approval from Assistant Secretary of Consular Affairs Maura Harty to go forward at posts that require Visas Condor security checks. Future plans may include taking electronic pictures at posts, requiring multiple photographs at different angles, and installing photograph systems at ports of entry to provide an additional check. Iris scans may eventually also be possible while the photographs are taken.

¹⁹⁵ Krouse, *Terrorist Identification*, 40 (see n. 150).

¹⁹⁶ Public Law 107-173, 107th Cong., 2d sess.

¹⁹⁷ US Department of Justice Office of Inspector General, *Status of IDENT/IAFIS Integration*, No. 1-2003-005, February 2004, 11.

¹⁹⁸ US Department of Justice Office of Inspector General, *Follow-up Review of the Status of IDENT/IAFIS Integration*, No. 1-2005-001, December 2004, ix.

¹⁹⁹ DHS, *Secretary Michael Chertoff Announces Six Point Agenda* (see n. 85).

²⁰⁰ This development would greatly reduce the possibility of tampering with a US visa or other forms of visa forgery.

²⁰¹ Krouse, *Terrorist Identification*, 41 (see n. 150).

In 2004 the International Civil Aviation Organization (ICAO) selected facial recognition, not fingerprinting, as the globally interoperable biometric for machine-assisted identity confirmation for visas, passports, and identity cards.²⁰² However, facial recognition has substantial technical shortcomings. One respondent piloting the use of facial recognition technology claimed that in some cases the photographs of babies were causing hits with persons on the terrorist watch lists. The British government suspended testing of biometric identification cards as a result of problems with its iris-scanning and facial recognition technologies.²⁰³ These errors occur because as persons age, the false rejection error rate increases from 5 percent (little time elapsed between the stored image and the image upon entrance) to 15 percent (thirty-eight months elapsed between images). The ICAO recommends that the pictures must be reshot at least every ten years to be effective,²⁰⁴ although the above-mentioned study indicates that waiting for such an interval has immense false rejection error rate implications. Furthermore, since photographs are not being taken onsite, it would be possible to replace or otherwise tamper with them.

Despite these technological issues, the State Department believes that facial recognition technology is adequately advanced to be a useful security check in addition to the programs that are already operational. While the State Department admits facial recognition technology is less accurate than other checks, the department claims it has provided enough hits to be useful.

Recommendations

While much progress has been made on biometric identification technology since September 11, the system still faces important technological challenges and discrepancies. Thus:

System Compatibility Must Be Improved. Where technology is concerned, systems adopted in haste prevent or delay interoperability and give rise to compatibility problems, unacceptable false hit rates, and the waste of public funds. Over time, such failures undermine public confidence in the public sector to deliver the security that government officials regularly promise in a timely, responsible, and efficient manner. The requirement is thus both simple and daunting: Biometric systems should be developed with quality and long-term efficiency in mind rather than speed. In particular:

- The State Department, DHS and the FBI must agree on a truly compatible fingerprinting system and adopt standards that can be used both among US agencies and in conjunction with the development of biometric passports from other countries. DHS's announcement requiring the use of a ten-fingerprint system is a positive first step, but the agency must ensure that the ten- and two-print systems interface with sufficiently low false hit rates. The Congress must use its oversight powers to make it clear that it will no longer tolerate delays—or waste of public funds—in this regard.
- While facial recognition technology might warrant further testing, particularly for use at consular posts, the State Department should be given a very short leash in this regard. The technology should be abandoned if it cannot meet a sufficient level of accuracy or if it cannot be easily integrated in the near future with the plans for iris scan technology. Consular officers in the field should be consulted for their input on the technology.
- The GAO should be asked to issue a report to Congress within the next twelve months comparing biometric technologies and their levels of accuracy.

C. Security Checks

The design of security checks substantially changed after September 11. Many of the initial measures, including extensive border checks and a twenty-day waiting period for males aged sixteen to forty-five from many Asian and Middle Eastern countries, were phased out with

²⁰² International Civil Aviation Organization (ICAO) Facilitation Division, "Face Recognition for Identity Confirmation: Inspection of Travel Documents," Twelfth Session of the Facilitation Division, March 22 to April 4, 2004, http://www.icao.int/icao/en/atb/fal/fal12/documentation/fal12wp063_en.pdf.

²⁰³ Alorie Gilbert, "US Moves Closer to e-passports," *New York Times*, October 25, 2004.

²⁰⁴ ICAO, "Face Recognition" (see n. 202).

improvements to the security advisory opinion (SAO) system. About 2.5 percent of visa applicants now undergo SAO screening.²⁰⁵

Increased Frequency of Security Advisory Opinions

The increased reliance on SAO checks, triggered in large part by name checks, the information collected on the new DS-157 form, and changes to SAO procedures, caused extensive visa delays in 2002. Before September 11, 2001, most of the major SAOs were on a timed clock and could be approved if Washington did not respond within a certain period of time.²⁰⁶ The post-September 11 requirement that each clearing agency respond specifically on each case was responsible for part of the backlogs.

As noted, name check hits for minor infractions have also become a headache for consular officers. As databases become more integrated, consular posts are becoming inundated with hits, including those from the NCIC for minor criminal convictions such as shoplifting. If a hit cannot be resolved with the information available (including the birth date of the applicant), the officer must take a full set of fingerprints for further processing. In one case, an observer reported that an applicant in Tokyo returned to the interview window three separate times before all ten fingerprints were taken (performed in the old-fashioned paper and ink style). He was then asked a series of questions about an arrest record in Japan—for a student bar fight forty years ago that had already been disclosed on his application.²⁰⁷ The consular officer responded that if all went well, the applicant would get his visa in a month, despite the fact that the applicant was in his sixties and had received two previous visas in the same category.

To help expedite the process, the State Department is spending over \$1 million on the SAO Improvement Project (SAO IP), which will

eliminate telegrams, allow real-time data-sharing, and eliminate transmission errors.²⁰⁸ The program, which would include electronic delivery of SAOs to the FBI and other agencies, is expected to be fully implemented by fall 2005. Most agencies have already implemented electronic data transmissions, which has greatly improved SAO response time.

DHS has also provided four staff members from its Visa Security Unit (VSU) to assist in resolving problem cases.²⁰⁹ The VSU employees work closely with other agencies, particularly on long-term pending cases requiring an FBI response. The SAO backlog, which the VSU began working on in October 2004, has dropped from 2,000 cases to around 200. VSU employees are also reviewing all cases from state sponsor of terror countries to ensure that the applicant does not pose a risk to national security under Section 306 of EBSVERA. No applicant can enter the United States from a state sponsor of terror country unless it is determined that the subject does not pose a threat to the United States.

Visas Condor

Another source of visa backlogs has been the creation of a new SAO category known as the Visas Condor, which focuses on potential applicants who were born or have resided in countries of security concern to the United States. Condor was the product of a White House process that took place in October 2001. Government sources note that it was initially envisioned less as a security clearance than as an intelligence-gathering tool for certain persons of interest. Begun in January 2002, Condor replaced the twenty-day hold period on some visa applicants.²¹⁰ The specific criteria of the Visas Condor check are classified, but most applicants from the state sponsors of terror and most male applicants

²⁰⁵ Darwood Staeben, "US Power: Strength and Security Across Borders," conference remarks, the Center for Strategic and International Studies and the Graduate Management Admissions Council, Washington DC, May 3, 2005, http://csis.org/events/050503_borders.pdf.

²⁰⁶ The length of time apparently varied according to the check.

²⁰⁷ Daniel Kowalski, "Memo from Tokyo," e-mail to Stephen Yale Loehr, September 10, 2004.

²⁰⁸ Tien-Li Loke Walsh, "The Technology Alert List, Visas Mantis and Export Control: Frequently Asked Questions," in American Immigration Lawyers Association, *Immigration & Nationality Law Handbook*, 2005 ed. (2004): 12.

²⁰⁹ Dezenski and Walters, *Strengthening Enforcement and Border Security* (see n. 86).

²¹⁰ Walsh and Wolfsdorf, "Negotiating Through the Maze" (see n. 49).

between the ages of sixteen and forty-five from certain other countries are presumed to undergo Condor checks.²¹¹

Delays were immediate, as none of the agencies involved in the checks were prepared for the volume of requests that followed. A particular problem was that the FBI did not have an electronic name check system until June 2002. Nor were its files electronically available for checks by other departments. Consular officers have also been confused about the standards for initiating Visas Condor checks. One official acknowledged in December 2002, “I don’t know what the standards are. Have no idea.”²¹²

Processing delays have been reduced as the scope of the check has been lessened and the CIA has ended its participation in the check. Even so, the program’s effectiveness is unclear. One appropriately placed government official noted that no person had been precluded from entering the United States because of a Visas Condor check, even though over 130,000 people had gone through such a check through April 2004.

Visas Mantis

Another major security check, the Visas Mantis check, predated September 11 but became much more frequently used in its aftermath. Based on the Technology Alert List (TAL) of sensitive technologies, persons from the state sponsors of terrorism countries as well as other countries of interest must undergo this check to ensure their eligibility to work, study, or exchange information in critical fields. The TAL is all-encompassing, spanning fields from pharmacology to urban

planning, in an attempt to capture any technology that may have “dual-use” for terrorism purposes.

Due to what many considered vague requirements and guidance, many consular officers requested Visa Mantis SAOs on all applicants unless they were absolutely certain the applicant would not be using a TAL technology. The result was that many more Mantis SAOs were filed after September 11 than in previous years.²¹³ These claims could not be processed in a timely fashion with the existing resources and infrastructure. In addition, many Mantis cables were delayed or lost, in large part due to cable formatting errors and other cases rejected by the FBI database. Since the State Department had assured the FBI that it would wait indefinitely for an FBI response before affirming the visa, delays grew exponentially. The White House considered establishing a task force on the TAL and intended to create an interagency panel to process Mantis requests in a timely manner, but these measures apparently never got off the ground.

Following a 2003 GAO report criticizing the wait time of Mantis checks and the lack of guidance for and feedback from consular officers, Visas Mantis processing requirements were simplified.²¹⁴ A classified cable from October 1, 2003, appears to have significantly revised the Mantis guidance.²¹⁵ Beginning in summer 2004, the Consular Affairs and Nonproliferation Bureaus of the State Department have primary responsibility over Mantis checks, with input from other interested agencies (including the CIA). While the FBI continues to collect Mantis SAOs, they have effectively stopped processing the checks.²¹⁶

²¹¹ NAFSA: Association of International Educators sources indicate that the following countries are subject to Visas Condor checks: Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. See NAFSA: Association of International Educators, “Visa Delays Due to Security Advisory Opinion Requests,” May 21, 2004, <http://www.nafsa.org/content/ProfessionalandEducationalResources/ImmigrationAdvisingResources/pa2004c.htm>.

²¹² Andrew Lipkind, “Still No Standards for Security Review of Visa Applicants,” *Andrew Lipkind News Archive*, January 26, 2003, http://www.lipkind.com/news/news_index.html.

²¹³ Janice Jacobs, *The Visa Approval Backlog and Its Impact on American Business*, Committee on House Small Business, June 4, 2004, http://travel.state.gov/visa/laws/testimony/testimony_1452.html.

²¹⁴ General Accounting Office, *Improvements Needed to Reduce Time Taken to Adjudicate Visas for Science Students and Scholars*, GAO 04-371, February 2004.

²¹⁵ Walsh and Wolfsdorf, “Negotiating Through the Maze” (see n. 49).

²¹⁶ Government Accountability Office, *Border Security: Streamlined Visas Mantis Program* (see n. 173).

Most recently, the State Department has extended the time that many visa recipients can remain in the United States before renewing security clearances. As a result, Visas Mantis clearances are now valid for up to four years for students and up to two years for working scientists who underwent the check.²¹⁷ This initiative, combined with the State Department effort to assist consular officers in identifying when to use the Visas Mantis SAO, had reduced the average Mantis processing time to fifteen days by November 2004.²¹⁸ The State Department aims to reduce the processing period to ten working days.

The same GAO report also gave a positive nod to State Department efforts to improve staffing, to improve electronic tracking of Mantis, and to extend the length of time visas are valid for citizens of certain countries. For example, visas for Chinese tourists and businesspeople were extended from multiple entry/six months to multiple entry/twelve months.²¹⁹ However, the GAO found that consular officers still need additional guidance, and other agencies are not sufficiently connected to the State Department's electronic tracking system. The report also confirmed that the FBI has only been able to fully interface with the electronic CCD database since December 2004.

Recommendations

The security check process is probably the most improved of the visa security initiatives and may thus be making the greatest contribution to homeland security. Moreover, initial delays in processing SAOs have been reduced over time. However, the response times of agencies for certain checks continue to cause delays, and individuals still experience security check delays without knowing why.²²⁰

²¹⁷ US Department of State Office of the Spokesman, *Extension of the Validity for Science Related Interagency Visa Clearances*, press release, February 11, 2005, <http://www.state.gov/r/pa/prs/ps/2005/42212.htm>.

²¹⁸ Government Accountability Office, *Border Security: Streamlined Visas Mantis Program* (see n. 173).

²¹⁹ The extension was reciprocal. US Department of State, *US Extends Visa Validity for Chinese Tourist and Business Travelers*, press release, January 12, 2005, <http://www.state.gov/r/pa/prs/ps/2005/40818.htm>.

²²⁰ This precludes obvious cases like for Visas Mantis and Condor.

Clearly, there are factors at work with Visas Condor that only those directly involved with the Condor process can evaluate. For example, there is an asymmetrical standard with regard to the risk involved. Even if only one intended terrorist is stopped as a result of the Condor process, it may be worth the time and energy involved. More importantly, it is nearly impossible to measure the deterrence effects of the check. But at some point, given the limited resources available for the myriad of systems and activities that impact national security, it may be more cost-effective to replace Visas Condor or reallocate the resources involved.

Allow the Applicant to Help His/Her Case. There is a security-related incentive to keep certain procedures secret, even if it leads to delays. Nevertheless, applicants and government officials also have an incentive to share information that helps expedite and improve the accuracy of visa adjudications.

- Applicants should routinely be informed that their application is undergoing a security advisory opinion if they request information about delays in processing their application, particularly so that they can provide additional information that might resolve discrepancies in a report.
- If an agency (USCIS, the State Department, CBP) has already performed a check (whether it is a simple name check or an SAO) in conjunction with an individual's case, the results of that check should be made available to other agencies that require that information, as should any extenuating circumstances or information revealed from the check.²²¹ One way to accomplish this would be to "tag" the results of security checks to the biometric identifiers at each stage of the process so that when a person registers with US-VISIT or applies for an immigration benefit, the results of the security checks will automatically appear on the computer screen.

Security Checks Must Be Made As Productive As Possible.

If existing security checks are not productive in identifying persons

²²¹ This does not preclude the second agency from performing another check, but it should help facilitate the inspection or visa adjudication process. Ideally, the system would automatically highlight important information or information received since the last check was run.

of security interest, they should be discontinued. In this spirit, an investigative body (the GAO or an agency inspector general) should evaluate the Visas Condor security check to assess its effectiveness in identifying potential terrorists. Countries should be removed from the check if no useful information is being provided, and the State Department should amend the check's criteria or even cancel the program if other checks can accomplish the same aims more efficiently or effectively.

VIII. CONCLUSIONS AND RECOMMENDATIONS

The processing of visas—the policies that shape it, the procedures that regulate it, the data systems that support it, and the training and diligence of the officials that make visa decisions—are a nation's first line of defense against terrorists. While visas are not the only line of defense in a country that also makes enormous investments in intelligence and in border inspections and controls, it is nonetheless one of the easiest and most effective areas where improvements can translate directly into greater homeland security. In the initial transaction between a US official and an individual seeking a visa to enter the United States, a number of important security checks can be performed with a diligence (and, relatively speaking, within a time frame) that is not available to US officials at later points in the process.

To put it differently, if “homeland security” is conceptualized as a series of concentric circles, applying for a visa is the outermost circle, while seeking entry into the United States by appearing at a port of entry is one of the innermost circles. In this conceptualization—which officials at times refer to as a “layered approach to security”—the greatest protection is afforded when each “circle” is organically connected to and integrated into all others (hence the emphasis on “real-time” intelligence and data systems interoperability). However, there is little doubt that the closer one gets to the US border, the greater the likelihood of gaining entry.

This report has painted a picture of the immigration-related components of the homeland security process, but has focused primarily on the visa function. Its companion reports focus on other parts of the overall process: the US-VISIT and One Face at the Border initiatives. This report is thus one piece of that overall effort.

Albeit in piecemeal fashion and with inevitable fits and starts, extensive changes have been made to the visa process since September 11.

Far greater attention is now given to the identity of visa applicants, applicants undergo much more extensive screening and security checks, and their applications are processed by a much better-trained and much better-equipped Bureau of Consular Affairs. Stakeholders both inside and outside the government believe that many of the bureau's security-related efforts have been successful in creating a more secure visa process and note that, as of late, visa facilitation improvements are also gaining ground.

However, many weaknesses remain, as the whole may not yet be equal to, let alone greater than, the sum of its parts. Getting to the point where the whole is greater than the sum of its parts requires that each component of the process through which one gains access to the United States is developed successfully and in a coordinated manner. Parts II-VII of this report discussed many of those details and offered recommendations about improving each component of the overall process. Generally, some of the components of the visa process such as SAO processing have been substantially improved. Others, however, like biometric identifiers, lag behind. Even when one considers the complexity of the challenges to reforming the visa process, however, and the short time since September 11, there is no reason for the overarching effort to be allowed to flag or the bar of expectations to be set lower.

Additionally, while the improvement of visa policy and processes is well under way, the effort to improve public perceptions abroad about these processes is less well developed. Because visa operations are very technical in nature, many of the changes that have been instituted are poorly understood abroad and continue to contribute to the perception that the United States is turning inward and is no longer as open to immigrants and visitors as it once was. Only a concerted effort to change these perceptions will allow the visa program—and the enormous economic, cultural, political, and foreign policy benefits it brings—to return to pre-September 11 levels.

