



# Visa Security Policy: Roles of the Departments of State and Homeland Security

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## Summary

Foreign nationals (i.e., aliens) not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted, with certain exceptions noted in law. The Departments of State (DOS) and Homeland Security (DHS) each play key roles in administering the law and policies on the admission of aliens. Although the DOS's Consular Affairs is responsible for issuing visas, the U.S. Citizenship and Immigrant Services (USCIS) in DHS approves immigrant petitions, the Immigration and Customs Enforcement (ICE) in DHS operates the Visa Security Program in selected embassies abroad, and the Customs and Border Protection (CBP) in DHS inspects all people who enter the United States. In addition, the Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice (DOJ) has a significant policy role through its adjudicatory decisions on specific immigration cases.

Although there was a discussion of assigning all visa issuance responsibilities to DHS when the department was being created, the Homeland Security Act of 2002 (P.L. 107-296) opted not to do so. Rather, P.L. 107-296 drew on compromise language stating that DHS issues regulations regarding visa issuances and assigns staff to consular posts abroad to advise, review, and conduct investigations, and that DOS's Consular Affairs continues to issue visas.

The case of Umar Farouk Abdulmutallab, who allegedly attempted to ignite an explosive device on Northwest Airlines Flight 253 on December 25, 2009, refocused attention on the responsibilities of the Departments of State and Homeland Security for the visa process. He was traveling on a multi-year, multiple-entry tourist visa issued to him in June 2008. State Department officials have acknowledged that Abdulmutallab's father came into the Embassy in Abuja, Nigeria, on November 19, 2009, to express his concerns about his son, and that those officials at the Embassy in Abuja sent a cable to the National Counterterrorism Center. State Department officials maintain they had insufficient information to revoke his visa at that time. In the aftermath of the Abdulmutallab case, policymakers explored what went wrong and whether statutory and procedural revisions were needed.

Some have expressed the view that DOS has too much control over visas, maintaining that the Homeland Security Act intended DHS to be the lead department and DOS to merely administer the visa process. Proponents of DOS playing the principal role in visa issuances assert that only consular officers in the field have the country-specific knowledge to make decisions about whether an alien is admissible and that staffing 250 diplomatic and consular posts around the world would stretch DHS beyond its capacity. Whether the visa security roles and procedures are adequately funded may arise as the budget issues are considered.

The House Committee on the Judiciary has reported legislation (H.R. 1741) that would give the Secretary of Homeland Security "exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa."

This report will be updated as significant developments occur.

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## Introduction

Foreign nationals (i.e., aliens) not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted.<sup>1</sup> Under current law, three departments—the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ)—play key roles in administering the law and policies on the admission of aliens.<sup>2</sup> DOS’s Bureau of Consular Affairs (Consular Affairs) is responsible for issuing visas, DHS’s Citizenship and Immigration Services Bureau (USCIS) is charged with approving immigrant petitions, DHS’s Immigration and Customs Enforcement (ICE) operates the Visa Security Program in selected embassies abroad, and DHS’s Customs and Border Protection Bureau (CBP) is tasked with inspecting all people who enter the United States. DOJ’s Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.<sup>3</sup>

The case of Umar Farouk Abdulmutallab, who allegedly attempted to ignite an explosive device on Northwest Airlines Flight 253 on December 25, 2009, refocused attention on the responsibilities of the Departments of State and Homeland Security for the visa process. He was traveling on a multi-year, multiple-entry tourist visa issued to him in June 2008.<sup>4</sup> State Department officials have acknowledged that Abdulmutallab’s father came into the Embassy in Abuja, Nigeria, on November 19, 2009, to express his concerns about his son, and that those officials at the Embassy in Abuja sent a cable to the National Counterterrorism Center.<sup>5</sup> State Department officials maintain they had insufficient information to revoke his visa at that time. In the aftermath of the Abdulmutallab case, policymakers explored what went wrong and whether statutory and procedural revisions were needed.

The 112<sup>th</sup> Congress continues to be interested in these issues of visa security. The policy questions center on whether immigration law needs to be strengthened, whether funding should be increased, and which agency should take the lead.

## Overview on Visa Issuances

There are two broad classes of aliens that are issued visas: immigrants and nonimmigrants. Humanitarian admissions, such as asylees, refugees, parolees and other aliens granted relief from deportation, are handled separately under the Immigration and Nationality Act (INA). Those aliens granted asylum or refugee status ultimately are eligible to become legal permanent

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<sup>1</sup> Authorities to except or to waive visa requirements are specified in law, such as the broad parole authority of the Attorney General under §212(d)(5) of Immigration and Nationality Act (INA) and the specific authority of the Visa Waiver Program in §217 of INA.

<sup>2</sup> Other departments, notably the Department of Labor (DOL), and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (DHHS) sets policy on the health-related grounds for inadmissibility discussed below.

<sup>3</sup> For an analysis of the transfer of immigration functions and activities to the Department of Homeland Security, see CRS Report RL31560, *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*; and CRS Report RL31584, *A Comparative Analysis of the Immigration Functions in the Major Homeland Security Bills*, both by Lisa M. Seghetti and (name redacted). (Archived reports, available upon request.)

<sup>4</sup> Ian Kelly, *On-the-Record Briefing*, U.S. Department of State, Washington, DC, December 28, 2009.

<sup>5</sup> *Ibid.*

residents (LPRs).<sup>6</sup> Illegal aliens or unauthorized aliens include those noncitizens who entered the United States without an official inspection at a port of entry, entered with fraudulent documents, or who violated the terms of their visas after entering the United States.

## **Immigrant Visas**

Aliens who wish to come to live permanently in the United States must meet a set of criteria specified in the INA. They must qualify as

- a spouse or minor child of a U.S. citizen;
- a parent, adult child, or sibling of an adult U.S. citizen;
- a spouse or minor child of a legal permanent resident;
- an employee that a U.S. employer has gotten approval from the Department of Labor to hire;
- a person of extraordinary or exceptional ability in specified areas;
- a refugee or asylee determined to be fleeing persecution;
- winner of a visa in the diversity lottery; or
- having met other specialized provisions of law.<sup>7</sup>

Petitions for immigrant (i.e., LPR) status are first filed with USCIS by the sponsoring relative or employer in the United States. If the prospective immigrant is already residing in the United States, the USCIS handles the entire process, which is called “adjustment of status.” If the prospective LPR does not have legal residence in the United States, the petition is forwarded to Consular Affairs in their home country after USCIS has reviewed it. The Consular Affairs officer (when the alien is coming from abroad) and USCIS adjudicator (when the alien is adjusting status in the United States) must be satisfied that the alien is entitled to the immigrant status.

## **Nonimmigrant Visas**

Aliens seeking to come to the United States temporarily rather than to live permanently are known as nonimmigrants.<sup>8</sup> These aliens are admitted to the United States for a temporary period of time and an expressed reason. There are 24 major nonimmigrant visa categories, and over 70 specific types of nonimmigrant visas are issued currently. Most of these nonimmigrant visa categories are defined in §101(a)(15) of the INA. These visa categories are commonly referred to by the letter and numeral that denotes their subparagraph in §101(a)(15), e.g., B-2 tourists, F-1 foreign students, H-1B temporary professional workers, or J-1 cultural exchange participants.

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<sup>6</sup> For background and further discussion of humanitarian cases, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by (name redacted), and CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by (name redacted) and (name redacted).

<sup>7</sup> For a more complete discussion of LPR categories and a statistical analysis of admissions trends, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by (name redacted).

<sup>8</sup> For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by (name redacted). (Hereafter cited as RL31381, *Temporary Admissions*.)

Most visitors, however, enter the United States without nonimmigrant visas through the Visa Waiver Program (VWP). This provision of INA allows the Attorney General to waive the visa documentary requirements for aliens coming as visitors from 35 countries (e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland). Since aliens entering through VWP do not have visas, CBP inspectors at the port of entry perform the background checks and admissibility reviews.<sup>9</sup>

## Statutory Basis of Current Visa Policy

Today's visa issuance policy dates back to 1924, when Congress first passed legislation assigning consular officers with the responsibility to approve or deny visas.<sup>10</sup> The Immigration Act of 1924 codified a decree in 1917 as a consequence of World War I that proclaimed aliens must present certain documents as a prerequisite to entering the United States. When the Senate Committee on the Judiciary was tasked with investigating the immigration system in 1947,<sup>11</sup> their report offered the following observation:

After a study of this problem, the Congress provided in the Immigration Act of 1924 for a double check of aliens by separate independent agencies of the Government, first by consular officers before the visas were issued, and by immigration officers after the aliens reached the port of entry. If a double check was essential 25 years ago to protect the United States against criminals or other undesirables, it is the opinion of the subcommittee that it is even more necessary in the present critical condition of the world to use the double check to screen aliens seeking to enter the United States.<sup>12</sup>

This view prevailed in 1952 when Congress codified the various statutes on immigration and nationality into the Immigration and Nationality Act of 1952 (P.L. 82-414), which remains the basis of governing law.

## Immigration and Nationality Act

The powers and duties of the Secretary of State are delineated in §104 of the INA. Most significantly, §104 (a) states: “The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, *except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas;....*”<sup>13</sup> The INA specifically gives consular officers the sole authority to issue visas in §221 of the act.<sup>14</sup> Over the years, the courts have held that consular

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<sup>9</sup> CRS Report RL32221, *Visa Waiver Program*, by (name redacted).

<sup>10</sup> Immigration Act of May 26, 1924; 43 Stat. 153.

<sup>11</sup> During the 80<sup>th</sup> Congress, Senate Resolution 137 directed the Senate Committee on the Judiciary to make a full and complete investigation of the entire immigration system, which passed on July 26, 1947.

<sup>12</sup> U.S. Congress, Senate Committee on the Judiciary, *The Immigration and Naturalization Systems of the United States, report pursuant to S. Res.137.*, committee print, 81<sup>st</sup> Cong., 2<sup>nd</sup> sess., April 20, 1950.

<sup>13</sup> 8 U.S.C. 1104.