The greatest and most urgent *security* concern revealed in this report is that the interfacing of various databases and systems is still incomplete. Such “interoperability” has been a principal aim of the post-September

11 reform process, and the lack of compatible electronic systems seems to be one of the major sticking points. Meanwhile, the quality and amount of data available in each watch list (including petty crimes such as shoplifting) may be producing false or otherwise irrelevant hits for the officials who use them. These data issues are of the utmost importance and should be addressed in a thorough and expedited manner.

This concluding chapter targets the overall picture for visa policy. While recommendations have been placed throughout this report, a number of themes deserve highlighting. These themes are discussed in two parts: (1) procedures and operations, and (2) reforms to the process as a whole.

A. Summary of Ideas for Reforming Visa Procedures and Operations

Agency Cooperation and Coordination: The agencies involved in visa policy must learn to coordinate their decisions better and communicate them to the field more efficiently. The relevant divisions of DHS and the State Department must divide responsibility for the visa processes, operations, and policies not mandated by statute more naturally. They must also engage the FBI more fully whenever possible. In particular, relevant agencies must work together to develop more compatible systems, combining accurate, up-to-date, and relevant information that allows frontline officials to identify—and block—potential terrorists while admitting legitimate travelers. If that proves difficult, an authority higher than any one of these agencies such as the Congress or the White House must impose greater coordination. Organic interdepartmental engagement remains the most crucial piece to ensuring the security of the visa process, whether the goal is the development of a consolidated and coordinated interagency fingerprinting system or the creation of a truly integrated national terrorist watch list.

Such cooperation and coordination should not be limited to each agency's headquarters. It must also be evident in and define the day-to-day relationships of the relevant officials at consular posts

and at the border. Strengthened connections between Washington, DC, and local posts in terms of improved and more consistent guidance, the dissemination of good practices, and the expansion of staffing can help thicken and deepen the networks that already exist and lead to more consistent and predictable outcomes.

Facilitation and Efficiency: Duplication of effort does not necessarily add to security, although building redundancies at key points in the process, when done strategically, can do so. The visa process should be facilitated for travelers with a legitimate purpose and vetted identity and background information and particularly for those who have already been approved and undergone security checks in the recent past. Moreover, duplicative practices between USCIS, consulates, and border officials should be streamlined unless it can be demonstrated that duplication has real security gains. Within “due diligence” and electronic security parameters, the results of a name or security check should be electronically available to each agency upon entering the name (or visa number at the border) into a search engine.

Administrative Reform—Transparency, Evaluation, and Data:

The administrative components of issuing visas, while seemingly mundane, are key to the development of a stronger, more coherent process. Currently, external stakeholders have little input into or access to the development of policies, and information is frequently unavailable or outdated. The State Department should publish better guidelines for visa applications and update them regularly, clarify the questions on application forms, and identify common misconceptions and mistakes made throughout the application process. It should also make its statistics more timely and accessible. The report of the Visa Office for each fiscal year should be made publicly available sooner than is now the case (say, within a year of the end of each fiscal year). Furthermore, USCIS and the State Department should make available their approval and denial rates for petitions and visa issuances in each visa category, both across the board and by each consular post or USCIS office.

Training and Investment in Personnel: The training components for visa processing must also be improved. Many consular and CBP officers

currently feel unprepared to accurately enforce immigration and customs law and are often uncertain about the processes for security checks, SAOs, the identification of forgeries and fraudulent documents, and border admissions. Among the unresolved issues are the continued uncertainty between DHS and the State Department over which agency has responsibility for training and the lack of capacity within the State Department to provide new training for seasoned officers at their posts (especially those who are unable to leave due to the lack of replacements). Furthermore, the State Department and DHS must devise training programs that go beyond the introductory sessions like ConGen and provide continuous on-the-job training that assists officials with adapting to changing international circumstances and emergency situations.

B. The Key: Reforming the Visa Issuance Process

The recommendations above have addressed what some consider the small but important picture: visa procedures, operations, technological capacities, and the statutes that define them. Missing is a discussion about the full purpose of visa policy. Three additional issues, while not directly a part of the visa process itself, are troubling. First, there is no mechanism by which to evaluate major security breaches in the visa process or those processes as a whole. Second, the visa category system is complicated and hard to adjudicate. And third, there is uncertainty about the quality, adequacy, and timeliness of intelligence that helps support visa adjudication decisions.

The Lack of Vision for US Visa Policy

An underlying theme of this report has been that the various pieces of the visa process must complement each other better so as to create a more coherent whole. The cause of the weaknesses discussed lies in the lack of organic interagency coordination, and addressing this is the first step to a solution. Although coordination between the State Department and DHS is improving, NAFSA: Association of International Educators laments that “[t]here has not yet been a formal, joint statement by the Department of State and the Department of Homeland Security that

clearly articulates visa policy—i.e., that would turn ‘Secure Borders, Open Doors’ into operational policy.”²²² To do so would require an interagency effort that identifies clearly the values that issuing visas should promote, articulates a vision for the program, and develops a strategic plan that implements that vision. Such a plan would not only be useful to help reduce visa delays, but, if properly conceptualized and successfully implemented, would define how security and visa facilitation can actually reinforce each other.

Defining Visa Policy

The first part of a strategic plan should clearly define visa policy and the goals of the visa program. This report conceptualizes visa policy more broadly than the current DHS-State Department MOU does. By undertaking a strategic planning process, the authors of this report believe that the different agencies will also be forced to think through their roles in achieving better visa issuance outcomes. This is the piece that appears to be missing between the statute and the MOU.

There are many ways that a broader statement about visa policy could be articulated. It could be done through statute, especially since the issuing of visas is a highly regulated process that is subject to statutory requirements. It could be done through the articulation of policy statements by the relevant agencies, which would then form the basis for a new MOU. Or, it could be done by convening a group of agency representatives and stakeholders to discuss and define the proper goals and objectives as well as the overall mission of a visa policy for the United States that promotes crucial, long-term national interests.

We are understandably partial to the last option. The purpose of such a group would be to identify and recommend ways to meaningfully strengthen our security while being truly mindful of our other interests. In the absence of good intelligence, reliable data, and robust human and electronic systems, a move toward greater facilitation risks making America more vulnerable. But lengthy time delays for consular visa

appointments and SAO processing do not make the United States more secure. In fact, by increasing our institutional capacity to identify low-risk visitors and facilitating their travel through timely reviews of their visa applications, there is greater opportunity to spend more time and energy on high-risk travelers.

Perhaps counterintuitively, then, a more systematic push towards smarter investments to stop terrorists at the visa issuance point would not only enhance security but also facilitate the pursuit of economic and other interests. Better screening mechanisms for all should be equally successful at weeding out terrorists (through risk analysis and accurate intelligence) *and* other undesirable individuals, including criminals. This would truly make the United States both safer and more secure. It is only then that agency assignments, relationships between them, and resources could be optimally allocated.

DHS has already acknowledged this basic point and is in the process of developing a strategic plan for Customs and Border Protection. The plan acknowledges many of the elements that any strategic plan for the broader visa process should incorporate, including a “person-centric” focus. It foresees that at each step of the visa process, detailed information about an applicant will be made available to each agency, including information from each visa application submitted, the reasons behind each approval or denial, and the results of any security checks. The information would be linked through the biometric information collected at each stage of the application process and should allow both DHS and State Department personnel to better identify high risk travelers (terrorists, criminals, and others) while also enabling them to move toward a more service-oriented organizational culture.

Once a vision for the visa program is agreed upon, the two agencies should engage in the process of instituting a joint strategic plan.²²³ It is our sense that the State Department is the agency with the best capacity to manage visa policy. Some of the new responsibilities

²²² This does not preclude the second agency from performing another check, but it should help facilitate the inspection or visa adjudication process. Ideally, the system would automatically highlight important information or information received since the last check was run.

²²³ The joint USAID-State Department Strategic Plan for 2004-2009 represents an excellent example of an interagency strategic plan that could be emulated by DHS and the State Department.

assigned to DHS might remain in that agency. The assignment of homeland security training for consular officers, for instance, is a task that fits squarely within DHS's mandate, and, one might argue, its core competences—but only if the agency can provide specialized information and skills that the State Department cannot. Otherwise, visa responsibilities not directly related to homeland security—including general consular training, the creation of consular officer performance standards, and the reform of visa policy—should be returned by statute to the State Department.

Making Visa Policy Operational

Once a strategic plan has been agreed upon, implementing it is the next step. This will require more than just guidance and instructions; it will require a shift in organizational culture.²²⁴ For example, the mantra of the intelligence community favors secrecy over even thoughtful transparency. This carries over into the interagency process, where there is precious little information-sharing. However, today's environment requires close cooperation and continuous communication among intelligence agencies in the name of security—a change in attitude that cannot and will not occur overnight. When change occurs, it will require constant reinforcement from the top and careful nurturing of new habits across the board.

A final element of a well-functioning visa system is having robust evaluation mechanisms, whereby individual programs are assessed for their effectiveness, especially when program responsibilities cut across agencies. These evaluations are so important that they deserve separate attention and are discussed below.

The Lack of Interagency Evaluation Mechanisms

It is only when key personnel understand and become invested in the fundamental principles of a visa policy that a well-designed operations system can be successfully implemented. And for that to happen, visa

operations must ultimately match the strategic goals that are set for the program. Assessing whether they do is an elementary requirement for any system regardless of complexity. The nature of visa policy complicates the development of coherent evaluation mechanisms for two reasons. First, there are no permanent mechanisms to evaluate the roles of each agency in individual breaches in national security. Second, it is more difficult to study the visa process as a whole.

While the State Department has its own evaluation mechanisms, there appears to be no interagency evaluation apparatus that studies how a person who presents a national security risk was able to enter the country. Currently, a consular officer who issues a visa to a person on a watch list is subject by statute to a negative performance evaluation.²²⁵ However, the Citizenship and Immigration Services adjudicator who may have approved the underlying visa petition and the Customs and Border Protection inspector who admitted the visa holder at the port of entry are not similarly held accountable. And, while a State Department accountability review board is convened for any incident involving the admission of a person who is “a participant in a terrorist act causing serious loss of life or property in the United States,” no similar process is initiated when a person is admitted with suspected terrorist ties before a terrorist attack.²²⁶

To rectify that lapse, Congress should require the establishment of a permanent interagency incident review board to review all government employees directly involved in the admission of a person who attempts to commit or commits a terrorist act. The board should be convened by the secretaries of state and homeland security (in consultation with any relevant intelligence agencies). It should be charged with evaluating the entire incident—from intelligence to the visa issuance to the crossing at the border—and making recommendations based on its evaluation. It should also have the power to impose disciplinary action on all parties found to be responsible for the improper admission.

²²⁴ DHS might look again at the successes and failures of the initiation of the One Face at the Border program as a relevant example of a shift in institutional culture. See Meyers, *One Face at the Border* (see n. 113)

²²⁵ 140 Public Law 103-236, 103rd Cong., 1st sess., US Department of State Authorization.

²²⁶ *Ibid.*

Additionally, the current evaluation mechanism for visa policy as a whole is spread among a number of agencies that cannot impose rapid change. Reviews by the Government Accountability Office are useful, but are only undertaken when specifically requested by Congress. No comprehensive report on national visa processes has been issued since October 2002.²²⁷ And reports by inspector general offices only deal with issues within a single agency. Both types of evaluations serve an important purpose, but in an area as time sensitive and cross-disciplinary as visa policy, vertical (within an agency) and horizontal (across agencies) evaluations are needed on a regular basis. This problem is not just limited to the visa program. All border security practices would benefit from similar evaluations. Only then can the more systemic problems be identified and corrected and the lessons shared across the board.

In an evaluation process there is value both to the inside information held by government officials and to the opinion of stakeholders and other outside evaluators. A permanent solution involving these parties might be for Congress²²⁸ to establish a committee modeled on the Departmental Advisory Committee on Commercial Operations of the Customs and Border Protection and Related Functions (COAC).²²⁹ A “Committee on Immigration and Related Functions of the Departments of State and Homeland Security” (CIRF) could be chaired by the secretaries of state and homeland

security, and membership would be selected in the same manner as in COAC.²³⁰ A permanent working group should focus on visa issues, with membership including representatives from universities, business, trade organizations, security experts, and other outside stakeholders. Given the threats to our national and economic security that a poorly managed immigration system poses and the fact that there is no government body devoted solely to these issues, a permanent interagency consultative process is a much-needed innovation.

The Visa Classification System Should Be Streamlined and the Application Process Made Easier

While many flaws remain in the visa adjudication system, external factors will continue to inhibit the development of a secure and efficient visa process. One example deserves particular attention: the complexity of the visa classification system.

The complexity of visa classifications as a whole remains an important obstacle to a coherent, sensible, and secure visa program. There is a virtual “alphabet soup” of visa categories, each with its own internal logic and accompanying rules, some of which overlap. The system is further complicated by the fact that while adjudicating officers have decision-making discretion, they are not always sufficiently aware of the extent and limits of this discretion. The resources (training in particular) required for DHS and State Department employees to disentangle the complexities of the system could be much better spent on the real goals of the visa process—secure facilitation. Statutory reform will be required to address this problem. However, until such reform occurs, electronic forms that automatically determine an applicant’s visa classification and tailor questions to each applicant might help ease the pressure on consular officers (and help facilitate the preparation of SAOs, among other advantages).²³¹

²²⁷ General Accounting Office, *Border Security: Visa Process* (see n. 8).

²²⁸ If Congress is unwilling to create an advisory committee on immigration and related functions under the Federal Advisory Committee Act, the departments might jointly create one as an administrative exercise.

²²⁹ This committee, which is chaired by the secretary of the treasury and the secretary of homeland security, “provides a critical and unique forum for distinguished representatives of diverse industry sectors to present their views and advice directly to senior Treasury, DHS, and customs officials” on a regular basis. COAC submits an annual report to Congress on its operations and has a number of sub-working groups on particular topics of importance to the chairs. See Department of Homeland Security, Notice of Committee Renewal and Request for Applications for Membership, Departmental Advisory Committee on Commercial Operations of the Customs and Border Protection and Related Functions (COAC), 69 FR 50393, August 16, 2004, <http://uscis.gov/lpBin/lpext.dll/inserts/dhsfr/dhsfr-5362/dhsfr-5478/dhsfr-5725?fn=templates&fn=document>

²³⁰ The committee includes outside representatives from the trade and transportation community selected jointly by the chairs, representing interests across the country and not more than ten of which can be from any political party.

²³¹ The UK has such an electronic form for many visa applicants. This interactive tool determines automatically the visa category to which the applicant belongs, asks questions specific to the visa category, and customizes a list of requested supplemental documents for the applicant to mail or bring along with his or her application.

Back to Basics: Much Better Intelligence

The current level of intelligence for identifying and tracking potential terrorists must be and remain the first priority if our visa system is to keep us secure. Only with better field-derived intelligence on individuals who may pose a potential homeland security threat can we become more secure. Such intelligence, however, must be made available to the personnel who need it to make informed decisions in real time. An integrated national watch list that is constantly checked for quality and has a robust process for adding new and removing bad entries efficiently, together with a stronger communications system between agencies for security advisory opinions, are essential domestic security priorities. In sum, intelligence, both human and data-driven, is the best tool we can put in the hands of those who make decisions that affect our security hundreds of thousands of times each day.

C. Conclusion

As Congress and executive agencies have come to better appreciate the intimate relationship between visa policy and US security interests, visa policy has come to occupy a truly central role on the front line of homeland security. Its new role, however, has compromised its effectiveness as a tool for stimulating US economic growth and competitiveness, enriching US culture, and advancing crucial social and foreign policy goals.

To better balance openness with vigilance, reforms to the system must start with a comprehensive vision. Only then can one make the strategic judgments and investments that will deliver a visa program that addresses and promotes the totality of US national priorities. To not do so would fail the nation's quest for "Secure Borders, Open Doors."

Four years after September 11 is also an appropriate time to begin to reintroduce the complexity into our thinking about responses to terrorism that reflex actions, understandably, almost always push aside. More and better intelligence, greater investments in technology (and particularly information technology), and continuous attention to

advances in fields that tie geographical information systems with different types of data (such as radio frequency and global positioning satellite technologies) will always be necessary if we are to thwart would-be terrorists. And so will better management systems and much greater cooperation between the agencies that protect us all.

But all these and more will not be sufficient in making us more secure because they focus on the symptoms of our homeland security problematic. To do better, much better, we will need to begin to address the causes of the security challenges we face more systematically by beginning to match intelligence, law enforcement, technological, and management solutions with social and political ones. This more comprehensive approach clearly has a foreign policy (and economic development) component that many analysts have written about. However, and as the London attacks of July 2005 make clear, it must also have a robust domestic component. That component must seek to better integrate communities of faith and ethnic background that are now at the margins of US society *and* under a cloud of suspicion for disloyalty. These are conditions that can easily become breeding grounds for "home-grown" terrorism. In the longer term, addressing these conditions thoughtfully may be as important to our security as all of the other investments we may make in preventing would-be terrorists from gaining access to US space.

APPENDIX A: THE VISA APPLICATION PROCESS

On November 25, 2002, President George W. Bush signed the Homeland Security Act, reorganizing the executive branch and creating the Department of Homeland Security (DHS). As a result, the former Immigration and Naturalization Service (INS) was dissolved, and its responsibilities were split among three new DHS departments: 1) Citizenship and Immigration Services (CIS), 2) Customs and Border Protection (CBP), and 3) Immigration and Customs Enforcement (ICE). The act also reassigned some responsibilities for visa policy and procedures from the Department of State (DOS), which previously had de facto jurisdiction over the entire visa process, to DHS. The two agencies negotiated a memorandum of understanding to help resolve some of the ambiguities of the new law.