<sup>14</sup> 8 U.S.C. 1201.

decisions are not appealable.<sup>15</sup> Under proscribed circumstances, the Secretary of State may direct a consular officer to deny a visa to a particular inadmissible alien.<sup>16</sup>

## **Enhanced Border Security and Visa Entry Reform Act of 2002**

After the terrorist attacks on September 11, 2001, Congress enacted the Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173), which aimed to improve the visa issuance process abroad, as well as immigration inspections at the border. It expressly increased consular officers' access to electronic information needed for alien screening. Specifically, it required the development of an interoperable electronic data system to be used to share information relevant to alien admissibility and removability and the implementation of an integrated entry-exit data system. It also required that all visas issued by October 2004 have biometric identifiers, and DOS met that deadline for biometric visas. In addition to increasing consular officers' access to electronic information needed for visa issuances, it expanded the training requirements for consular officers who issue visas.

## **§428 of the Homeland Security Act of 2002**

The Homeland Security Act of 2002 (HSA) contained language stating that DHS is responsible for formulating regulations on visa issuances. In §428, the Secretary of DHS is expressly tasked as follows:

...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 ...*<sup>17</sup>

The HSA also enabled DHS to assign staff to consular posts abroad to advise, review, and conduct investigations, which is discussed more fully below. It further stated that DOS's Consular Affairs continued to be responsible for issuing visas. The HSA required DHS and DOS to reach an understanding on how the details of this division of responsibilities would be implemented.<sup>18</sup>

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<sup>15</sup> Some critics of transferring the visa function to DHS warned that visa issuance "adjudication" might become subject to judicial appeals or other due process considerations if a stateside agency, such as DHS, assumed responsibility. As a result, §428(f) of the HSA stated: "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."

<sup>16</sup> §428(c) of the Homeland Security Act of 2002 (P.L. 107-296)

<sup>17</sup> §428 (b)(1) of the Homeland Security Act (P.L. 107-296).

<sup>18</sup> For a complete account of this debate, see **Appendix A**.



## **2003 Memorandum of Understanding**

On September 28, 2003, then-Secretary of State Colin Powell and then-Secretary of Homeland Security Thomas Ridge signed the memorandum of understanding (MOU) implementing §428 of the HSA. The MOU described each department's responsibilities in the area of visa issuances. Among its major elements, the MOU stated that DOS may propose and issue visa regulations subject to DHS consultation and final approval. It further stated that DHS shall assign personnel to diplomatic posts, but that DOS will determine who, how many, and the scope of their functions.

Then-Assistant Secretary of State for Consular Affairs Maura Harty described several key responsibilities that remain with the DOS.

The Secretary of State will have responsibility over certain visa decisions, including decisions of a foreign policy nature.... He will also be responsible for establishing visa validity periods and fees based on reciprocity. In the case of visa validity periods, however, he will consult with Homeland Security before lengthening them, and Homeland Security will have authority to determine that certain persons or classes of persons cannot benefit from the maximum validity period for security reasons. The Secretary of State will also exercise all the foreign policy-related grounds of visa denial enumerated in Section 428 and the additional provision, not specifically enumerated, under which we deny visas to persons who have confiscated the property of American citizens without just compensation.<sup>19</sup>

She emphasized that the MOU "recognizes that the Secretary of State must have control over officers in his chain of command." She further stated that "DHS officers assigned visa duties abroad may provide input related to the evaluations of consular officers doing visa work, but the evaluations themselves will be written by State Department consular supervisors," and that "direction to consular officers will come from their State Department supervisors, and all officers assigned abroad, including DHS, come under the authority of the Chief of Mission."<sup>20</sup>

In congressional testimony during October 2003, C. Stewart Verdery, Jr., as then-DHS Assistant Secretary for Border and Transportation Security Policy and Planning, discussed DHS' role in visa security. Verdery reported that DHS officers were already in Saudi Arabia reviewing all visa applications prior to adjudication (as required by §428(i) of P.L. 107-296). He indicated that officers in Riyadh and Jeddah also provided assistance, expert advice and training to consular officers on fraudulent documents, fingerprinting techniques and identity fraud. More specifically, he stated:

As part of the review process, DHS officers at home and abroad have full access to a variety of law enforcement databases, including the National Crime Information Center (NCIC); Treasury Enforcement Communication System (TECS); Interagency Border Inspections System (IBIS); National Security Entry Exit System (NSEERS); Student Exchange and Visitor Information System (SEVIS); Biometric 2-print fingerprint system (IDENT); and Advanced Passenger Information System (APIS). They also have access to selected legacy-INS automated adjudications data and certain commercial databases.<sup>21</sup>

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<sup>19</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee On Immigration, Border Security and Citizenship, *Visa Issuance: Our First Line of Defense for Homeland Security*, hearing, Sept. 30, 2003.

<sup>20</sup> Ibid.

<sup>21</sup> U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global* (continued...)

## **Visa Security Program Memoranda of Understanding**

Additionally, §428 of the HSA gave the Secretary of DHS the authority to assign DHS employees to diplomatic and consular posts, which became the statutory basis of the Visa Security Program (VSP). In 2004, DHS and DOS signed a MOU on administrative aspects of assigning personnel overseas as part of the VSP. Among other things, this MOU described administrative support, security, facilities, security awareness training, and information systems for VSP personnel.

On January 11, 2011, DHS and DOS signed another MOU which further delineates the roles, responsibilities, and collaboration of VSP agents, consular officers, and diplomatic security officers in daily operations of VSP at posts overseas. The 2011 MOU discusses general collaboration between ICE and State for VSP operations; roles and responsibilities of VSP agents and consular officers and routine interaction between the officers and agents; development of formal, targeted training and briefings by VSP agents for consular officers and other U.S. government officials at post; clarification of the dispute resolution process; and collaboration between diplomatic security officers and VSP agents on visa and passport fraud investigations.<sup>22</sup>

## **Intelligence Reform and Terrorism Prevention Act of 2004**

Congress also relied on recommendations made by the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) to revise visa security policies. The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) mandated improvements in technology and training to assist consular and immigration officers in detecting and combating terrorist travel. Among other provisions, it required the Secretary of Homeland Security, in consultation with the Director of the National Counter Terrorism Center, to establish a program to oversee DHS's responsibilities with respect to terrorist travel and required the Secretary of State to establish a Visa and Passport Security Program within the Bureau of Diplomatic Security at the Department of State.

The Intelligence Reform and Terrorism Prevention Act added requirements for an in-person consular interview of most applicants for nonimmigrant visas between the ages of 14 and 79. It further mandated that an alien applying for a nonimmigrant visa must completely and accurately respond to any request for information contained in his or her application.

## **Consular Screening Procedures**

Foreign nationals seeking visas must undergo admissibility reviews performed by DOS consular officers abroad.<sup>23</sup> The visa applicant is required to submit his or her photograph and fingerprints, as well as full name (and any other name used or by which he or she has been known), age,

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(...continued)

*Environment*, hearing, Oct. 23, 2003.

<sup>22</sup> For further discussion on the issues leading up to this MOU, see U.S. Government Accountability Office, *Border Security: DHS's Visa Security Program Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide*, GAO-11-315, March 31, 2011, <http://www.gao.gov/products/GAO-11-315>.

<sup>23</sup> USCIS adjudicators also conduct admissibility reviews for petitions filed within the United States, and CBP inspectors do so when aliens seek entry to the United States.

gender, and the date and place of birth. Depending on the visa category, certain documents must be certified by the proper government authorities (e.g., birth certificates and marriage licenses). All prospective LPRs must submit to physical and mental examinations, and prospective nonimmigrants also may be required to have physical and mental examinations.

These reviews are intended to ensure that aliens are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the INA.<sup>24</sup> These INA §212(a) inadmissibility criteria are

- health-related grounds,
- criminal history,
- security and terrorist concerns,
- public charge (e.g., indigence),
- seeking to work without proper labor certification,
- illegal entrants and immigration law violations,
- ineligible for citizenship, and
- aliens previously removed.

Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. Records of all visa applications are now automated in the CCD, with some records dating back to the mid-1990s. Since February 2001, the CCD has stored photographs of all visa applicants in electronic form; since 2007, the CCD has begun storing 10-finger scans. In addition to indicating the outcome of any prior visa application of the alien in the CCD and comments by consular officers, the system links with other databases to flag problems that may have an impact on the issuance of the visa. These databases linked with the CCD include DHS's Automated Biometric Identification System (IDENT) and FBI's Integrated Automated Fingerprint Identification System (IAFIS) results, and supporting documents.

The CCD also links to the DHS's Traveler Enforcement Compliance System (TECS), which enables CBP officers at ports of entry to have access to CCD.<sup>25</sup> A limited number of consular officers have recently been granted access to DHS's Arrival Departure Information System (ADIS).<sup>26</sup> ADIS tracks foreign nationals' entries into and most exits out of the United States. DOS credits access to ADIS with its ability to identify previously undetected cases of illegal overstays in the United States.

For some years, consular officers have been required to check the background of all aliens in the "lookout" databases, specifically the Consular Lookout and Support System (CLASS) database, which contained over 26 million records in 2009.<sup>27</sup> According to Janice Jacobs, Assistant

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<sup>24</sup> §212(a) of the INA.

<sup>25</sup> Consular officers do not have direct access to the TECS database.

<sup>26</sup> Unclassified congressional staff briefing by Assistant Secretary of State Janice Jacobs, January 11, 2010.

<sup>27</sup> For information on other watchlists, see CRS Report RL33645, *Terrorist Watchlist Checks and Air Passenger Prescreening*, by (name redacted) and (name redacted). (Hereafter cited as *SR645, Terrorist Watchlist Checks and Air Passenger Prescreening*.)

Secretary of State for Consular Affairs, the CLASS database grew by approximately 400% after September 11, 2001.

This increase in the quantity and quality of CLASS records is largely the result of improved data sharing between the Department of State and the law enforcement and intelligence communities. In 2001, only 25 percent of records in CLASS came from other government agencies. Now, almost 70 percent of CLASS records come from other agencies.<sup>28</sup>

The Security Advisory Opinion (SAO) system requires a consular officer abroad to refer selected visa cases for greater review by intelligence and law enforcement agencies.<sup>29</sup> The current interagency procedures for alerting officials about foreign nationals who may be suspected terrorists, referred to in State Department nomenclature as Visa Viper, began after the 1993 World Trade Center bombing and were institutionalized by enactment of the Enhanced Border Security and Visa Entry Reform Act of 2002. If consular officials receive information about a foreign national that causes concern, they send a Visa Viper cable (which is a dedicated and secure communication) to the NCTC. In 2009, consular posts sent approximately 3,000 Visa Viper communications to NCTC.<sup>30</sup>