The visa application process still consists of three principal steps: petitioning for a visa (for certain categories), applying and interviewing at a consular post, and submitting to inspection at a port of entry. While these three steps seem to have changed little since September 11, the processes within each have been substantially modified with an eye toward enhancing US security interests.

US visas are divided into two categories: immigrant and nonimmigrant. Immigrant visas are for those who wish to enter and reside in the United States on a permanent basis. Nonimmigrant visas encompass all other categories of travel to the United States, including travel for extended periods to study, teach, or work. (Immigrant visas confer the right to work on their holders.) Some individuals who were not required to have visas to enter the United States previously, such as those traveling by air from one country to another via the United States, are now required to obtain them.

Some visa applicants must first petition DHS to establish their eligibility to apply. While all immigrants are required to file petitions, many nonimmigrants wishing to study or work in the United States must also

file. CIS processes the petitions at regional centers in the United States and ensures that they meet the criteria for admission under the selected category (for example, that skilled workers have the required skills). Petitioners' names are checked against watch lists such as the Interagency Border Inspection System (IBIS), and any "hits" are investigated to determine whether the "hit" is indeed the same person as the petitioner. (This process was required before September 11, but is enforced more rigorously now.) If for some reason the petition is denied, the petitioner may apply for a waiver of inadmissibility, which, if granted, allows him or her to continue the process.

After their petitions have been approved, or in cases where a petition is not required, applicants proceed to consular posts, where adjudicative responsibility moves from DHS to DOS. This phase of the visa process involves an interview/background check with a consular officer. Interviews are often scheduled with the assistance of a private firm contracted specifically to arrange them.

Consular officers conduct interviews with applicants to determine the legitimacy of their applications, the authenticity of their documentation, and the purpose of their visits. Some applicants, notably diplomats, workers from certain international organizations, and persons below the age of fourteen or above the age of seventy-nine, are not required to undergo interviews. Nonimmigrants must complete the DS-156 form and, in some cases, the DS-157 supplemental form, to make a visa application. The DS-157 form requires a more detailed history of each applicant's current or past affiliations with military, charitable, educational, and work-related institutions as well as a comprehensive travel history. Additionally, many nonimmigrant visa applicants (depending on the applicant's category) must demonstrate that they do not intend to reside permanently in the United States.

To prevent the proliferation of fraudulent passports and visas, consular officers also record biometric data from applicants. Under the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program, an automated entry-exit tracking system for foreign nationals, all visa applicants are required to submit two flat fingerprints, which are electronically processed in a DHS database.

Additionally, applicants are subject to rigorous security screening processes. Name checks in the Consular Lookout and Support System (CLASS) are required for all applicants. If a hit occurs or if the applicant originates from a certain country or works in a particular field, the applicant will be subject to a security advisory opinion (SAO). If the identity of a hit cannot be resolved, ten rolled fingerprints are submitted to the Federal Bureau of Investigation (FBI) to establish the applicant's identity. Other agencies such as DHS or the Central Intelligence Agency (CIA) are often consulted as well.

Several programs that had been implemented prior to September 11 to facilitate and expedite visa applications have now been eliminated, further increasing the hands-on role of consular officers in the visa process. Notably, the "Visa Express" program in Saudi Arabia, which allowed select travel agencies to submit applications on behalf of the applicants, has been eliminated. Other Travel Agent Referral Programs (TARPs) are also no longer able to accept applications because individuals are now required to report to the consulate for biometric data collection. The Visa Waiver Program (VWP), which allows the citizens of twenty-seven countries to enter the United States without obtaining a visa, has also been scaled back. Two VWP countries have been removed from the program. The remaining countries have been required to conform to new and more stringent requirements set forth by the DHS such as providing all travelers with machine-readable passports.

Delays in the consular process have resulted in several initiatives to facilitate the processing of applications for certain categories affected by the post-September 11 changes, most notably business and student applicants. These efforts include expedited appointment scheduling and improved public outreach.

Receipt of a visa is not a guarantee of admission. DHS is responsible for the adjudicative process at the border, where CBP officers at points of entry make final decisions about admission. Before September 11, entry points were staffed by both INS and Customs Service officers. The One Face at the Border program amalgamated these two positions with agricultural inspectors, forming a unified inspections team in CBP.

Upon arrival, travelers must present their passports and visas to a CBP officer and are briefly interviewed about the purpose and duration of their visits. This primary inspection is used to determine the validity of the documentation provided and whether or not the applicant meets other customs and immigration admissions criteria. If the officer doubts the applicant's eligibility, he or she is referred to secondary inspection, where a CBP officer with access to a greater number of investigative tools has more time to interview the applicant and make a final determination.

With the implementation of US-VISIT, most visa holders are referred to secondary inspection, where they enroll in the program by submitting their fingerprints, a machine readable passport (though this requirement can be waived in some cases), and a digital photograph. Travelers from VWP countries must also enroll in US-VISIT. Students are also required to enroll in the Student and Exchange Visitor Information System (SEVIS). The National Security Entry and Exit Registration System (NSEERS), which was established in October 2002 to track the whereabouts of foreign nationals from certain Middle Eastern and Asian countries, is currently being phased out as the US-VISIT program is being implemented.

APPENDIX B: A CHRONOLOGY OF MAJOR ACTIONS RELATED TO VISAS, TERRORISM, AND TRAVEL, 1980 TO PRESENT

Early 1980s: The Central Intelligence Agency (CIA) produces the Redbook and a training video entitled "The Threat Is Real." Both are intended to help border officials, customs officers, and consular employees identify terrorists. They emphasize five main types of travel document fraud: travel cachets, commercial forgeries, stolen blank passports, genuine altered passports, and genuine unaltered passports. The Redbook is discontinued in 1992.¹

¹ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel* (Washington, DC: National Commission on Terrorist Attacks Upon the US, August 21, 2004): 45.

1986: Congress establishes a pilot version of the Visa Waiver Program (VWP), which enables citizens of participating countries to travel to the United States for business or tourism for 90 days or less without obtaining a visa. Countries are admitted to the program after the State Department and the Justice Department jointly determine their eligibility.²

1990: The State Department develops a machine-readable visa with a laser-printed photograph of the applicant. However, by the time of the World Trade Center bombing in 1993, the program has not yet been implemented because it is not funded.³

1991: The TIPOFF (nonacronym) terrorist watch list database becomes available to the Immigration and Naturalization Service (INS) through the National Automated Immigration Lookouts System (NAILS). A memorandum of understanding among the State Department, the US Customs Service (Customs), and INS makes expanded access to the watch list possible.⁴

February 1993: On February 26 the World Trade Center in New York City is bombed. The mastermind of the plot, Sheikh Omar Abdel Rahman, had been granted a visa at the US embassy in Sudan even though his name was on a microfilm-based watch list at the embassy.⁵

April 1993: The State Department's Bureau of Consular Affairs is restructured to become a "reinvention lab" as part of Vice President Al Gore's initiative to reinvent government.⁶ Reinvention labs were government initiatives to improve work products, decrease costs, cut red tape, and improve customer service.

August 1993: In response to the World Trade Center attack, the Visas Viper program is initiated to improve interagency communication

² 1952 *Immigration and Nationality Act*, P.L. 82-414, 8 U.S.C. Sec. 1101 et seq., §217.

³ Ethan Goldrich and Bryan Dalton, "A Passport Is Not a Pizza," *Foreign Service Journal*, March 2001, <http://www.afsa.org/fsj/mar01/goldrichdaltonmar01.cfm>.

⁴ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 79 (see n. 1).

⁵ *Ibid.*, 80.

⁶ Department of State Record, "The Consular Function," in *History of the Department of State During the Clinton Presidency (1993-2001)*, <http://www.state.gov/r/pa/ho/pubs/8525.htm>.

regarding the placement of potential terrorists on watch lists. The State Department coordinates the program but is sometimes frustrated by the lack of cooperation from intelligence and law enforcement officials.⁷

1995: The Justice Department and INS initiate the Immigrant Visa Datashare, which allows INS and the State Department to track an immigrant's processing and application from the initial filing to arrival at a port of entry.⁸

1995: The *Annual Strategic Intelligence Review for Counterterrorism* calls for increased intelligence information on terrorist "travel procedures," "surveillance/targeting capability regarding modes of transportation and facilities," and "training." The April 1998 edition calls for similar information.⁹

1995: The State Department requirement of a mandatory name check for all visa applicants is modified to require a computer-based check. Before 1995 a name check requirement existed but required a search of multiple databases. In fact, terrorist names were frequently available only on microfilm. After 1995 all visa-issuance posts worldwide gained centralized, computer-based name check access, and none relied on microfilm for name checks.¹⁰

1995: Operation Global Reach is coordinated among INS, the State Department, and the Justice Department's Office of National Security to train law enforcement officials, airline personnel, and consular officers abroad to detect fraudulent travel documents. The program is extraordinarily successful and instigates a 5,500 percent increase in fraudulent document interceptions from 1994 to 1995. However, the training is intended to prevent alien smuggling and does not focus on terrorism.¹¹

⁷ General Accounting Office, *Passports and Visas: Status of Efforts to Reduce Fraud*, GAO/NSAID-96-99 (May 1996).

⁸ Department of Justice Office of Inspector General, *Immigration and Naturalization Service's Ability to Provide Timely and Accurate Alien Information to the Social Security Administration*, Report I-2003-001 (November 2002).

⁹ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 68 (see n. 1).

¹⁰ General Accounting Office, *Nonimmigrant Visa Processing*, GAO-95-122R (April 17, 1995): 1.

¹¹ Phyllis Coven, "Federal Law Enforcement," House Appropriations Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, May 1, 1996.

1996: Congress passes legislation directing INS to move to an electronic data collection system for international students. The program, at first called the Coordinated InterAgency Partnership Regulating International Students (CIPRIS), came to be known as the Student and Exchange Visitor Information System (SEVIS). Despite a successful pilot program, full program implementation is delayed by funding and technical challenges.¹²

1996: The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) creates the Alien Terrorist Removal Court, which allows classified evidence to be used to support a terrorist allegation by employing counsel that have security clearance. The court is never used, in part because classified evidence can be used in traditional deportation hearings.¹³

1996: The Carrier Consultant Program, which trains foreign airlines to recognize fraudulent travel documents and imposes fines on airlines that fail to detect *mala fide* travelers, is implemented.¹⁴

1996: An amendment to the VWP gives the attorney general, in consultation with the State Department, the power to waive or refrain from waiving the visa requirement and the power to designate a country as a member of the program.¹⁵

1997: INS develops the National Security Unit to oversee national security work in the field, produce security alerts for ports of entry, and work with the Justice Department on security issues.¹⁶

1997: The CIA develops the Personal Identification Secure Comparison and Evaluation System (PISCES) to be used by foreign

¹² University of Texas, "The Alphabet Soup of National Security," <http://www.utwatch.org/security/intlprograms.html>.

¹³ *Antiterrorism and Effective Death Penalty Act of 1996*, P.L. 104-132, 104th Cong., 2d sess. (April 24, 1996).

¹⁴ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 90 (see n. 1).

¹⁵ 1952 Immigration and Nationality Act, §217 (see n. 2), as amended by the *Illegal Immigration Reform and Responsibility Act of 1996*.

¹⁶ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 96 (see n. 1).

authorities to track and apprehend terrorists and to improve the watch list capabilities of foreign countries.¹⁷

1997: The State Department develops the *Consular Best Practices Handbook*, designed to instruct consular officers in ways to reduce the amount of time they spend reviewing individual visa applications. The *Consular Best Practices Handbook*, along with the *Foreign Affairs Manual*, gives consular officers great discretion. Officers have the ability to waive personal interviews for nonimmigrant visa applications, to use third parties like travel agencies as casework intermediaries, and to determine the visa validity period.¹⁸

1998: INS's National Security Unit places INS inspectors on high alert for persons born or residing in certain Middle Eastern countries, including, coincidentally, all of the countries of origin of the future September 11 attackers.¹⁹

December 1998: The State Department develops language algorithms to improve CLASS's name check capability.²⁰

1999: The Consular Consolidated Database (CCD), a centralized database that contains information on visa applicants, including electronic records of applications, photographs, and visa information, is created.²¹

October 30, 2000: The VWP is made permanent by the Visa Waiver Permanent Program Act.²²

January 2001: By January 1 every visa-issuing post has the ability to access CCD and send updated information in real time.²³

¹⁷ Ibid., 68.

¹⁸ *1952 Immigration and Nationality Act*, §222e (see n. 2), 22 CFR § 41.102 (2001).

¹⁹ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 96 (see n. 1).

²⁰ Department of State Record, *History of the Department of State* (see n. 6).

²¹ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 81 (see n. 1).

²² *1952 Immigration and Nationality Act*, §217 (see n. 2), as made permanent by the *Visa Waiver Permanent Program Act*, P.L. 101-649.

²³ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 81 (see n. 1).

July 5, 2001: Richard Clarke convenes the Counterterrorism Security Group of the National Security Council and hosts an emergency CIA briefing for operational agencies, including INS and Customs. Both organizations send midlevel persons to the briefing, which focuses on the potential of a terrorist attack on an overseas target. While INS fails to declassify information to prepare a threat advisory for ports of entry, a Customs official creates a message to agency personnel warning of suspicious activity.²⁴

September 11, 2001: Nineteen hijackers who had previously entered the United States take control of four commercial airplanes and crash them into both towers of the World Trade Center and into the Pentagon. A passenger uprising grounds the fourth plane in Pennsylvania. Immediately after the terrorist attacks, INS and Customs put their agencies on highest alert, nearly shutting down American borders in the process. Over fifty embassies are also closed in the aftermath of the attacks.

September 18, 2001: INS and Customs suspend in-transit processing, which formerly allowed passengers whose final destinations were in the United States to enter the country and catch a connecting flight without undergoing immigration inspection until their final destinations. The new policy requires all flights to be inspected at the first port of entry.²⁵

September 19, 2001: The State Department issues a cable stating that no change has been made in visa processing procedures as a result of the terrorist attacks, though posts were required to review and closely adhere to special processing guidelines and instructions for security checks.²⁶

September 2001: The CIA sets up a Passport Analysis Program designed to identify terrorists by the documents they use. The program

²⁴ Richard A. Clarke, Testimony of Richard A. Clarke Before the National Commission on Terrorist Attacks Upon the US, March 24, 2004, <http://news.findlaw.com/hdocs/docs/terrorism/clarke32404stmt.pdf>.

²⁵ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 163 (see n. 1).

²⁶ "Recent Terrorist Attacks and Nonimmigrant Visa Processing and Searches of Visa Records," Interpreter Releases 78, no. 37 (September 24, 2001).

is designed to develop automated detection tools based on indicators of terrorist affiliation.²⁷

October 2001: The CIA creates the Terrorist Transportation and Travel Branch, later renamed the Terrorist Mobility Branch, which identifies key groups and individuals that facilitate terrorist travel. However, there is no electronic dissemination system to send these classified reports to field units.²⁸

October 18, 2001: The State Department issues a cable to diplomatic and consular posts providing detailed guidance on Visas Viper policy and procedures. No substantive changes from previous guidance are made, but a “program reminder” is deemed necessary.²⁹

October 26, 2001: President George W. Bush signs the USA PATRIOT Act authorizing additional funding for SEVIS and requiring national compliance by January 30, 2003.³⁰ The USA PATRIOT Act also advances to October 1, 2003, the deadline for participating VWP countries to have passengers submit machine-readable passports.³¹ The deadline until then had been 2007.

October 29, 2001: President Bush issues a Homeland Security Presidential Directive, creating the Foreign Terrorist Tracking Task Force (FTTTF), ordering a thorough review of student visa policies and mandating increased coordination of customs and immigration information with Canada and Mexico.³²

²⁷ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel*, 150 (see n. 1).

²⁸ Ibid.

²⁹ US Department of State, State Department Instructs on “Visas Viper” *Procedures for Identifying Terrorists for Lookout List Purposes*, cable, October 18, 2001.

³⁰ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act*, P.L. 107-56, 107th Cong., 1st sess. The State Department issued a number of cables explaining the visa-related provisions of the USA PATRIOT Act, which are available at http://travel.state.gov/visa/laws/telegrams/telegrams_1446.html.

³¹ General Accounting Office, *Border Security: Implications of Eliminating the Visa Waiver Program*, GAO 03-38 (November 2002): 13.

³² “The Aftermath of September 11: A Chronology,” *Interpreter Releases* 79, no. 3 (January 14, 2002): 70-73.

November 9, 2001: Attorney General John Ashcroft issues a memo expanding the use of S nonimmigrant visa status for alien informants who have reliable and critical information regarding either terrorist operations or criminal organizations.³³

November 14, 2001: The State Department introduces new security checks for visa applicants at US embassies, including a twenty-day mandatory waiting period for males aged sixteen to forty-five from many Asian and Middle Eastern countries.³⁴ Applicants from two dozen countries, mainly in North Africa, South Asia, and the Middle East, must be cleared by the FBI and CIA before obtaining a visa.³⁵

November 2001: President Bush releases an INS restructuring plan that would create a “Bureau of Immigration Services” and a “Bureau of Immigration Enforcement.”³⁶

November 2001: INS issues a memorandum stating that aliens cannot be admitted under “deferred inspection” or “parole status,” or with a waiver of documentary requirements unless approved at the district director level.³⁷

December 10, 2001: The US and Canadian governments sign a declaration establishing a “smart border,” including a thirty-point plan to improve intelligence sharing, visa policy coordination, and common biometric documentation identifiers, among other items.³⁸

January 2002: The State Department begins to offer an advanced course in CLASS name checks.³⁹

³³ “DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens to Obtain Info on Terrorists,” *Interpreter Releases* 78, no. 46 (December 3, 2001): 1817-21.

³⁴ Murray Hiebert, “Less Welcome,” *Far Eastern Economic Review*, July 25, 2002.

³⁵ Mark Bixler, “U.S. gets tougher on visa interviews,” *The Atlanta Journal-Constitution*, June 9, 2003.

³⁶ “Administration Presents INS Restructuring Proposal,” *Interpreter Releases* 78, no. 45 (November 19, 2001): 1773-75.

³⁷ Michael D. Cronin, *Deferred Inspection, Parole, and Waivers of Documentary Requirements*, INS memorandum, November 14, 2001.

³⁸ Lisa Seghetti, *Border Security: Immigration Issues in the 108th Congress*, Congressional Research Service, May 18, 2004.

³⁹ General Accounting Office, *Border Security: Visa Process Should Be Strengthened as an Antiterrorism Tool*, GAO-03-132NI (October 2002): 35.

January 11, 2002: Consular posts begin collecting a new form called the DS-157 Supplemental Nonimmigrant Visa Application from all male visa applicants between the ages of sixteen and forty-five. Certain posts elect to extend the requirement to female applicants as well.⁴⁰

January 25, 2002: The attorney general introduces the Absconder Apprehension Initiative to locate, capture, and deport persons with final orders of removal who have remained in the United States.⁴¹

January 26, 2002: The government initiates the Visas Condor thirty-day name check for persons who are required to undergo the twenty-day wait period and who fit certain other criteria. Condor cables are sent to the FBI and CIA for name checks. CCD access is also provided to INS ports of entry, though images of the DS-156 and DS-157 visa application forms are not made available.⁴²

February 21, 2002: Argentina is removed from the list of visa waiver countries because of concerns that the country's economic crisis might lead to additional influxes of unauthorized persons to the United States.⁴³

February 25, 2002: The State Department publishes an interim rule pertaining to the fingerprinting of immigrants and nonimmigrants and establishes regulations that guide the use, protection, dissemination, and destruction of criminal history and other records provided to the FBI.⁴⁴

February 27, 2002: The US Department of Agriculture terminates its J-1 visa sponsorship program. It relinquishes its right to act as an "interested government agency" in the sponsorship program, which allows J-1 visa holders to practice primary medical care in under-

served (mainly rural) communities, because the department has no authority or ability to conduct background checks on applicants.⁴⁵

February 28, 2002: Consular posts are instructed not to use the CD-ROM backup version of CLASS to perform name checks because the backup system did not always contain updated names of persons recently added to CLASS.⁴⁶

March 2002: The State Department requires all consular posts to collect electronic photographs of refused visa applicants.⁴⁷

March 7, 2002: The State Department announces, via an interim rule effective April 1, 2002, an amendment of its regulation for automatic visa revalidations for certain short-trip visitors from terrorist-sponsoring countries.⁴⁸ The rule limits the ability of persons with expired visas to reenter the United States from contiguous territories (e.g., Mexico and Canada).⁴⁹

March 11, 2002: Six months to the day of the September 11 attacks, INS mails change-of-status notifications to two of the now-deceased terrorists involved in the September 11 attacks.⁵⁰

April 12, 2002: INS proposes changes to rules governing visitors and students. Effective immediately, nonimmigrants admitted under B-1 and B-2 visas are required to obtain INS approval to change their nonimmigrant status to that of an F (academic) or M (vocational) student before beginning a course of study. INS also proposes to limit the minimum six-month admissions period for B-2 visitors and to limit the conditions under which a B visitor could receive an extension of stay.⁵¹

⁴⁰ Kathleen Walker, "The Tale of the CONDOR and Security-Related State Department Developments Post 9/11," *Bender's Immigration Bulletin* 8, no. 2 (January 15, 2003).

⁴¹ Muzaffar A. Chrishti et al, *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11* (Washington, DC: Migration Policy Institute, 2003): 40.

⁴² Walker, "The Tale of the CONDOR" (see n. 40).

⁴³ "INS Terminates VWP Designation for Argentina," *Interpreter Releases* 79, no. 9 (February 25, 2002): 300-1.

⁴⁴ "State Department Publishes Interim Rule Amending Regs on Fingerprinting, Handling of Criminal History Records," *Interpreter Releases* 79, no. 11 (March 11, 2002): 372-3.

⁴⁵ "USDA Terminates Support of J-1 Waivers," *Interpreter Releases* 79, no. 11 (March 11, 2002): 376-7.

⁴⁶ Walker, "The Tale of the CONDOR" (see n. 40).

⁴⁷ General Accounting Office, *Border Security: Visa Process Should Be Strengthened*, 36 (see n. 39).

⁴⁸ "State Department Suspends Automatic Visa Revalidations for Certain Aliens from Terrorist-Sponsoring Countries," *Interpreter Releases* 79, no. 11 (March 11, 2002): 377-8.

⁴⁹ Janice Jacobs, *Bureau of Consular Affairs Accomplishments in FY 2002/2003*, Senate Committee on the Judiciary Subcommittee on Immigration and Border Security, July 15, 2003.

⁵⁰ National Commission on Terrorist Attacks, "9/11 and Terrorist Travel," (see n. 1): 28.

⁵¹ United States Department of Justice, "INS Proposes Significant Changes to Rules Governing Visitors and Students," April 8, 2002.

Late April, 2002: The Foreign Terrorism Tracking Task Force (FTTTF) assumes primary responsibility for the FBI's Visas Condor name checks. The FTTTF takes on a backlog of at least 8,000 unchecked cables due to a lag in Condor security checks by the FBI's Name Check Unit.⁵²

May 7, 2002: The State Department issues a final rule amending the agency's regulations under the VWP to correspond with the Visa Waiver Permanent Program Act of 2000. The rule requires that aliens denied admission to the United States under the VWP must obtain a visa to again apply for admission.⁵³

May 13, 2002: INS proposes provisions that limit tourists to a maximum thirty-day stay and claims that Canadians (who at the time could remain in the United States for as long as six months) would not be afforded special status under the new rules.⁵⁴ These provisions are not implemented.

May 14, 2002: President Bush signs the Enhanced Border Security and Visa Entry Reform Act (EBSVERA). The new act requires consular officers to transmit electronic versions of visa files to INS and to immigration inspectors at ports of entry in the United States. It also mandates that machine-readable, tamper-resistant entrance and exit documents be in use by October 2004, complete with photographs and fingerprints. Visa waiver countries are required to provide biometric machine-readable passports by 2003 and are required to report stolen blank passports to continue to participate in the VWP. EBSVERA also requires commercial vessels and flights en route to the United States to provide immigration officials with comprehensive data about each passenger and requires expanded training for visa-issuing consular officers.⁵⁵

May 16, 2002: INS proposes a rule that amends information retention for nonimmigrant students and exchange visitors, a first step in a process to implement SEVIS.⁵⁶

May 17, 2002: INS announces that old nonbiometric Mexican border crossing cards (BCCs), which had been phased out starting in October 1, 2001, in keeping with provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, would again be valid until October 1, 2002, in keeping with the provisions of EBSVERA.⁵⁷

May 18, 2002: The State Department announces a number of changes to strengthen the existing visa referral system, a program under which US government employees recommend visas for individuals of official interest to the US government who are favorably and well known to them.⁵⁸ The changes include creating new terms for various types of referrals as well as necessitating that consular posts use standardized forms and track referrals.

June 2002: The State Department adds 400,000 records from the National Crime Information Center (NCIC) to the CLASS computer database system. The batch includes 7,000 records from the Violent Gang and Terrorist Organization File.⁵⁹

June 5, 2002: The attorney general announces the National Security Entry and Exit Registration System (NSEERS), an entry-exit system that requires certain nonimmigrants who are deemed to be national security risks to register and submit fingerprints upon arrival, to report at regular intervals, and to notify an INS agent upon departure.⁶⁰

June 6, 2002: The Bush administration proposes a homeland security department.⁶¹

⁵² Walker, "The Tale of the CONDOR" (see n. 40).

⁵³ "State Department Issues Final Rule on VWP," *Interpreter Releases* 79, no. 22 (May 24, 2002): 827.

⁵⁴ Sarah Kennedy, "Snowbirds' migration could be thwarted," *Globe and Mail*, May 13, 2002.

⁵⁵ *Enhanced Border Security and Visa Entry Reform Act* (EBSVERA), P.L. 107-173, 107th Cong., 2d sess.

⁵⁶ "INS Proposes Rule Implementing Electronic Reporting, Addition Limits, on F, J, M Nonimmigrants," *Interpreter Releases* 79, no. 21 (May 20, 2002): 773-75.

⁵⁷ "INS Announces Old Mexican BCCs Are Valid Again Until October 1, 2002," *Interpreter Releases* 79, no. 21 (May 20, 2002): 825.

⁵⁸ Walker, "The Tale of the CONDOR" (see n. 40).

⁵⁹ *Ibid.*

⁶⁰ "The Aftermath of September 11: A Chronology" (see n. 32).

⁶¹ Ruth Ellen Wasem, *Visa Policy: Roles of the Departments of State and Homeland Security*, Congressional Research Service, March 4, 2004, 8.

June 8, 2002: The State Department adds a provision to its Foreign Affairs Manual (FAM) requiring the visa chief, the nonimmigrant visa chief, or the consular section chief to spot check approved nonimmigrant visa applications. Before the policy change, consular managers needed only to spot check denials.⁶²

June 10, 2002: Deputy Secretary of State Richard Armitage states that FTTTF information received from the Justice Department for security advisory opinions (SAOs) has been insufficient to permit consular officers to deny a visa because it does not provide a statutory ground for inadmissibility.⁶³

June 12, 2002: The State Department, while not yet linked to the SEVIS system, sends instructions to employees by cable on student visa processing.⁶⁴

June 13, 2002: INS publishes a proposed rule to broaden registration, fingerprinting, and photographing requirements for nonimmigrant aliens who meet special criteria.⁶⁵

June 27, 2002: The State Department proposes a rule that would place a maximum length of five years on visas for exchange visitor scholars and professors.⁶⁶

July 11, 2002: Representative David Weldon (R-FL) offers an amendment to legislation that would have moved the consular visa function to the future Department of Homeland Security (DHS). The amendment failed by a vote of 118 to 309 in the US House of Representatives.⁶⁷

July 15, 2002: The Saudi Arabian Visa Express program for expediting Saudi visa applications is ended and all Saudi applicants between the ages of twelve and seventy are required to go through visa interviews.⁶⁸

July 17, 2002: According to correspondence between the Senate and the State Department's inspector general, the State Department orders a review of all 207 US posts that issue visas.⁶⁹ The correspondence also suggests that the department wants to send special inspection teams to visa-issuing posts in countries harboring suspected terrorists, and that officials intend to require interviews of all visa applicants.⁷⁰

July 20, 2002: The FBI and State Department change the Visas Condor name check procedures, moving the primary responsibility to the FBI's Name Check Unit (NCU).⁷¹ The FBI also announces that it could not meet the thirty-day target for name checks, so visa applicants are placed on indefinite hold pending FBI responses.

August 2002: Approximately six million FBI criminal records are added to CLASS. Also, the State Department invokes a new policy to issue a revocation code, shared with other agencies via the Inter-Agency Border Inspection System (IBIS), when a visa is revoked. The code is not fully operational until December 2002.⁷²

August 12, 2002: The INS adopts a final rule regarding NSEERS, the special registration and monitoring of certain nonimmigrants. The rules require that certain aliens provide information at specific intervals to ensure compliance with the terms of their visas.⁷³

⁶² Walker, "The Tale of the CONDOR" (see n. 40).

⁶³ "Letter from Richard Armitage to Larry Thompson," *Interpreter Releases* 79, no. 28 (July 15, 2002): Appendix I, 1047-48.

⁶⁴ "State Dept. Instructs on SEVIS, New Student and Exchange Visitor Reforms," *Interpreter Releases* 79, no. 31 (August 5, 2002): 1170-72.

⁶⁵ "The Aftermath of September 11: A Chronology" (see n. 32).

⁶⁶ "State Department Proposes to Lengthen Permitted Program Period for Exchange Visitor Professors, Scholars," *Interpreter Releases* 79, no. 26 (July 1, 2002): 984-85.

⁶⁷ Wasem, *Visa Policy: Roles of the Departments*, 9 (see n. 61).

⁶⁸ Betsy Cooper, "Security Checks Affect Legal Immigration," Migration Information Source (Migration Policy Institute), October 1, 2004, <http://www.migrationinformation.org/USfocus/display.cfm?id=258>.

⁶⁹ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 141 (see n. 1).

⁷⁰ George Gedda, "U.S. to Review Visa-Issuing Offices," Associated Press, July 17, 2002.

⁷¹ Walker, "The Tale of the CONDOR" (see n. 40).

⁷² Janice Jacobs, *Bureau of Consular Affairs* (see n. 49).

⁷³ "INS Publishes Final Rule on Special Registration, Monitoring in Light of Ongoing Terrorism Concerns," *Interpreter Releases* 79, no. 33 (August 19, 2002): 1230-32.

September 2002: The State Department, CIA, and Justice Department again change the name check procedures for Visas Condor, giving the FBI primary oversight for name checks and Condor cables and referring to the CIA only in selected instances.⁷⁴

FY2002 (date varied by post): The State Department deploys the tamper-resistant Lincoln visa worldwide.⁷⁵

September 5, 2002: INS issues a confidential memo that outlines an expanded registration process for nationals of Pakistan, Saudi Arabia, and Yemen as well as those who are identified in IBIS alerts.⁷⁶

September 10, 2002: The State Department adds a session on visa fraud to its traditional consular training course.⁷⁷

September 11, 2002: The INS implements the National Security Entry and Exit Registration System (NSEERS). The program requires photographing, fingerprinting, and interviewing of individuals from certain countries and requires registration of persons already in the United States.⁷⁸

September 11, 2002: In addition to NSEERS, the State Department launches the Interim Student and Exchange Authentication System (ISEAS) to electronically verify foreign students and exchange visitors. The program is discontinued on March 31, 2003, with the implementation of SEVIS.

September 24, 2002: A State Department press statement reveals that the Department sent authorization to consular posts worldwide to issue 10,000 (presumably delayed) visas after Visas Condor checks were completed.⁷⁹

⁷⁴ Walker, "The Tale of the CONDOR" (see n. 40).

⁷⁵ Janice Jacobs, *Bureau of Consular Affairs* (see n. 49).

⁷⁶ "INS Expands Special Registration, DOS Promises Swifter Visa Processing," *Interpreter Releases* 79, no. 38 (September 30, 2002): 1464-5.

⁷⁷ General Accounting Office, *Border Security*, 34 (see n. 39).

⁷⁸ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 157 (see n. 1).

⁷⁹ "INS Expands Special Registration," (see n. 76).

September 25, 2002: INS implements a second phase of transition to SEVIS, publishing an interim rule and closing the preliminary enrollment period.⁸⁰

October 1, 2002: The NSEERS program officially begins, and all aliens applying to enter the United States are screened against the Interagency Border Inspection System. If the registrant is determined to be subject to NSEERS registration (INS inspectors are required to register nonimmigrant aliens applying to come to the United States who are citizens or nationals of the state sponsors of terror), he or she is referred to secondary inspection and placed under oath. The screeners ask predefined questions, including the applicant's biography, employment status, school, address upon arrival, contact information, and credit card information, and store the person's photograph and index fingerprints. The biometric data are stored in a database and checked against four databases before the applicant is admitted to the United States. Registrants are required to report for interviews after thirty days and again after one year of being in the United States and also must undergo an exit interview. Call-in registration for persons already in the United States begins on November 15, 2002, and ends on April 25, 2003. The program provides for enforcement measures against individuals found to be in violation of immigration or other laws.⁸¹

October 11, 2002: INS implements an interim rule, specifying certain passenger data that carriers seeking to transport visa waiver passengers must submit to INS. The rule is effective immediately.⁸²

October 18, 2002: The interim twenty-day hold procedure for certain nonimmigrant visa applications is terminated.⁸³

November 2002: A new DS-157 form is required for all nonimmigrant visa applicants from the seven state sponsors of terrorism coun-

⁸⁰ "INS Implements Second Phase of Transition to SEVIS," *Interpreter Releases* 79, no. 38 (September 30, 2002): 1465-6.

⁸¹ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 159 (see n. 1).

⁸² "INS Implements VWP Passenger Data Requirements Under Entry-Exit System," *Interpreter Releases* 79, no. 40 (October 14, 2002): 1539.

⁸³ "State Department Terminates Interim 20-Day Hold Procedure for Certain Nonimmigrant Applications," *Interpreter Releases* 79, no. 43 (November 4, 2002): 1644.

tries who are age sixteen and older (no upper age cap) regardless of gender. All applicants from such countries must also appear for an interview with a consular officer.⁸⁴

November 4, 2002: The State Department finalizes the S classification for nonimmigrant visas for alien informants and witnesses.⁸⁵

November 13, 2002: House Majority Leader Dick Armey introduces a compromise bill to establish a Department of Homeland Security, including a provision allowing the State Department's Bureau of Consular Affairs to continue issuing visas.

November 15, 2002: NSEERS domestic call-in registration begins.⁸⁶

November 25, 2002: The president signs the Homeland Security Act of 2002, P.L. 107-296, establishing the Department of Homeland Security (DHS). The law stipulates that INS will be divided into two agencies, the Bureau of Citizenship and Immigration Services (reporting to the deputy secretary for homeland security) and the Bureau of Border Security (reporting to the undersecretary for border and transportation security).⁸⁷

The Homeland Security Act assigns DHS six major visa-related functions:

- Assigning DHS employees to Saudi Arabia to review visa applications before consideration by consular officers
- Developing training programs for homeland security designed for State Department consular officers
- Ensuring that DHS and consular employees are provided appropriate training, including foreign language training, interview tactics, and fraud detection training
- Developing performance standards for the secretary of state to use when evaluating consular employees
- Studying the role of foreign nationals as they pertain to the granting and refusing of visas and other alien entry documents into the United States

⁸⁴ Walker, "The Tale of the CONDOR" (see n. 40).