In a similar set of SAO procedures, consular officers send suspect names, identified by law enforcement and intelligence information (originally certain visa applicants from 26 predominantly Muslim countries), to the Federal Bureau of Investigation (FBI) for a name check program called Visa Condor.<sup>31</sup> There is also the “Terrorist Exclusion List” (TEL), which lists organizations designated as terrorist-supporting and includes the names of individuals associated with these organizations.<sup>32</sup>

## Visa Revocation

After a visa has been issued, the consular officer as well as the Secretary of State has the discretionary authority to revoke a visa at any time.<sup>33</sup> A consular officer must revoke a visa if

- the alien is ineligible under the INA §212(a) grounds of inadmissibility to receive such a visa, or was issued a visa and overstayed the time limits of the visa;
- the alien is not entitled to the nonimmigrant visa classification under INA §101(a)(15) definitions specified in such visa;

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<sup>28</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Five Years After the Intelligence Reform and Terrorism Act: Stopping Terrorist Travel*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., December 9, 2009.

<sup>29</sup> U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, hearing, October 23, 2003.

<sup>30</sup> Unclassified congressional staff briefing by Assistant Secretary of State Janice Jacobs, January 11, 2010.

<sup>31</sup> U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, hearing, October 23, 2003.

<sup>32</sup> For further discussion of terrorist screening, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by (name redacted) and (name redacted).

<sup>33</sup> §221(i) of the INA; 8 U.S.C. §1201(i).

- the visa has been physically removed from the passport in which it was issued; or
- the alien has been issued an immigrant visa.<sup>34</sup>

The Foreign Affairs Manual (FAM) instructs: “in making any new determination of ineligibility as a result of information which may come to light after issuance of a visa, the consular officer must seek and obtain any required advisory opinion.” This applies, for example, to findings of ineligibility under “misrepresentation,” “terrorist activity” or “foreign policy.” FAM further instructs: “pending receipt of the Department’s advisory opinion, the consular officer must enter the alien’s name in the CLASS under a quasi-refusal code, if warranted.”<sup>35</sup> According to DOS officials, they sometimes prudentially revoke visas (i.e., they revoke a visa as a safety precaution).<sup>36</sup>

When a consular officer suspects that a visa revocation may involve U.S. law enforcement interests, FAM instructs the consular officer to consult with law enforcement agencies at post and inform the State officials of the case, to permit consultations with potentially interested entities before a revocation is made.<sup>37</sup> The rationale for this consultation is that there may be legal or intelligence investigations that would be compromised if the visa were revoked and that law enforcement and intelligence officials may prefer to monitor the individual to further investigate their actions and associates.

Visa revocation has been a ground for removal in the INA §237(a)(1)(B) since enactment of P.L. 108-458 in December 2004. That provision (§5304 of P.L. 108-458) permits limited judicial review of removal if visa revocation is the sole basis of the removal.

## **New Visa Revocation Regulations**

On April 27, 2011, the DOS promulgated regulations that broadened the revocation authority.

(a) Grounds for revocation by consular officers. A consular officer, the Secretary, or a Department official to whom the Secretary has delegated this authority is authorized to revoke a nonimmigrant visa at any time, in his or her discretion.

(b) Provisional revocation. A consular officer, the Secretary, or any Department official to whom the Secretary has delegated this authority may provisionally revoke a nonimmigrant visa while considering information related to whether a visa holder is eligible for the visa. Provisional revocation shall have the same force and effect as any other visa revocation under INA 221(i).

(c) Notice of revocation. Unless otherwise instructed by the Department, a consular officer shall, if practicable, notify the alien to whom the visa was issued that the visa was revoked or provisionally revoked. Regardless of delivery of such notice, once the revocation has been entered into the Department’s Consular Lookout and Support System

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<sup>34</sup> 22 C.F.R. §41.122 Notes N1.

<sup>35</sup> 22 C.F.R. §41.122 Notes PN3.

<sup>36</sup> Testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *Visa Issuance, Information Sharing and Enforcement in a Post-9/11 Environment: Are We Ready Yet?* hearing, July 15, 2003.

<sup>37</sup> 22 C.F.R. §41.122 Notes PN9.2-1.

(CLASS), the visa is no longer to be considered valid for travel to the United States. The date of the revocation shall be indicated in CLASS and on any notice sent to the alien to whom the visa was issued.

(d) Procedure for physically canceling visas. A nonimmigrant visa that is revoked shall be canceled by writing or stamping the word "REVOKED" plainly across the face of the visa, if the visa is available to the consular officer. The failure or inability to physically cancel the visa does not affect the validity of the revocation.<sup>38</sup>

These new regulations seek to address a series of concerns that have been raised in recent years about the visa revocation process, especially relating to the timely transmission of information among federal agencies.<sup>39</sup>

## DHS Visa Security Program

As mentioned above, §428 of the HSA gave the Secretary of DHS the authority to assign DHS employees to diplomatic and consular posts. The duties of these DHS employees were delineated in §428 as

- provide expert advice and training to consular officers regarding specific security threats relating to the adjudication of individual visa applications or classes of applications;
- review any such applications, either on the initiative of DHS or upon request by a consular officer or other person charged with adjudicating such applications; and,
- conduct investigations with respect to consular matters under the jurisdiction of the Secretary of DHS.