⁸⁵ "State Department Issues Final Rule Creating Nonimmigrant 'S' Classification for Alien Informants, Witnesses," *Interpreter Releases* 79, no. 44 (November 11, 2002): 1678.

⁸⁶ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 158 (see n. 1).

⁸⁷ The Bureau of Border Security is eventually divided into Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). Ruth Ellen Wasem, *Visa Issuances: Policy, Issues, and Legislation*, Congressional Research Service, August 4, 2003.

- Assigning DHS employees to diplomatic and consular posts where such assignments would promote national security

December 2002: The visa revocation code issued in August is fully implemented. According to the new system, there are three scenarios:

- 1) If person's visa is revoked due to a case of mistaken identity or the need for additional information, the visa is reissued.
- 2) If a visa is revoked because of valid security concerns, officials at the border have the power to immediately revoke the visa while the applicant is at the port of entry.
- 3) If the alien has already been admitted to the United States, it will be difficult to deport the person because there is no legal precedent that a visa revocation alone makes someone deportable.⁸⁸

The National Security Unit of the Bureau of Immigration and Customs Enforcement (ICE) is charged with investigating cases involving aliens who have visas revoked after admission or are admitted despite the revocation.

December 11, 2002: INS issues a final rule governing the retention and implementation of SEVIS, effective January 1, 2003.⁸⁹

December 13, 2002: The State Department publishes a proposed rule that eliminates crew list visas. The rule is not finalized until July 21, 2004.⁹⁰

January 24, 2003: DHS officially comes into existence. Also, the stated deadline to have DHS personnel in place in Saudi Arabia to review visa applications passes. Temporary personnel do not arrive until August 31, 2003.⁹¹

⁸⁸ Janice Jacobs, *Bureau of Consular Affairs* (see n. 49).

⁸⁹ "INS Issues Final Rule, Makes Changes in SEVIS Reporting Requirements" *Interpreter Releases* 79, no. 48 (December 16, 2002): 1813-7.

⁹⁰ "Citing Post-9/11 Security Concerns, DOS Requires Full Application Process for Crew Members," *Interpreter Releases* 80, no. 1 (January 6, 2003): 5.

⁹¹ The undersecretary for border and transportation security disputes this date and argues that the provisions were not effective until the MOU was signed. See US Department of Homeland Security Office of the Inspector General, *An Evaluation of DHS Activities to Implement Section 428 of the Homeland Security Act of 2002*, OIG-04-33 (August 2004): 4.

January 30, 2003: National compliance for SEVIS is required, as prescribed by the USA PATRIOT Act.⁹²

January 31, 2003: The State Department and INS issue an interim rule requiring visas and passports for noncitizens of Canada and Bermuda residing in those countries.⁹³

February 2003: The State Department revises the DS-156 form, including adding questions and changing the format to make it more compatible with the current nonimmigrant visa processing system.⁹⁴

February 2003: The State Department's Bureau of Consular Affairs organizes Consular Management Assistance Teams (CMATs) to visit consular posts and provide guidance on strengthening management practices.

February 28, 2003: The Justice Department publishes a final rule, effective the same day, implementing the transfer of the INS's service, enforcement, and administrative functions to DHS.⁹⁵

March 14, 2003: The State Department unveils the "Secure Borders, Open Doors" initiative to better publicly communicate changes to US visa policies.⁹⁶

March 31, 2003: In response to significant opposition to the NSEERS program from US government officials who fear the program will hurt diplomatic relations with foreign countries, the White House issues a "global message" on the program to the executive secretaries of relevant government departments to explain the "responsibilities and ramifications of NSEERS to foreign governments."⁹⁷

April 2003: The State Department Bureau of Consular Affairs launches a facial recognition pilot program for nonimmigrant visas.⁹⁸

April 15, 2003: Uruguay is removed from the list of visa waiver countries, becoming the second country to be removed from the program since September 11.⁹⁹

April 25, 2003: Domestic call-in registration for NSEERS ends.

May 1, 2003: The Terrorist Threat Integration Center (TTIC), a joint venture of several counterterrorism groups, begins work while housed at the CIA. Its role is to prepare threat assessments for policymakers, institutionalize information-sharing, and maintain a database of suspected and known terrorists.¹⁰⁰

May 10, 2003: The State Department issues a cable stating that consular officers can issue visas to NSEERS violators, provided that "the applicant can demonstrate good cause for the violation and/or reasonable assurances that the applicant will comply with these requirements in the future."¹⁰¹

May 15, 2003: Belgian citizens who wish to travel to the United States under the Visa Waiver Program must present a machine-readable passport. In addition, Belgium is placed in the VWP on a provisional basis for one year, pending evaluation to determine if the country's continued participation is in the security and law enforcement interests of the United States.¹⁰²

May 19, 2003: DHS announces its intention to create a new Office of Visa Compliance under ICE. The new office is charged with review-

⁹² USA PATRIOT Act, P.L. 107-56 (see n. 30).

⁹³ "Citing Post-9/11 Concerns, INS and DOS to Require Passports, Visas for Certain Canadians, Bermudans," *Interpreter Releases* 80, no. 6 (February 10, 2003): 212-213.

⁹⁴ US Department of State, *A Revised DS-156, Nonimmigrant Visa Application*, Unclas State 040347, February 2003.

⁹⁵ "DOJ Implements Regulatory Transfer of INS Functions to DHS," *Interpreter Releases* 80, no. 9 (March 3, 2003): 305-09.

⁹⁶ "Noteworthy," *Interpreter Releases* 80, no. 13 (April 1, 2003): 487.

⁹⁷ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 159 (see n. 1).

⁹⁸ Janice Jacobs, *Bureau of Consular Affairs* (see n. 49).

⁹⁹ C. Stewart Verdery Jr., *Creating Secure Borders and Open Doors: A Review of DHS-State Collaboration on U.S. Visa Policy*, House Government Reform Committee, September 9, 2004, <http://reform.house.gov/UploadedFiles/DHS%20-%20Verdery%20Testimony.pdf>.

¹⁰⁰ Chrishti et. al, *America's Challenge* (see n. 41).

¹⁰¹ "State Department Issues Guidance on Special Registration Compliance and Good Cause Exceptions," *Interpreter Releases* 80, no. 19 (May 12, 2003): 698-99.

¹⁰² "DOJ Conducts Post-9/11 VWP Evaluations, Makers Changes, Terminates Uruguay," *Interpreter Releases* 80, no. 19 (March 10, 2003): 365.

ing information on potential or existing visa violations and conferring with field enforcement teams for additional investigation.¹⁰³

May 21, 2003: The State Department issues a new regulation requiring consular officers to begin face-to-face interviews with most foreign nationals who desire a visa to enter the United States. Certain persons are exempted, including diplomats, persons working for particular international organizations, persons under the age of sixteen or over the age of sixty, and persons who had a visa that expired in the previous year. Consulates are given until August 1 to implement the regulations.¹⁰⁴

May 23, 2003: The State Department publishes an interim rule amending its regulations pertaining to foreign students and exchange visitors and establishing verification and reporting procedures required for SEVIS. The rule gives educational institutions additional time to enter information on foreign students.¹⁰⁵

June 5, 2003: The validity of Mantis clearances for certain categories of applicants is extended to one year.¹⁰⁶

July 25, 2003: ICE sends a memorandum to academic institutions outlining the approach to be used for the new SEVIS registration and creating a SEVIS Response Team to resolve issues related to student admission.¹⁰⁷

August 1, 2003: The State Department implements new face-to-face interview policies.¹⁰⁸ The department had issued the interim rule tighten-

ing requirements for interviews on July 7, 2003, and made the program known by cable on May 21, 2003.¹⁰⁹

August 1, 2003: The SEVIS program becomes fully operational, requiring students to enter no more than thirty days before the beginning of their academic programs.¹¹⁰

August 2, 2003: DHS suspends the Transit Without Visa (TWOV) and the International to International (ITI) transit programs for passengers in transit to foreign countries.¹¹¹

August 18, 2003: The State Department makes final, without change, the interim rule on automatic visa revalidation first published on March 7, 2002.¹¹²

August 19, 2003: The State Department releases instructions for the Diversity Visa Program for 2005, requiring entries to be submitted electronically and adding new provisions for digital photographs.¹¹³

August 31, 2003: Temporary DHS personnel arrive in Saudi Arabia to review visa applications. The deadline for implementation under the Homeland Security Act of 2002 was January 24, 2003.¹¹⁴

September 3, 2003: DHS announces the “One Face at the Border” program, which will consolidate immigration, customs, and agricultural inspectors at the border.¹¹⁵

¹⁰⁹ Wasem, *Visa Issuances*, 5 (see n. 87).

¹¹⁰ Maia Jachimowicz, “Government Widens Efforts to Scrutinize Foreign Visitors,” Migration Information Source (Migration Policy Institute), August 1, 2003.

¹¹¹ “Transit Without Visa, International-to-International Transit Programs Suspended,” *Interpreter Releases* 80, no. 30 (August 4, 2003): 1065.

¹¹² “DOS Finalizes Rule on Automatic Visa Revalidation,” *Interpreter Releases* 80, no. 33 (August 25, 2003): 1208-09.

¹¹³ “State Department Releases DV-2005 Instructions: Electronic Filing, Digital Photographs Required,” *Interpreter Releases* 80, no. 33 (August 25, 2003): 1201-08.

¹¹⁴ DHS Office of the Inspector General, *An Evaluation of DHS Activities*, 4 (see n. 91).

¹¹⁵ US Department of Homeland Security Office of the Press Secretary, *Homeland Security Announces New Initiatives*, news release, September 2, 2003, <http://www.dhs.gov/dhspub-lic/display?content=1435>.

¹⁰³ “DHS Plans New Office of Visa Compliance,” *Interpreter Releases* 80, no. 21 (May 23, 2003): 743.

¹⁰⁴ US Department of State, *Waiver of Personal Appearance Revision*, Unclas State 136300, May 21, 2003.

¹⁰⁵ “DOS Publishes Interim Rule on SEVIS Verification and Reporting Procedures,” *Interpreter Releases* 80, no. 21 (May 23, 2003): 745.

¹⁰⁶ US Department of State, *Standard Operating Procedures No. 22, Revision to Visas Mantis Clearance Procedures*, Unclas State 153587, June 5, 2003.

¹⁰⁷ “ICE Outlines Policy on Entry of Students Following August 1 SEVIS Deadline; Schools React,” *Interpreter Releases* 80, no. 31 (August 11, 2003): 1111-12.

¹⁰⁸ National Commission on Terrorist Attacks, *9/11 and Terrorist Travel*, 152 (see n. 1).

September 16, 2003: The secretary of state, attorney general, secretary of homeland security, and CIA director issue a joint memorandum of understanding in response to a homeland security presidential directive (HSPD-6) dated the same day and entitled “Integration and Use of Screening Information to Protect Against Terrorism.” The memorandum establishes the Terrorist Screening Center (TSC), which reports to the attorney general, to consolidate terrorist-related threats and screening. The Department of Homeland Security has a representative assigned to the TSC that reviews each threat and determines whether or not to make the information public to persons enforcing homeland security at home. The State Department reviews the threats and determines whether or not to make the names accessible to cooperative foreign governments. The Terrorist Threat Integration Center (TTIC) is the main source for TSC screening information, along with purely domestic terrorist information provided by the FBI. The TTIC also assumes responsibility for the TIPOFF counterterrorism program in the State Department, and the government plans to discontinue or transfer to TSC duplicative operations such as the FBI’s watch list and the Transportation Security Agency’s “no-fly” list.

September 22, 2003: The State Department begins deploying biometric nonimmigrant visa software for the collection of fingerprints.

September 24, 2003: The State Department, in consultation with DHS, postpones the date by which VWP countries must present a machine-readable passport until October 26, 2004. The USA PATRIOT Act originally mandated a deadline of October 1, 2003. Andorra, Brunei, Liechtenstein, Luxembourg, and Slovenia are not granted an extension because the vast majority of their citizens already have machine-readable passports.¹¹⁶

September 30, 2003: President Bush publishes a memorandum of understanding (MOU) between Secretary of State Colin Powell and Secretary of Homeland Security Tom Ridge describing the roles and

responsibilities of each agency.¹¹⁷ Among the key provisions of the MOU:

- DHS is given final decision-making responsibility over visa policy and implementation, including “classification, admissibility, and documentation; place of visa application; discontinuing granting visas to a country not accepting aliens; personal appearance; visa validity periods and multiple entry visas; the Visa Waiver Program; notices of visa denials; and the processing of persons from state sponsors of terrorism.” The State Department may propose and issue visa guidance, but it will be subject to consultation and final approval by DHS.
- Homeland Security officials announce they will review Saudi visa applications before they go to the State Department for final approval.¹¹⁸ The State Department continues to issue security advisory opinions (SAOs).
- Consular officers retain the responsibility for visa adjudication and issuance, and DHS officers overseas advise consular officers regarding security threats, review visa applications, and conduct investigations regarding visa matters
- DHS is given discretion to place additional DHS officers overseas in strategic locations, adding to the Visa Security Officer program already planned in Saudi Arabia.
- DHS gains final responsibility over the following (with a few minor exceptions): visa guidance to consular officers regarding eligibility for nonimmigrant and immigrant visa classifications; guidance on grounds of inadmissibility for visa applicants and the granting of waivers on grounds of inadmissibility; guidance determining information, evidence, or documentation collected to determine visa eligibility; guidance prescribing circumstances in which aliens applying for visas may apply at places other than consular posts; and guidance determining when consular officers may waive personal appearances by applicants or waive notice of visa denials.¹¹⁹

¹¹⁷ US Department of State and Department of Homeland Security, *Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002*, September 30, 2003.

¹¹⁸ Andrew Mollison, “Monitoring begins for Saudi visa requests,” *Atlanta Journal-Constitution*, October 1, 2003.

¹¹⁹ “DHS to Establish, Review Visa Policy Under New DOS-DHS Agreement,” *Interpreter Releases* 80, no. 38 (October 6, 2003): 1365-67.

¹¹⁶ “DOS Postpones Machine-Readable Passport Requirement for Certain VWP Participants,” *Interpreter Releases* 80, no. 37 (September 29, 2003): 1337-38.

September 30, 2003: Secretary Ridge announces the creation of the Office of International Enforcement (OIE) to oversee DHS activities with the State Department.¹²⁰

October 2, 2003: The Visas Condor criteria are changed and become more narrowly focused.

October 3, 2003: The State Department issues a cable extending the validity of all Visas Mantis clearances (for people working in one of sixteen sensitive technology areas) to twelve months.¹²¹

October 17, 2003: The State Department extends basic training for new consular employees (known as ConGen) by five days to increase the amount of training in visa and security procedures.¹²²

November 2003: A State Department official testifies before the House of Representatives Committee on Science in February 2004 that the State Department implemented the SAO Improvement Project, a cableless SAO process that makes responses and requests available through CCD, beginning in November of 2003. The program is fully implemented by September 2004.¹²³

December 2, 2003: DHS amends but does not abolish NSEERS requirements. The interim rule suspends the automatic thirty-day and annual re-registration policies, but states that DHS will notify individual aliens of future registration requirements.¹²⁴

December 30, 2003: The TIPOFF watch list is transferred to the Terrorist Screening Center (TSC) for integration with other watch lists.

January 5, 2004: DHS issues an interim final rule stating that under the US-VISIT program (a biometric identification and tracking

¹²⁰ Wasem, *Visa Policy: Roles of the Departments*, 12 (see n. 61).

¹²¹ US Department of State, *Standard Operating Procedures No. 45: Revision To Visas Mantis Clearance Procedure*, Unclas State 285912, October 3, 2003.

¹²² Mollison, "Monitoring begins for Saudi visa requests," (see n. 118).

¹²³ Janice Jacobs, *The Conflict Between Science and Security in Visa Policy: Status and Next Steps*, House of Representatives Science Committee, February 25, 2004.

¹²⁴ "DHS Amends, But Does Not Abolish, Special Registration Requirements," *Interpreter Releases* 81, no. 46 (December 8, 2003): 1633-34.

program), DHS may require those arriving with visas to provide fingerprints, photographs, and other biometric indicators upon arrival at air and seaports. The rule does not apply to travelers under the VWP or persons who enter through land ports of entry.¹²⁵

July 16, 2004: The State Department, in an interim final rule issued March 18, 2004, discontinues domestic visa reissuances for C, E, H, I, L, O, and P visas, encouraging them to either apply for renewal in their home countries or at a US visa processing post in Mexico and Canada.¹²⁶ The requirement was added so that federal officials could obtain digitally recorded fingerprint data, the technology for which is only available at consulates and embassies overseas.¹²⁷

July 21, 2004: The State Department finalizes a rule eliminating crew list visas. Seafaring crew members are now required to complete a nonimmigrant visa application form, submit a passport, and undergo an interview and background check.¹²⁸

July 30, 2004: The State Department issues a cable requiring diplomatic and consular posts to provide information on existing business visa facilitation programs by August 30, 2004.¹²⁹

August 2, 2004: DHS and the State Department release memos dictating the procedure for processing aliens with revoked visas. According to the procedure, the Terrorist Screening Center initiates revocation cases, notifying both the visa office and DHS. The information is updated into CLASS, and ICE follows up by checking whether or not the alien is in the United States.¹³⁰

¹²⁵ "DHS Issues US-VISIT Interim Final Rule, Notice," *Interpreter Releases* 81, no. 1 (January 5, 2004): 1-2.

¹²⁶ "DOS to Discontinue Many Domestic Visa Reissuances," *Interpreter Releases* 81, no. 25 (June 28, 2004).

¹²⁷ Jack Chang, "Renewal Rules Change for Some Visa Holders," *Contra Costa Times*, July 20, 2004.

¹²⁸ "DOS Finalizes Rule Eliminating Crew List Visas," *Interpreter Releases* 81, no. 29 (July 26, 2004): 971.

¹²⁹ US Department of State, *Initiative to Facilitate Business Travel*, Unclas State 166108, July 30, 2004, http://travel.state.gov/visa/laws/telegrams/telegrams_1490.html.

¹³⁰ "DOS and DHS Discuss Visa Revocation Processes," *Interpreter Releases* 81, no. 33 (August 23, 2004): 1138-39.

August 6, 2004: Secretary Powell releases a cable praising past efforts by diplomatic and consular posts in implementing the State Department initiatives, including the “Nonimmigrant Travel Initiative” to streamline the SAO process. It also asks each post to prioritize students and medical cases as well as to undertake a self-assessment of processes and procedures.¹³¹

August 9, 2004: President Bush signs into law H.R. 4417, a bill extending the deadline for visa waiver countries to issue biometric passports by one year to October 26, 2004.¹³²

August 12, 2004: USCBP gives border inspectors leeway to “parole,” on a one-time basis, no-risk travelers who previously overstayed a Visa Waiver Program visit.¹³³

August 13, 2004: DHS extends the time that Mexican citizens with border crossing cards can stay in the United States without being issued an I-94 from seventy-two hours to thirty days.¹³⁴

August 27, 2004: In response to the lack of awareness of the visa application process, the State Department requires consular posts to publish processing time information in prominent places on each post’s Web site.¹³⁵

September 25, 2004: For the first time, CBP gains the ability to simultaneously search the IDENT database and the FBI’s Integrated Automated Fingerprint Identification System (IAFIS), allowing agents

to check the criminal and immigration background of persons illegally entering the United States or of visa overstayers.¹³⁶

September 30, 2004: All VWP visitors are subject to US-VISIT processing at airports and seaports of entry.¹³⁷

October 4, 2004: NAFSA: National Association for International Educators announces that SAO processing times have shown dramatic improvements in many categories, including declines in the number of Mantis SAO cases and in Mantis SAO processing times. Less than 300 cases are in the backlog (cases pending for over thirty days) as of October 4, while over 2,000 had been pending in April.¹³⁸

October 8, 2004: The State Department issues a cable congratulating posts on the completion of the biometric visa program, in which posts were required to implement an infrastructure to collect and disseminate biometric information from visa applicants.¹³⁹

October 20, 2004: The State Department distributes a cable encouraging the facilitation of business travel in visa cases.¹⁴⁰

October 26, 2004: All VWP entrants are required to have a machine-readable passport, per the extension granted on September 24, 2003. Officials at ports of entry were granted the authority to give one-time waivers to passengers from most VWP countries that had not yet obtained a new passport.¹⁴¹ According to the Government Accountability Office, 201 out of 207 overseas posts had completed

¹³¹ US Department of State, *Nonimmigrant Travel Initiative*, Unclas State 170771, August 4, 2004, http://travel.state.gov/visa/laws/telegrams/telegrams_1491.html.

¹³² “President Signs Biometric Passport Deadline Extension,” *Interpreter Releases* 81, no. 32 (August 16, 2004): 1031-82.

¹³³ US Customs and Border Patrol, *U.S. Customs and Border Protection Commissioner Broadens Authority, Directs More Leeway for Admitting No Risk Visitors to the United States*, press release, August 12, 2004.

¹³⁴ “DHS Extends Time Limit for Mexicans with BCCs,” *Interpreter Releases* 81, no. 32 (August 16, 2004): 1035.

¹³⁵ US Department of State, Key Visa Processing Information on Post Websites-Follow-up, Unclas State 181968, August 27, 2004, http://travel.state.gov/visa/laws/telegrams/telegrams_1492.html.

¹³⁶ Jerry Seper, “Border Plugs Into Vast Database,” *Washington Times*, September 25, 2004.

¹³⁷ US Department of Homeland Security, *Department of Homeland Security to Begin Biometric Exit Pilot as Part of US-VISIT Program*, press release, August 3, 2004.

¹³⁸ NAFSA: National Association for International Educators, “Visa Processing Progress,” October 4, 2004, <http://www.nafsa.org/content/PublicPolicy/NAFSAontheIssues/VisaProcessingProgress.htm>.

¹³⁹ US Department of State, *Completion of Biometric Deployment*, Unclas State 218478, October 8, 2004.

¹⁴⁰ US Department of State, *Facilitation of Business Travel*, Unclas State 225608, October 20, 2004.

¹⁴¹ US Department of Homeland Security, *Visa Waiver Program: Important Notice*, press release, 2004, http://travel.state.gov/visa/tempvisitors_novisa_waiver.html.

the installation of technology for the biometric visa program by early September.¹⁴²

December 2004: The State Department issues a cable clarifying the use of INA 214B as a basis of refusal for a nonimmigrant visa and its use as a measure to prevent terrorism, stating that “it should not be used as or equated with 212(a) grounds of inadmissibility, one of which directly relates to terrorism.”¹⁴³

December 2004: The State Department issues a cable clarifying the use of English language student programs for F-1 visas and reminding consular posts that students do not require future academic plans in the United States to be admitted. Nor can they be denied a visa merely because an English language study program is available locally.¹⁴⁴

December 4, 2004: The State Department issues a cable entitled “We Don’t Want to Lose Even One Student,” urging consular officers to process student and scholar visas in a timely manner and to conduct additional outreach to improve the perception of the student visa process.¹⁴⁵

December 8, 2004: President Bush signs the Consolidated Appropriations Act, which requires DHS, the Justice Department, and the State Department to conduct a joint study of all matters related to the efficiency and effectiveness of the interagency process for reviewing nonimmigrant visas under 8 USCA 1201(a)(1)(B). The report is due to Congress a year after the enactment date of the act, and may be classified or unclassified.¹⁴⁶

December 17, 2004: President Bush signs into law the Intelligence Reform and Terrorist Prevention Act (Intelligence Reform Act) in response to the recommendations of the September 11 Commission. The

bill expands the required visa interview age to all persons age fourteen to seventy-nine, makes the revocation of a visa a deportable offense, and grants the State Department the authority to hire an additional 150 consular officers over the next four fiscal years (FY2006 to FY2009).¹⁴⁷

December 29, 2004: The US-VISIT program is successfully implemented at the 50 busiest land ports in the United States, two days ahead of schedule.

December 30, 2004: The State Department makes permanent the Biometric Visa Program initiated under EBSVERA, which requires immigrant and nonimmigrant visa applicants to enroll finger scans of their index fingers and provide photographs with their visa application. This program exempts diplomats, NATO visas, persons under the age of fourteen, and persons over eighty, except in Mexico, where all applicants age seven and above must undergo a finger scan.¹⁴⁸

2005: The government intends to produce and issue passports with radio frequency identification chips, known as e-passports, that will make it more difficult to forge passports. The chips will be able to hold basic data such as name and date of birth, as well as a biometric photo. The government asked technology companies for bids on the e-passports in late 2004, and intends to introduce them by the end of 2005.¹⁴⁹

February 11, 2005: Visas Mantis clearances are made valid for up to four years for students and up to two years for working scientists.¹⁵⁰

February 16, 2005: The State Department makes final a rule, without change, that establishes the verification and reporting procedures for the SEVIS student information system.¹⁵¹

¹⁴⁷ *Intelligence Reform and Terrorist Prevention Act*, P.L. 108-458, 108th Cong., 2d sess.

¹⁴⁸ US Department of State, “Deployment of the Biometric Visa Program for the Collection of Biometric Identifiers of Nonimmigrant and Immigrant Visa Applicants,” *Federal Register* 69, no. 250 (December 30, 2004).

¹⁴⁹ Alorie Gilbert, “U.S. Moves Closer to e-passports,” *New York Times*, October 25, 2004.

¹⁵⁰ US Department of State Office of the Spokesman, *Extension of the Validity for Science Related Interagency Visa Clearances*, press release, February 11, 2005, <http://www.state.gov/r/pa/prs/ps/2005/42212.htm>.

¹⁵¹ “DOS Publishes Final SEVIS Regulations,” *Interpreter Releases* 82, no. 8 (February 21, 2005): 356.

¹⁴² Government Accountability Office, *Border Security: State Department Rollout of Biometric Visas on Schedule, But Guidance Is Lagging*, GAO-04-1001 (September 9, 2004).

¹⁴³ US Department of State, *INA 214(B) Basis of Refusal Not Equal to Inadmissibility*, Unclas State 274068, December 2004.

¹⁴⁴ US Department of State, *English Language Study on F-1 Visas*, date unknown, <http://www.nafsa.org/content/publicpolicy/nafsaontheissues/elp.pdf>.

¹⁴⁵ US Department of State, *We Don’t Want to Lose Even One Student*, Unclas State 261900, December 4, 2004.

¹⁴⁶ *Consolidated Appropriations Act 2005*, P.L. 108-447, 108th Cong., 2d sess.

April 30, 2005: The State Department issues a cable updating technical details about the student visa process, including ways for posts to improve appointment accessibility, to deal with data fixes, and to resolve other visa issuance problems.¹⁵²

May 5, 2005: The State Department issues a cable describing the interview requirement under the Intelligence Reform Act. The State Department regulations permitting interview exemptions for diplomatic visas remain in effect.¹⁵³

June 15, 2005: The Department of Homeland Security announces that all Visa Waiver Countries must provide passports with digital photographs by October 26, 2005, in keeping with the EBSVERA requirement that any VWP passport issued after that date must contain a biometric identifier based on applicable standards established by the International Civil Aviation Organization (ICAO). According to the statement, the VWP countries will be required to begin issuing e-passports with integrated circuit chips by October 26, 2006.¹⁵⁴

June 20, 2005: The United States begins issuing student (F, J, and M) visas to Chinese travelers for the duration of one year with multiple entries permitted. Previously, these travelers had to renew their visas every six months.¹⁵⁵

June 24, 2005: Senior immigration officials attending the annual American Immigration Lawyers Association conference state that President Bush wants to tighten screening of foreign reasons, and may not allow individuals transitioning from student to H-1B visas to remain in the United States. Previously, nonimmigrant students who finished one year of practical training during the summer after obtaining

a bachelor's degree were allowed to stay in the United States until October 1, when the new federal fiscal year begins and they could start working on an H-1B visa.¹⁵⁶

June 26, 2005: The Department of Homeland Security begins enforcing the requirement that all VWP travelers present a machine-readable passport to enter the United States without a visa.¹⁵⁷

July 13, 2005: DHS Secretary Michael Chertoff announces a six-point agenda for homeland security. The provisions include a proposal for a new Directorate of Policy headed by an Undersecretary for Policy, and the elimination of the Directorate for Border and Transportation Security. Instead, CBP, ICE, and CIS all would directly report to the Secretary and Deputy Secretary for Homeland Security.¹⁵⁸ The Secretary also announced that future travelers to the US will have all 10 fingers scanned for the US-VISIT program; two fingerprints are currently required. Secretary Chertoff also states that additional changes to the visa program will be forthcoming.

¹⁵² US Department of State, *Student Visa Update*, Unclas State 079909, April 30, 2005.

¹⁵³ US Department of State, *Intelligence Reform and Terrorist Prevention Act 2004 Interview Requirement Changes*, Unclas State 092176, May 5, 2005.

¹⁵⁴ Department of Homeland Security Office of the Press Secretary, "DHS to Require Digital Photos in Passports for Visa Waiver Travelers," press release, June 15, 2005, <http://www.dhs.gov/dhspublic/display?content=4542>.

¹⁵⁵ United States Embassy in Beijing, "US Embassy in Beijing Extends the Term of Validity for F-1/F-2, J-1/J-2, and M-1/M-2 Visas," press release, June 14, 2005, <http://www.usembassy-china.org.cn/visa/>.

¹⁵⁶ True, Walsh, and Miller, "Immigration Update," June 24, 2005, [http://www.twmlaw.com/resources/nes\[07_08_05\].html](http://www.twmlaw.com/resources/nes[07_08_05].html)

¹⁵⁷ Department of State Office of the Spokesman, "Machine-Readable Passport Requirements to Take Effect at US Borders on June 26, 2005," press release, May 12, 2005, <http://www.state.gov/r/pa/prs/ps/2005/46138.htm>.

¹⁵⁸ Department of Homeland Security, "Secretary Michael Chertoff announces Six Point Agenda for Department of Homeland Security," press release, July 13, 2005, <http://www.dhs.gov/dhspublic/display?content=4598>.

APPENDIX C: VISA CATEGORIES

Relevant Nonimmigrant Visa Categories

A-1	Ambassador/Diplomat
A-2	Other Foreign Government Official
A-3	Employee of A-1, A-2
B-1	Visitor for Business
B-2	Visitor for Pleasure
C-1	Alien in Transit
C-2	Alien in Transit to UN Headquarters
C-3	Foreign Government Official in Transit
C-4	Transit Without Visa
D-1	Crewman Departing on Vessel of Arrival
D-2	Crewman Not Departing on Same Vessel
E-1	Treaty Trader
E-2	Treaty Investor
F-1	Academic Student
F-2	Spouse of Academic Student
G-1	Lead Rep to International Organization
G-2	Other Rep to International Organization
G-3	Nonmember Rep to International Organization
G-4	International Organization Officer/Employee
G-5	Employee of G-1, G-2, G-3, G-4
H-1B	Specialty Occupations
H-1C	Nurses in Shortage Areas
H-2A	Temporary Agricultural Worker
H-2B	Temporary Worker (skilled/unskilled)
H-3	Trainee
H-4	Spouse/Child of Temporary Worker
I	Journalist and Foreign Media

J-1	Exchange Visitor
J-2	Spouse of Exchange Visitor
K-1	Fiancé of U.S. Citizen
K-2	Minor Child of K-1
K-3	Spouse of U.S. Citizen
K-4	Minor Child of K-3
L-1A	Executive/Managerial Intracompany Transfer
L-1B	Specialized Knowledge Intracompany Transfer
L-2	Spouse or Child of L-1
M-1	Vocational Student
M-2	Spouse of Vocational Student
N-8	Parents or Children of Special Immigrants
N-9	Child of Special Immigrant
NATO-1	Principal Representative to NATO
NATO-2	Other Representative of Member State
NATO-3	Official Clerical Staff
NATO-4	Official NATO Staff
NATO-5	Expert Other Than NATO Officials
NATO-6	Member of Civilian Component
NATO-7	Family of NATO-1 through NATO-6
O-1	Person of Extraordinary Ability
O-2	Alien Accompanying O-1
O-3	Spouse/Child of O-1
P-1	Individual/Team Athlete or Entertainment Group
P-2	Artist in a Reciprocal Exchange Program
P-3	Artist in a Culturally Unique Program
P-4	Spouse/Child of P-1, P-2, P-3
Q-1	International Cultural Exchange Visitor
Q-2	Irish Peace Process Program
Q-3	Spouse/Child of Q-2
R-1	Religious Worker
R-2	Spouse/Child of R-1
S-5	Informant of Criminal Organization Information

S-6	Informant of Terrorist Organization
T-1	Victims of Severe Form of Trafficking in Persons
T-2	Spouse of T-1
T-3	Child of T-1
T-4	Parent of T-1 (if T-1 is under 21 years old)
TN	NAFTA Professionals (Mexico/Canada)
TD	Spouse or Child of TN
U-1	Victim of Certain Criminal Activity
U-2	Spouse of U-1
U-3	Child of U-1
U-4	Parent of U-1 (if U-1 is under 21 years old)
V-1	Spouse of Legal Permanent Resident Awaiting LPR
V-2	Child of Legal Permanent Resident Awaiting LPR
V-3	Derivative Child of V-1 or V-2

Relevant Immigrant Visa Categories

Not Subject to Numerical Limitations	Immediate Relatives of Adult US Citizens (spouse, children, parents) Special Immigrants and Others
Subject to Numerical Limitations	Family-Sponsored Immigrants (226,000 per year) Employment Based Immigrants (140,000 per year) Diversity Immigrants (50,000 per year)

APPENDIX D: IMMIGRATION AND NATIONALITY ACT CATEGORIES OF INADMISSIBILITY

Section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182) delineates the various categories of aliens ineligible for visas or admission. These include:

212(a)(1) - Health Related Grounds

- Persons who have a communicable disease of public health significance, including HIV/AIDS
- Persons who have failed to present documentation of vaccination against certain preventable diseases (except adopted children of ten years old or younger)
- Persons who have a physical or mental disorder, the behavior from which may pose a threat to the property, safety, or welfare of the immigrant or others
- Persons who are determined to be drug addicts or abusers

212(a)(2) - Criminal and Related Grounds

- With exceptions, persons who have committed crimes involving moral turpitude (other than purely political offences) or violations of law or regulation related to a foreign substance
- Persons with two or more offenses for which the aggregate sentences to confinement are five years or more
- Controlled substance traffickers and their families, traffickers in persons and their families
- Certain persons involved in seriously criminal activity who have invoked immunity from prosecution
- Money launderers and prostitutes

212(a)(3) - Security and Related Grounds

- Persons attempting to violate United States law on espionage, sabotage, or the export from the United States of goods, technology, and sensitive information
- Persons who engage in activity to overthrow the United States government
- Persons who have engaged in terrorist activities¹ or are representatives of a foreign terrorist organization or an organization that endorses terrorism
- Persons whose entry or activities in the United States are believed to have potentially serious adverse foreign policy consequences for the United States
- Individuals who have been a member of or affiliated with the Communist Party or any other totalitarian party (or subdivision and affiliate)
- Individuals who have participated in Nazi persecutions or genocide

202(a)(4) - Public Charge

- In general, any individual who is likely to become a public charge, after age, health, family status, assets, and education are taken into account
(Exceptions are made for family-sponsored spouses or children of US citizens, and certain employment-based immigrants with an affidavit of support.)