This statutory language established what is currently known as the Visa Security Program (VSP). The ICE Office of International Affairs (OIA) operates the VSP in high-risk consular posts. As described by DHS, the VSP sends ICE special agents with expertise in immigration law and counterterrorism to diplomatic posts overseas to perform visa security activities, which aim to complement the DOS visa screening process with law enforcement resources not available to consular officers.

The first VSP units were established in Saudi Arabia, as required by §428. In October 2005, VSP units were set up in: Manila, Philippines; Abu Dhabi and Dubai in the United Arab Emirates; and Islamabad, Pakistan. By the end of 2007, there were VSP units in: Cairo, Egypt; Caracas, Venezuela; Montreal, Canada; Hong Kong, China; and Casablanca, Morocco. That year, the VSP proposed a five-year expansion plan, which proposed to concentrate expansion to the highest risk posts with the goal of covering 75% of the highest risk visa activity by 2013.<sup>40</sup>

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<sup>38</sup> U.S. Department of State, "Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended," 76 *Federal Register* 23477-23479, April 27, 2011.

<sup>39</sup> For examples of past critiques, see U.S. General Accounting Office, *New Policies and Procedures Are Needed to Fill Gaps in the Visa Revocation Process*, GAO 03-798, June 18, 2003; and U.S. General Accounting Office, *Border Security: Additional Actions Needed to Eliminate Weaknesses in the Visa Revocation Process*, GAO-04-795, July 13, 2004.

<sup>40</sup> Office of Inspector General, *U.S. Immigration and Customs Enforcement Visa Security Program*, U.S. Department (continued...)

One of the major tasks of the VSP agents is to screen visa applicants to determine the applicant's risk profile. Unlike consular officers, VSP agents have access to DHS's Traveler Enforcement Compliance System (TECS), a substantial database of law enforcement and border inspection information. The ICE agent further vets visa applicants who are possible matches, performing additional research and investigation of the visa applicant (e.g., in-depth searches in law enforcement databases and other information systems, examining documents, and consulting with consular, law enforcement, or other officials).<sup>41</sup>

VSP agents are supposed to engage in informal discussions with consular officers, as well as develop formal, targeted training and briefings to inform consular officers and others about threats to the visa process. They "identify and monitor the threat environment and trends in the visa applicant pool specific to their post and host country... Examples of topics covered in these briefings include fraud trends in specific visa categories and how to identify fraudulent documents and imposters."<sup>42</sup> Aimed at improving VSP integration in the SAO process, Congress appropriated \$5 million to establish an SAO review unit within VSP headquarters in FY2007.<sup>43</sup>

## Current Issues

### Competing Interests

Some have expressed the view that DOS retains too much power and control over visa issuances. They maintain the Homeland Security Act intended DHS to be the lead department and that DOS was to merely administer the visa process. They warn that consular officers are too concerned about facilitating tourism and trade to scrutinize visa applicants thoroughly.<sup>44</sup> Some argue that visa issuance is the real "front line" of homeland security against terrorists and that the principal responsibility should be in DHS, which does not have competing priorities of diplomatic relations and reciprocity with foreign governments.

Not long after the attempted bombing of Flight 253, the Chairman of the Senate Committee on Homeland Security and Governmental Affairs, Senator Joseph Lieberman, stated: "I believe, incidentally, that we ought to take a look at taking the visa application and admission responsibility from the State Department. It doesn't really fit with foreign policy anymore." The Chairman continued, "And in an age of terrorism, I think the Department of Homeland Security ought to be handling visas abroad."<sup>45</sup>

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(...continued)

of Homeland Security, July 2008. (Hereafter OIG, *Visa Security Program*, July 2008.)

<sup>41</sup> OIG, *Visa Security Program*, July 2008.

<sup>42</sup> OIG, *Visa Security Program*, July 2008.

<sup>43</sup> House and Senate Committees on Appropriations, "Summary of the Fiscal 2007 Supplemental Funding Legislation," press release, April 23, 2007.

<sup>44</sup> Proponents of this view often cite: Office of Inspector General, *Review of Nonimmigrant Visa Issuance Policy and Procedures*, U.S. Department of State, Memorandum Report ISP-I-03-26, December 2002, <http://oig.state.gov/documents/organization/16215.pdf>.

<sup>45</sup> Senator Joseph Lieberman appearing on ABC's "This Week", January 3, 2010.