202(a)(5) - Labor Certification and Qualifications for Certain Immigrants

- Any individual who wishes to enter the United States to perform skilled or unskilled labor unless it is certified that a) there are not

¹ Terrorist activity is any activity under the laws of the place where it is committed and involves (in summary) the hijacking or sabotage of any conveyance; the seizing or detaining and threatening to kill or injure another individual in order to compel a person to do or abstain from an act; a violent attack upon an internationally protected person or the liberty of such a person; an assassination; the use of any biological, chemical, or nuclear agent; the use of an explosive, firearm, or other weapon with the intent to endanger the safety of persons or cause substantial damage to property; a threat, attempt, or conspiracy to do any of the foregoing.

sufficient workers who are able, willing, qualified, and available to perform such labor, and b) their employment will not adversely affect the wages and working conditions of similarly employed workers

(Members of the teaching profession and persons with exceptional ability in the sciences or arts are subject to special rules, as are professional athletes.)

- Unqualified physicians and foreign health care workers

202(a)(6) - Illegal Entrants and Immigration Violators

- Any immigrant present in the United States without being admitted or paroled, with exceptions for certain battered women and children.
- Any immigrant who failed to attend removal proceedings and seeks to reenter within five years of his or her subsequent deportation
- With exceptions, any applicant who, by fraud or willing misrepresentation, seeks to obtain a visa, citizenship, or otherwise seeks admission to the United States
- Stowaways and student visa abusers
- Any smuggler or individual who has knowingly encouraged, induced, assisted, or aided any other alien to enter the United States in violation of law
- Any person who is the subject of certain civil penalties

202(a)(7) - Documentation Requirements

- Any immigrant not in possession of a valid immigrant visa and a valid passport and without an authorized waiver
- Any nonimmigrant who is not eligible under the visa waiver program and who is not in possession of a passport valid for six additional months and a nonimmigrant visa or border crossing card

202(a)(8) - Ineligible for Citizenship

- Any immigrant permanently ineligible for citizenship, including draft evaders

202(a)(9) - Aliens Previously Removed and "Unlawful Presence"

- Persons who have been ordered removed and seek admission within five years of their removal or within ten years of having departed the United States while the order of removal was outstanding
- Persons who a) were unlawfully present in the United States for more than 180 days but less than one year, voluntarily departed the United States, and seek reentry within three years or b) were unlawfully present in the United States for more than one year, voluntarily departed, and seek reentry within ten years (Exceptions exist for minors, asylum seekers, family unity, and battered women and children as well as for persons tolling for good cause.)
- Persons unlawfully present after previous immigration violations, with some exceptions

202(a)(10) - Miscellaneous

- Practicing polygamists
- Persons required to accompany helpless immigrants
- Any person who, after the United States grants custody to a citizen child, retains the child or withholds custody
- Any person who aids international child abductors, as described above, or is a relative of an abductor
- Unlawful voters

APPENDIX E: A SPOTLIGHT ON STUDENT VISA PROCESSING

The nearly 600,000 international students studying in the United States provide several unique advantages to American academic institutions.¹ They add diversity to the student population, bring unique

¹ Institute of International Education, "Open Doors 2004: Executive Summary," November 10, 2004, <http://opendoors.iienetwork.org/?p=50137>.

educational experiences to the classroom, and usually pay higher tuition rates than US citizens. Overall, international students contribute \$13 billion dollars annually to the American economy.² However, since the September 11 attacks and the revelation that one hijacker entered on a student visa and two others changed to student status after entering the United States, the issuance of student visas has undergone additional scrutiny and procedural changes. That, in turn, has affected the number of foreign students attending US universities.

Student Visas and September 11

While most of the September 11 hijackers arrived on B-1/B-2 temporary visas for tourism or business, three of them had a direct relationship to the student visa program. Hani Hanjour, the person who piloted American Airlines Flight 77, entered the United States four times before September 11, three times on a student visa. In 1996 and 2000 respectively, Hanjour received a student visa to attend the same English language school. The Immigration and Naturalization Service (INS) approved the first application while Hanjour was in the United States. The State Department had no record of that approval when the second application was made. The consular officer stated that had the knowledge of the first application been available, the application in 2000 might have been denied because students are expected to show progress in their studies.³ Mohammed Atta also received an approved "change-of-status" application from tourist to student in July 2001, even though his application should have been considered abandoned when he left the country in 2000 and even though he had made false statements about his student status.⁴

In addition, paperwork lagged behind for change-of-status applications. For example, INS mailed change-of-status confirmations (for status

² NAFSA: Association of International Educators, "The Economic Benefits of International Education to the United States of America," November 4, 2004, <http://www.nafsa.org/content/publicpolicy/dataoninternationaleducation/econbenefits.htm>.

³ National Commission on Terrorist Attacks Upon the US, *9/11 and Terrorist Travel* (Washington, DC: National Commission on Terrorist Attacks Upon the US, August 21, 2004): 14, http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf.

⁴ *Ibid.*, 28.

that had been approved months before the attacks) to the school attended by Atta and another pilot on March 11, 2002, six months to the day after the September 11 attacks. As a result of these discrepancies and the September 11 attacks, the public perceived an urgent need to institute reforms to the student visa process.

Policy Changes

Major congressional action to reform student visas had been approved several years before the terrorist attacks. In 1996 Congress approved legislation to track students from selected countries. That program was to be fully implemented by January 2003.⁵ A pilot program, the Coordinated Interagency Partnership Regulating International Students (CIPRIS) was in place during the mid-1990s, funded primarily by the reallocating of other appropriations.⁶ By 1998 the program was in place at twenty-two schools. However, the program was scaled back because the statute required it to be funded by user fees, which universities opposed because it put a financial burden both on the students and the universities that were expected to collect them.

After September 11 the student tracking system was given renewed attention. In December 2002 DHS published a final rule requiring all schools to comply with the new program, known as the Student Exchange Visitor Program (SEVP), by January 30, 2003. SEVP employs a technology known as the Student and Exchange Visitor Information System (SEVIS), an Internet-based system that provides the government, educational institutions, and exchange programs an electronic means to exchange timely information about foreign students, exchange visitors, and their dependents. Universities must provide the start and end date of a student's enrollment and any information on their failure to enroll, maintain a full course of study, or otherwise maintain their student status.⁷ When SEVIS was first implemented,

critics complained that the system was unwieldy, difficult to use, and a burden on both students and universities.

After September 11 many students also became subject to other important changes in visa procedures, including mandatory interviews at US consular posts and background security checks.⁸ Student visa applicants who generated a hit against the State Department's Consular Lookout and Support System (CLASS) computer database—those who cannot be cleared by simple data comparisons such as birth dates and full names—must undergo additional scrutiny. Similarly, male student visa applicants between the ages of sixteen and forty-five and who are from one of the twenty-six predominantly Muslim countries are subject to a Visa Condor security clearance. The program with the largest impact on students, however, has been the Visas Mantis security clearance, performed on persons whose field/area of study falls under the Technology Alert List. These checks, which numbered less than 1,000 in the year 2000, increased to 14,000 by 2002⁹ and grew to a high of 20,000 in 2003. As a result of these new security requirements, some students have faced delays in receiving their visas. By June 2003 one report estimated that it took an average of sixty-seven days for the Visas Mantis security check and notification process to be completed.¹⁰

Results

The new requirements for international students in the United States have caused a decline in the foreign student population in the United States. The decline in new applications is even more noticeable. The total number of nonimmigrants admitted in the F-1 (academic student), M-1 (vocational student), and J-1 (exchange visitors) visa categories has dropped by nearly 17,000 students since 2001. The Institute of International Education reports that the United States experienced an absolute drop of 2.4 percent in international enrollment from the 2002-

⁵ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), P.L. 104-208, § 641, 110 Stat. 3009, 3009-704 (1996).

⁶ University of Texas, "The Alphabet Soup of National Security," <http://www.utwatch.org/security/intlprograms.html>.

⁷ US Department of Justice, *Justice Department Proposes Rule Governing Foreign Student Reporting*, news release, May 10, 2002.

⁸ Because personal appearance waivers were not specifically authorized for F, J, or M visas, most students already had to appear for visa interviews before the terrorist attacks. There were exceptions, however, for personal hardship.

⁹ Tim Johnson, "Post-September 11, U.S. Commerce, Higher Education Feel Pinch from Tight American Borders," *Washington Dateline*, September 6, 2004.

¹⁰ General Accounting Office (GAO), *Improvements Needed to Reduce Time Taken to Adjudicate Visas for Science Students and Scholars*, GAO 04-371 (February 2004).

03 school year to the 2003-04 school year, the first drop in enrollment since 1971-72. According to a fall 2004 survey by NAFSA: Association of International Educators and other educational associations, foreign student enrollments continue to decline.¹¹

Foreign Students in the United States (2000-2004)

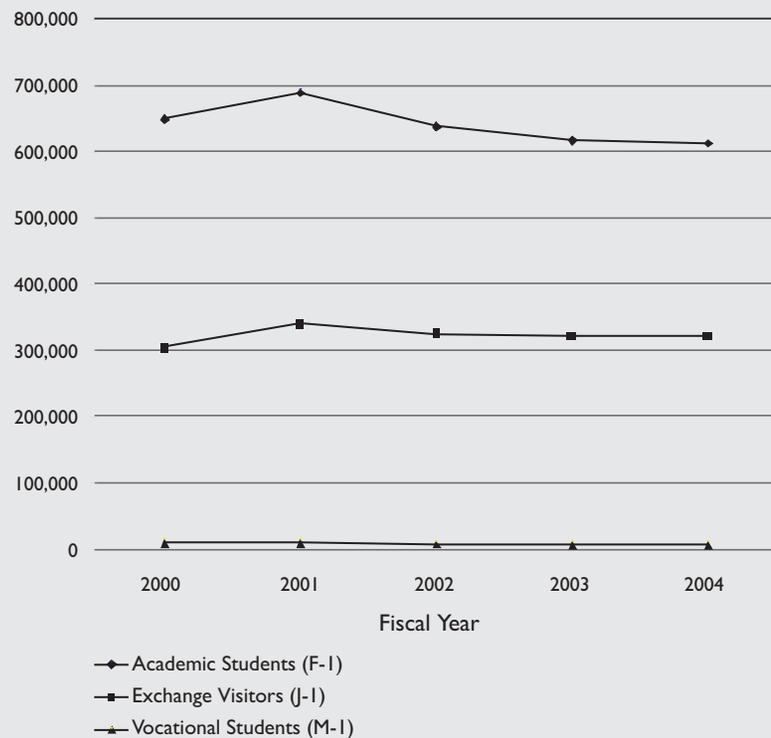


Figure 1. Source: USCIS Yearbook of Immigration Statistics: 2004.

¹¹ NAFSA: Association of International Educators, "Survey of Foreign Student and Scholar Enrollment and Visa Trends for Fall 2004," November 2004, http://www.nafsa.org/content/publicpolicy/forthemedia/enrollment_surveysummary.pdf.

An alternative measure to tracking enrollment is to look at the number of students admitted to the United States in a particular visa category.¹² The number of student admissions, particularly from some Middle Eastern countries, has decreased substantially. The percentage decrease has been greatest for students from Saudi Arabia, with a 42 percent decrease from 2000-01 to 2001-02 and a 43 percent decrease from 2001-02 to 2002-03. Of the countries listed below, only India has met or exceeded pre-September 11 student visa admissions levels.

Chart of Student Visa Admissions in Selected Year by Country

	FY 2000	FY 2001	00-01 Difference	FY 2002	01-02 Difference	FY 2003	02-03 Difference	FY 2004	03-04 Difference
Bangladesh	2,451	2,517	+2.6%	1,490	-40%	1,382	-7.2%	1,346	-2.6%
China	68,628	73,823	+7.6%	68,722	-6.9%	56,870	-17.2%	63,940	+12.4%
Egypt	1,926	1,796	-6.7%	1,137	-36%	979	-13.9%	911	-6.9%
India	39,795	48,809	+22%	48,708	-.2%	50,884	+4.4%	51,191	+0.6%
Iran	624	852	+36.5%	295	-65.3%	255	-13.56%	329	+29.0%
Japan	91,048	95,201	+4.6%	87,478	-8.1%	81,558	-6.76%	77,044	-5.5%
Pakistan	5,761	7,496	+30.1%	5,274	-29.6%	5,433	+3%	4,343	-20.0%
Saudi Arabia	8,286	8,765	+5.8%	5,080	-42%	2,869	-43.5%	2,340	-18.4%
Thailand	12,439	13,146	+5.7%	11,727	-10.8%	10,433	-11%	9,890	-5.2%
Worldwide	659,081	698,595	+6%	646,016	-7.5%	624,917	-3.3%	620,210	-0.7%

Figure 2. Source: USCIS Yearbook of Immigration Statistics: 2004.

What has caused the decrease in international student enrollment? Two causes that can be explored are decreased demand for visas (as demonstrated by decreased applications), and fewer student visa approvals (as measured by refusal rates, since there is no cap on student visas). In terms of visa approvals, the refusal rate for student visas has not substantially increased since September 11. The State Department's Bureau of Consular Affairs reports an adjusted student

¹² Admissions reflect the absolute number of persons admitted to the United States in a given visa category, not the numbers of persons admitted to the university or college.

visa refusal rate (including F-1, J-1, and M-1 visas) of 16.7 percent in 2003, and 15 percent in 2004.¹³ The F-1 visa category has had a higher refusal rate, ranging from 20 percent in FY2000 to over 27 percent in FY2002, though it declined to 22.5 percent in FY2004. In comparison, the refusal rate for the J-1 visa category ranged between 4 and 8 percent over the same period.

Chart of F-1 Visas Issued (2000 to 2004)

	FY2000	FY2001	FY2002	FY2003	FY2004
Issued	284,053	293,357	234,322	215,695	218,898
Refused	91,181	112,310	118,856	117,011	92,598
Waived/Overcome	18,052	25,222	30,500	43,972	28,837
Adjusted Refusal Rate	20.47%	22.89%	27.38%	25.30%	22.56%
Workload (minus Waived/Overcome)	357,182	380,445	322,678	288,734	282,659

Figure 3. Source: DOS Statistics, authors' copy: 2004.

More notable is the number of applications waived/overcome in the F-1 category, for which applicants are required to produce additional information. These applications, which also are indicative of those needing additional time for processing, more than doubled from FY2000 to FY2003.

Anecdotal evidence suggests that while refusal rates have not increased drastically, various processing delays (as represented partially by the waived/overcome rate¹⁴) have hurt student visa applicants and have caused many students to miss their programs or to start late. An informal survey by the Arab American Institute determined that student enrollment from eleven Middle Eastern countries decreased by

nearly 2,000 students from 2001 to 2002. Thirty percent of that decrease was the result of students being unable to make their start dates at school due to visa delays.¹⁵ Even in the spring of 2004, over 60 percent of ninety academic institutions surveyed reported that at least one student had missed his or her start date as a result of visa processing (and fourteen schools reported that at least ten students were delayed). In the spring of 2005, eleven schools reported a delay of at least ten or more students, and the number of schools experiencing problems had dropped to 52 percent.¹⁶

An additional problem is that visa delays do not only occur for first-time applicants, but also for returning students. Some students have been delayed for more than four weeks beyond their intended return dates due to additional security clearances, information about study programs, and verification of continued enrollment.¹⁷ As a result, many students are reluctant to return home because they fear that their visas will be delayed or denied too late for their return start dates.

As with visas more generally, problems with obtaining visas and perceptions that the process is more difficult have led to a decrease in demand for student visas. The annual number of applications submitted for F-1 visas has dropped by nearly 100,000 from FY2001 to FY2004. Demand has not recovered even three years after the September 11 attacks. Applications for graduate study declined by 28 percent and 5 percent, respectively, in 2004 and 2005. Applications from the two countries that send the most students to the United States, China and India, dropped by 13 and 9 percent, respectively, for the 2005 school year.¹⁸ And this occurred after a substantial decrease

¹⁵ Arab American Institute, "Delays Caused by New Visa Regulations Are Behind Drop in Number of Arab Students in the United States," http://www.aaiusa.org/PDF/visa_rpt.pdf.

¹⁶ NAFSA: Association of International Educators, "Topline Results: Survey of Foreign Student and Scholar Enrollment and Visa Trends for Spring 2005," author's copy, March 2005.

¹⁷ C. D. Mote Jr., *Tracking International Students in Higher Education: A Progress Report*, House of Representatives Committee on Education and the Workforce, Subcommittees on 21st Century Competitiveness and Select Education Committee on Education and the Workforce, March 17, 2005, <http://edworkforce.house.gov/hearings/109th/21st/jointhea031705/mote.htm>.

¹⁸ Heath Brown and Maria Doulis, "Findings from 2005 CGS International Graduate Admissions Survey I," Council of Graduate Schools, March 2005, <http://www.cgsnet.org/pdf/CGS2005IntlAppRep.pdf>.

¹³ US Department of State Consular Affairs, *CA Fact Sheet: October 1, 2003-September 30, 2004*, September 30, 2004.