Others are recommending further deliberation before changing the law, observing that today's visa security policies grew out of lessons learned from the September 11, 2001, terrorist attacks.<sup>46</sup> The Chairman of the Senate Committee on the Judiciary, Senator Patrick Leahy, stated "After Congress passed major legislation in 2004 to implement the 9/11 Commission's recommendations, and after the country invested significant resources to upgrade security systems and reorganize our intelligence agencies, the near tragedy on Christmas Day compels us to ask what went wrong and what additional reforms are needed."<sup>47</sup>

Proponents of the current division of responsibilities argue that it strikes the proper balance between the two departments and reflects the bifurcation envisioned in the Homeland Security Act. They maintain that it plays off the strengths of the two departments and allows for refinement of the implementation in the future.<sup>48</sup> Proponents of DOS playing the lead role in visa issuances assert that only consular officers in the field have the country-specific knowledge to make decisions about whether an alien is admissible and that staffing approximately 250 diplomatic and consular posts around the world would stretch DHS beyond its capacity.<sup>49</sup>

The House Committee on the Judiciary has reported legislation (H.R. 1741) that would give the Secretary of Homeland Security "exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa." The markup of H.R. 1741, which was introduced by House Judiciary Chairman Lamar Smith, occurred on June 23, 2011. Several amendments, notably one clarifying the Secretary of State's authority to direct a consular officer to refuse or revoke a visa if it is necessary or advisable to U.S. interests, were approved at that time.

## **Broadening Visa Revocation Authority**

As discussed above, the INA gives the authority to revoke a visa at any time to the Secretary of State and consular officers, but the Secretary of Homeland Security does not have the authority to revoke visas.<sup>50</sup> As consequence, a re-occurring issue is whether the Secretary of Homeland Security should have the authority to revoke visas and to immediately remove a foreign national whose visa has been revoked. Legislation to amend the INA to give such authority in DHS has been introduced in recent congresses, and H.R. 1741 in the 112<sup>th</sup> Congress would do so. Some have maintained that a foreign national should be immediately removed if the visa that enabled his or her entry has been revoked. They have recommended that grounds for removal in INA

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<sup>46</sup> U.S. Congress, Senate Committee on the Judiciary, *Securing America's Safety: Improving The Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication*, Statements of DOS Under Secretary Patrick Kennedy and DHS Assistant Secretary David Heyman, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 20, 2010.

<sup>47</sup> U.S. Congress, Senate Committee on the Judiciary, *Securing America's Safety: Improving The Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication*, Statement of Senator Patrick Leahy, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 20, 2010.

<sup>48</sup> U.S. Congress, Senate Committee on the Judiciary Subcommittee On Immigration, Border Security and Citizenship, *Visa Issuance: Our First Line of Defense for Homeland Security*, hearing, Sept. 30, 2003.

<sup>49</sup> Proponents of this view often cite the conclusions of this report: U.S. Government Accountability Office, *Strengthened Visa Process Would Benefit from Improvements in Staffing and Information Sharing*, GAO-05-859, September, 2005, <http://www.gao.gov/new.items/d05859.pdf>.

<sup>50</sup> §221(i) of the INA; 8 U.S.C. §1201(i).



§212(a) should be amended to expressly state visa revocation as a basis for deportation. Some further argue that aliens whose visas are revoked should not be entitled to a hearing before an immigration judge to determine if the alien should be deported.<sup>51</sup> Others have asserted that current law balances the broader discretion given to the consular officers abroad with the explicit standards of the grounds for inadmissibility and the legal process for removing aliens from the United States. They further have maintained that consular officers often make “prudential revocations” of visas that they subsequently re-issue and that anecdotal cases of mistaken identities suggest that the alien screening databases are not sufficiently precise to be the basis for removal without a hearing. During the markup, the House Judiciary Committee rejected an amendment to H.R. 1471 that would have stricken the provisions in the bill prohibiting judicial review of the DHS Secretary’s decision to refuse or revoke a visa. The defeated amendment also would have eliminated an exception in the INA that allows judicial review if a visa revocation provides the sole grounds for an individual’s deportation.

## **Acceptance of VSP in Consular Posts**

The statutory language of §428(d) of P.L. 107-296 makes clear that authority of the chief of mission remained intact despite the added authorities given to DHS.<sup>52</sup> It states that nothing in that provision may be construed to alter or affect the authority of a chief of mission under §207 of the Foreign Service Act of 1980.<sup>53</sup> Ultimately, it is the DOS chief of mission at a particular consular post who determines whether to accept a VSP unit.<sup>54</sup> A 2008 report of the DHS Office of Inspector General discussed tensions between DOS and DHS in establishing VSP units abroad.

Some DOS headquarters officials have said that ICE special agents do not need to be posted overseas to conduct their visa security activities. The DOS officials said ICE special agents are able to access the law enforcement databases and information systems used in the screening and vetting process remotely. VSP managers said that experienced law enforcement agents assigned overseas provide unique added value at overseas posts. ICE special agents assigned to VSUs [shorthand for VSP units] use their expertise in immigration and nationality law, investigations, document examination, intelligence research, and counterterrorism to complement the consular visa adjudication process with law enforcement vetting and investigation. In addition, ICE special agents assigned to VSUs at post focus on identifying “not yet known” terrorists and criminal suspects....<sup>55</sup>

Top-level DOS leadership has stated they are fully supportive of the VSP and are coordinating with DHS to expand the units to additional consular posts.<sup>56</sup> The 2011 GAO report continued to

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<sup>51</sup> P.L. 108-458 permits limited judicial review of removal if visa revocation is the sole basis of the removal.

<sup>52</sup> The chief of mission is defined as the principal officer in charge of a diplomatic facility of the United States, including any individual assigned to be temporarily in charge of such a facility. This person, normally the ambassador, is the personal representative of the President to the country of accreditation. He or she is responsible for the direction, coordination, and supervision of all US Government executive branch employees in that country (except those under the command of a United States military commander).