¹⁴ This does not preclude the fact that some waived/overcome applications were not completed immediately or that processing delays did not require the applicant to be waived/overcome.

in 2003 of graduate student visa applicants from China (45 percent) and India (28 percent). These trends are not surprising, given that 42 percent of recent Chinese F-1 and J-1 visa applicants and 43 percent of Indian F-1 and J-1 visa applicants in 2003 were denied.¹⁹

Applications for tests related to the admission of foreign students to the United States have also decreased worldwide. The number of students taking the Test of English as a Foreign Language (TOEFL) declined by over 56,000 persons, a decrease of nearly 8 percent since 2000.²⁰ Additionally, the number of students from China and India who took the Graduate Record Exam (GRE) during a recent administration of the test dropped by half.²¹

Analysts who specialize in foreign student enrollment attribute the decline in international student enrollment to difficulties in obtaining visas, rising tuition costs, competition from other non-English speaking nations, and the perception that foreign students are no longer welcome in the United States.²²

Colleges and universities elsewhere seem to be benefiting from these trends. The US market share of international students has declined recently relative to our traditional competitors—the United Kingdom, Canada, and Australia. In contrast to the decreasing US market share of Chinese and Indian students, in 2003 the number of Chinese and Indian students going to Australian universities increased by 25 percent. Great Britain, which, along with Australia, Taiwan, and Hong Kong, is aggressively recruiting foreign students, saw a 36 percent rise in Chinese students and a 16 percent rise in Indian students.²³ And in 2003 Canada enrolled more than 100,000 foreign students, a 55 percent

increase since 2000.²⁴ Nontraditional markets are also gaining ground. Countries such as France, Finland, and Poland have increased their offerings of English language programs, and Japan has grown into a primary destination for Chinese students.²⁵

In response to these trends, the State Department has undertaken a number of initiatives to help improve the perception and reality of the student visa issuance process. Since 2003 the State Department has issued a number of cables to its consular posts encouraging the expedited processing of student visa applications (see Appendix B). Assistant Secretary of State Maura Harty has made clear that the State Department does not “want to lose even one qualified student.”²⁶ She encouraged each consular post to develop and publicize a system for expediting the processing of student visa applications.²⁷ Another recent cable clarified the use of English language study for F-1 visas and reminded consular posts that students do not require future academic plans in the United States to be admitted. Nor can they be denied a visa merely because a similar English language study program is available locally.²⁸ Finally, Ms. Harty also published an op-ed in the *Chronicle of Higher Education* summarizing the State Department’s improvements in processing student visa applications, including expedited application appointments and reforms to expedite Visa Mantis processing.

The State Department has also issued regulatory guidance regarding the residency requirements for students under Section 214(b) of the Immigration and Nationality Act,²⁹ clarifying that it is natural that stu-

¹⁹ GAO, *Science Students and Scholars* (see n. 10).

²⁰ Educational Testing Service, “Statistics Library,” <http://www.ets.org/tse/download.html>.

²¹ Sam Dillon, “U.S. Slips in Attracting the World’s Best Students,” *New York Times*, December 21, 2004.

²² Moon Gwang-lip, “U.S. Visas Harder to Come By: Complicated Process Causes Long Lines, Greater Costs,” *The Korea Times*, October 18, 2004.

²³ Martin C. Jischke, *Addressing the New Reality of Current Visa Policy on International Students and Researchers*, Senate Committee on Foreign Relations, October 6, 2004, <http://foreign.senate.gov/testimony/2004/JischkeTestimony041006.pdf>.

²⁴ Burton Bollag, “Wanted: Foreign Students,” *Chronicle of Higher Education*, October 8, 2004, <http://chronicle.com/free/v51/i07/07a03701.htm>.

²⁵ Lawrence Bell, *Tracking International Students in Higher Education: A Progress Report*, House of Representatives Committee on Education and the Workforce, Subcommittees on 21st Century Competitiveness and Select Education Committee on Education and the Workforce, March 17, 2005, <http://edworkforce.house.gov/hearings/109th/21st/jointhea031705/bell.htm>.

²⁶ Maura Harty, *We Don’t Want to Lose Even One Student*, US Department of State Cable, Unclas State 261900, December 4, 2004.

²⁷ *Ibid.*

²⁸ US Department of State, *English Language Study on F-1 Visas*, date unknown, <http://www.nafsa.org/content/publicpolicy/nafsaontheissues/elp.pdf>.

²⁹ The act requires that the applicant reside in a country abroad.

dents may not have the same residential ties as in other cases.³⁰ As a result, they are only required to possess “the present intent to depart the United States at the conclusion of his or her studies. That this intention is subject to change or even likely to change is not a sufficient reason to refuse a visa.”³¹

In part due to these changes, the State Department announced that student visa issuances from January through June 2004 increased by 11 percent from the same period in 2003. And in February 2005 the DOS announced that Mantis clearances are now valid for up to four years, which should also help improve student visa processing times and avoid delays for returning students.³²

Effects for the Future

It is too soon to determine whether the new requirements for students and the growing perception of American inhospitality, if not hostility, toward foreign students—a perception that exceeds reality—will cause a permanent decrease in student visas. In the meantime, the fact that the government has continued to make administrative improvements, including a number of changes in late 2004, may help. For example, the Visas Mantis backlogs and the number of pending requests for security checks have decreased, while processing times are faster.³³ Many of the data glitches and errors that plagued SEVIS when it began in 2003 have been fixed. However, problems remain. In particular, schools still report having problems with slow fixes in data entry cor-

rection and with inconsistent or incorrect help desk responses.³⁴ Additionally, stakeholders report that there is no link between records of pending data fixes and current SEVIS records.³⁵ Because DHS has not yet corrected all records, consular officers are expected to receive more frequent SEVIS hits in the CLASS system, even when the student or exchange visitor has maintained proper status.³⁶ If a data entry error causes a student to be in technical violation of his or her status, the student may have to apply for reinstatement of status and pay a \$195 fee or face being denied entry or other benefits, even though he or she has not done anything wrong.

The government has not done well in reversing the perception that the United States no longer values foreign students. Foreign countries such as Canada appear primed to take advantage of that perception and plan to provide additional incentives for foreign students to attend their institutions. Some advocates fear that the decrease in foreign students will particularly hurt the US effort to improve its capabilities in math and science—areas that contribute to higher productivity and are crucial to industrial and technological innovation.³⁷ Thus, the international perception of the quality of American academic institutions, juxtaposed against the perceived difficulty of the procedures required to enroll here, may be a deciding factor for the future flow of international students.

³⁰ Maura Harty, “State Department: We Don’t Want to Lose Even One Student,” *The Chronicle Review* (October 8, 2004): 10.

³¹ Stephen A. Edson, *Tracking International Students in Higher Education: A Progress Report*, House of Representatives Committee on Education and the Workforce, Subcommittees on 21st Century Competitiveness and Select Education Committee on Education and the Workforce, March 17, 2005, <http://edworkforce.house.gov/hearings/109th/21st/jointhea031705/edson.htm>.

³² US Department of State Office of the Spokesman, *Extension of the Validity for Science Related Interagency Visa Clearances*, press release, February 11, 2005, <http://www.state.gov/t/pa/prs/ps/2005/42212.htm>.

³³ NAFSA: Association of International Educators, “Visa Processing Progress,” October 4, 2004, <http://www.nafsa.org/content/PublicPolicy/NAFSAontheIssues/VisaProcessingProgress.htm>.

³⁴ Government Accountability Office, *Homeland Security: Performance of Foreign Student and Exchange Visitor Information System Continues to Improve, But Issues Remains*, GAO-05-440T (March 17, 2004), <http://www.gao.gov/htext/d05440t.html>.

³⁵ Bell, *Tracking International Students* (see n. 25).

³⁶ US Department of State, *Student Visa Update*, Unclas State 079909, April 30, 2005.

³⁷ American students lag behind most of their counterparts in other industrial nations in math and science, and eighth graders rank 15th of 45 nations in the *Trends in International Mathematical and Science Study*. See “The Math Deficit,” *Washington Post*, editorial, December 19, 2004, B06.

APPENDIX F: GLOSSARY AND ABBREVIATIONS OF VISA-RELATED TERMS

ARSO-I. Assistant Regional Security Officer – Investigator. A position in the Department of State's Diplomatic Security program with law enforcement capabilities. ARSO-Is use investigative techniques to shut down fraudulent document rings and investigate links to terrorism.

AT. Anti-Terrorism.

BCC. Border Crossing Cards. Special visa cards, issued to Mexicans in particular, that include both a fingerprint and a photograph. The cards allow Mexicans, including work commuters, to cross the border temporarily.

BTS. Directorate of Border and Transportation Security. A Department of Homeland Security Directorate that includes Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and Citizenship and Immigration Services (CIS), as well as a number of policy offices.

CBP. Customs and Border Protection. A division of the US Department of Homeland Security charged with border and customs enforcement. CBP incorporates the inspection functions of the Animal and Plant Health Inspection Service, the Border Patrol, INS, and US Customs.

CCD. Consular Consolidated Database. A US Department of State computer database that contains information on visa applicants for the previous five years, including electronic records of applications, photographs, and information about their visas.

CIA. Central Intelligence Agency. Intelligence agency which provides accurate, comprehensive, and timely foreign intelligence on national security topics to national policy and decision makers.

CIS. See USCIS.

CLASS. Consular Lookout and Support System. CLASS is a US Department of State remote access name-checking database for consular posts. Before the September 11 attacks, the six million or so records in CLASS including individuals with previous visa denials or other immigration law infractions. After 9/11, millions of additional records were added from FBI files. The CLASS system also includes the TIPOFF database, a list of known and suspected terrorists.

CMAT. Consular Management Assistance Team. Management team program created in February 2003. CMATs visit, assess, and guide posts on consular management practices.

Condor. See Visas Condor.

ConGen. Basic Consular Course. A twenty-six day training course for consular officers.

DHS. The Department of Homeland Security. DHS was created on March 1, 2003. It contains the former INS, US Customs, Agricultural Inspectors, and several other federal agencies.

DOJ. The Department of Justice. DOJ contained the Immigration and Naturalization Service (INS) until the US Department of Homeland Security was created.

DS-156. Nonimmigrant Visa Application filed with the State Department. It is the basic application for nonimmigrant visa admission to the United States.

DS-157. Supplemental Nonimmigrant Visa Application filed with the State Department, used as an interim measure to allow officials to obtain information that may, in some instances, lead to a security advisory opinion (SAO).

EBSVERA. The Enhanced Border Security and Visa Entry Reform Act. This act was signed on May 14, 2002, as P.L. 107-173. Among its provisions are the following:

- Requires that consular officers provide electronic versions of visa files to INS and to immigration inspectors at ports of entry in the United States.
- Mandates that machine-readable, tamper-resistant entrance and exit documents be in use by October of 2004, complete with photographs and fingerprints.
- Requires commercial vessels and flights en route to the United States to provide immigration officials with comprehensive data about each passenger.

FAM. Foreign Affairs Manual. The US Department of State's instructive manual for employees.

FBI. Federal Bureau of Investigation. The investigative arm of the US Department of Justice.

FLETC. Federal Law Enforcement Training Center. An inter-agency law enforcement training organization for eighty-one federal agencies.

FPM. Fraud Prevention Manager. A specialized consular staff position designated at every post. FPMs collect and analyze data and trends, and specialize in tools and techniques for detecting fraud.

FSN. Foreign Service National. Local employees who staff the frontline of US embassies, consulates, and diplomatic missions abroad.

FSO. Foreign Service Officer. Department of State career personnel who staff the frontline of US embassies, consulates, and diplomatic missions.

FTTTF. The Foreign Terrorism Tracking Task Force. FTTTF was initiated by President Bush in October 2001. The task force took over the name checks for the Visas Condor program in April 2002 and faced a large backlog as a result.

GAO. General Accounting Office or Government Accountability Office (after July 7, 2004). The independent investigative arm of Congress.

I-94. An arrival-departure form used by the Department of Homeland Security at ports of entry that specifies an individual's duration of legal stay.

IAFIS. Integrated Automated Fingerprint Identification System. The FBI's fingerprint system, which allows electronic searches of the agency's ten-rolled-fingerprint master criminal database.

IBIS. The Interagency Border Inspection System. Includes combined databases from US Customs, ICE, the State Department and twenty-one other federal agencies. It permits access to TIPOFF, CLASS, SEVIS, and other key databases.

ICE. Immigration and Customs Enforcement. A division of the US Department of Homeland Security which is responsible for interior investigative and enforcement responsibilities of immigration and customs, including enforcement of federal immigration laws, customs laws, and air security laws. The agency incorporated the investigative and interior law enforcement functions of INS, the US Customs Service, and the Federal Protective Services.

IDENT (nonacronym). Automated Biometric Identification System. A database that holds electric files as well as fingerprints and photographs of arriving travelers that have been returned to their native countries after the border inspection process. The IDENT system utilizes two flat fingerprints and is used for the US-VISIT system.

IG. Inspector General. A government official who conducts independent and objective audits, investigations, and inspections of a particular cabinet-level agency or department.

INA. Immigration and Nationality Act of 1952. The main body of law governing temporary and permanent immigration to the United States.

INS. Immigration and Naturalization Service. An agency of the US Department of Justice, terminated on March 1, 2003, and transferred to the US Department of Homeland Security.

ISEAS. Interim Student and Exchange Authentication System. A program, implemented temporarily during the development of SEVIS, to electronically verify foreign students and exchange visitors.

IV. Immigrant Visa. Visa for persons who intend to live permanently in the US.

ITI. International to International Transit Program. A program similar to Transit without Visa that allowed passengers to travel to another foreign destination without first obtaining a visa. The program was restricted to transit through one airport, and ITI passengers could not leave the international transit lounge while connecting planes. The program was suspended in August 2003.

JTTF. Joint Terrorism Task Force. A task force operated under the FBI with cooperation from other agencies to prevent terrorism.

Lincoln Visa. A new visa, so named because of an imprint of President Abraham Lincoln, which is tamper-resistant to alterations and duplications.

LPR. Legal Permanent Resident. A person who permanently resides legally in the United States. Also known as a green card.

Mantis. See Visas Mantis.

MOU. Memorandum of Understanding.

NAIS. The National Automated Immigration Lookout System. The central mainframe computer used to verify the admissibility of individuals to the United States.

NCIC. National Crime Information Center. A computerized index of criminal justice information (i.e., criminal record history information, fugitives, stolen properties, missing persons) hosted by the FBI.

NCTC. National Counterterrorism Center. A consolidated and classified national database of terrorist-related threats, formerly known as the Terrorist Threat Integration Center.

NCU. Name Check Unit. Unit of the FBI that took over responsibility for Visas Condor name checks in July 2002.

NIV. Nonimmigrant visa. Visa for a temporary visit to the US.

NSEERS. National Security Entry and Exit Registration System. A registration program that requires photographing, fingerprinting, and interviewing of individuals from certain countries and requires registration of persons already in the United States.

PISCES. The Personal Identification Secure Comparison and Evaluation System. A CIA information collection system used by foreign authorities to track and apprehend terrorists as well as to improve the watch list capabilities of foreign countries.

SAO. Security Advisory Opinion. A process by which the State Department further scrutinizes a potential visa applicant before approving the application. See Visas Condor, Visas Mantis.

SEVIS. The Student and Exchange Visitor Information System. An Internet-based system designed to maintain current information on individuals with F, J, or M nonimmigrant status.

TARP. Travel Agency Referral Program. A program by which carefully vetted travel agents could submit applications on behalf of their clients.

TAL. Technology Alert List. A list containing sensitive areas of study of concern to the Visas Mantis program. These technologies include conventional munitions, nuclear technology, rocket systems, chemical and biomedical engineering, imaging and reconnaissance, computers and information technology.

Terrorist Mobility Branch. A CIA branch that identifies key groups and individuals that facilitate terrorist travel.

TIPOFF. A watch list database included in CLASS that lists known or suspected terrorists.

TSC. Terrorist Screening Center. A center maintaining watch list information from all database sources. TSC links to local and state law enforcement via the National Crime Information Center.

TTIC. Terrorist Threat Integration Center. A consolidated national database of terrorist-related threats. TTIC became the National Counterterrorism Center (NCTC) in 2004.

TWOV. Transit without Visa Program. A program suspended in August 2003 that allowed passengers to travel through the United States to another country without obtaining a visa.

Visa. An official authorization appended to a passport permitting entry into and travel within a particular country or region. A visa does not authorize admission to the United States alone. An immigration officer at the border must permit entry. See Appendix C for a list of visa categories.

Visa Express. A Travel Agency Referral Program (TARP), cancelled in July 2002, for Saudi Arabian applicants to receive express processing through commercial travel agencies. The program allowed Saudi Arabian applicants to frequently avoid in-person interviews with US consular officers.

Visa Referral System. A program under which US government employees recommend a visa for someone of official interest to the US government who is favorably known to them.

VSO. Visa Security Officer. Department of Homeland Security law enforcement personnel who staff US posts abroad. VSOs are currently only deployed in Saudi Arabia.

VSU. Visa Security Unit. Department of Homeland Security Unit that supervises Visa Security Officers, prepares homeland security training, and reviews backlogged visa applications, among other responsibilities.

Visas Bear. A telegram cable code used for suspected terrorists who are applying for A, C-3, or G nonimmigrant visas.

Visas Condor. Started in January 2002, a type of security advisory opinion (SAO) that checks a visa applicant's name against various US government databases to find known terrorists. A given applicant's identification information is checked against as many as twenty US security databases.

Visas Donkey. A telegram cable code used for suspected terrorists who are applying for visas. It is used for all suspected terrorists who are not applying for A, C-3, or G visas.

Visas Mantis. A security advisory opinion (SAO) that requires special clearance for people working in one of sixteen sensitive areas - such as munitions and nuclear technology - as identified by the Technology Alert List (TAL).

Visas Viper. A cable code created in August 1993 designed to improve interagency communication about placing potential terrorists on a watch list even when they were not applying for visas.

VWP. Visa Waiver Program. A program that enables persons from certain countries to present themselves at a US port of entry without a visa. Citizens participating in the program are screened at the port of entry, and the program only applies to temporary visitors traveling to the United States for business or pleasure who are staying ninety days or less.

USCIS. Citizenship and Immigration Services. Responsible for providing immigration-related services and benefits such as petitions for nonimmigrant and immigrant classification, naturalization, and work authorization. The CIS incorporates the service and benefit functions of the former INS.

US-VISIT. A border security enhancement program that incorporates biometric indicators to track visitors to the United States.

USA PATRIOT Act. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. Public Law 107-56, signed on October 26, 2001.

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