<sup>53</sup> 22 U.S.C. 3927.

<sup>54</sup> For more on this process, see National Security Decision Directive–38.

<sup>55</sup> OIG, *Visa Security Program*, July 2008.

<sup>56</sup> Unclassified congressional staff briefing by Assistant Secretary of State Janice Jacobs, January 11, 2010; and, U.S. Congress, Senate Committee on the Judiciary, *Securing America’s Safety: Improving the Effectiveness of Anti-terrorism Tools and Interagency Communication*, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 20, 2010.

find difficulties in the working relationships between VSP agents and consular officials, but cited the January 2011 MOU as a corrective step.<sup>57</sup>

## **Effectiveness of the Visa Security Program**

The U.S. Government Accountability Office recently released an evaluation of the VSP that identified several shortcomings. In addition to noting the tensions between the consular officials and the VSP agents, GAO was especially concerned about the lack of standard operating procedures for VSP agents across the various posts. GAO also found that “VSP agents perform a variety of investigative and administrative functions beyond their visa security responsibilities that sometimes slow or limit visa security activities, and ICE does not track this information in the VSP tracking system, making it unable to identify the time spent on these activities.” Staffing shortages and the use of temporary duty assignments, GAO further observed, created coverage problems and delays in some posts. Variability in the consistency and quality of training was cited as well.<sup>58</sup>

Perhaps most importantly, GAO stated that ICE has not expanded VSP to key high-risk posts despite well-publicized plans to do so.

In 2007, ICE developed a 5-year expansion plan for the VSP, but ICE has not fully followed or updated the plan. For instance, ICE did not establish 9 posts identified for expansion in 2009 and 2010. Furthermore, the expansion plan states that risk analysis is the primary input to VSP site selection, and ICE, with input from State, ranked visa-issuing posts by visa risk, which includes factors such as the terrorist threat and vulnerabilities present at each post. However, 11 of the top 20 high-risk posts identified in the expansion plan are not covered by the VSP. Furthermore, ICE has not taken steps to address visa risk in high-risk posts that do not have a VSP presence. Although the expansion of the VSP is limited by a number of factors, such as budgetary limitations or limited embassy space, ICE has not identified possible alternatives that would provide the additional security of VSP review at those posts that do not have a VSP presence.<sup>59</sup>

The absence of VSP in these high-risk posts is a matter of particular congressional concern. This issue has arisen at congressional oversight and appropriations hearings in recent years.<sup>60</sup> H.R. 1741 would require DHS to conduct on-site review of visas issuances at all visa-issuing posts in Algeria; Canada; Colombia; Egypt; Germany; Hong Kong; India; Indonesia; Iraq; Jerusalem, Israel; Jordan; Kuala Lumpur, Malaysia; Kuwait; Lebanon; Mexico; Morocco; Nigeria; Pakistan;

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<sup>57</sup> U.S. Government Accountability Office, *Border Security: DHS's Visa Security Program Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide*, GAO-11-315, March 31, 2011, <http://www.gao.gov/products/GAO-11-315>.

<sup>58</sup> U.S. Government Accountability Office, *Border Security: DHS's Visa Security Program Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide*, GAO-11-315, March 31, 2011, <http://www.gao.gov/products/GAO-11-315>.

<sup>59</sup> U.S. Government Accountability Office, *Border Security: DHS's Visa Security Program Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide*, GAO-11-315, March 31, 2011, <http://www.gao.gov/products/GAO-11-315>.

<sup>60</sup> For examples, see U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *President's Fiscal Year (FY) 2009 budget request for U.S. Immigration and Customs Enforcement (ICE)*, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., February 2008; and U.S. Congress, Senate Committee on the Judiciary, *Securing America's Safety: Improving The Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication*, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 20, 2010.

the Philippines; Saudi Arabia; South Africa; Syria; Tel Aviv, Israel; Turkey; United Arab Emirates; the United Kingdom; Venezuela; and Yemen.

## Resources for Visa Security

### DOS Visa Processing and Security Funding

The adjudication and issuance of visas are largely fee-based, rather than a government service funded by direct appropriations. For the most part, prospective immigrants and nonimmigrants cover the costs of visa processing. The Consular Affairs immigrant visa application processing fee is \$355, and the nonimmigrant processing fee is \$131.<sup>61</sup> Moreover, the 107<sup>th</sup> Congress permanently authorized the collection of Machine-Readable Visa (MRV) fees at \$65—or the cost of the machine-readable visa service if higher—and a \$10 surcharge for machine-readable visas in nonmachine-readable passports. These MRV fees are credited as an offsetting collection used by DOS to recover costs of providing consular services.<sup>62</sup>

**Table 1. Department of State Border Security Program Resource Summary**  
(dollars in thousands)

Category	FY2009 Actual	FY2010 Actual	FY2011 CR	FY2012 Request
Machine Readable Visa (MRV) Fees	830,948	926,135	1,005,639	1,076,663
Western Hemisphere Travel Surcharge	248,889	294,258	315,000	365,750
Enhanced Border Security Program Fees	257,600	319,404	628,913	598,570
Fraud Prevention and Detection Fee	40,000	42,865	40,000	44,000
Affidavit of Support Fee	10,000	0	0	0
Total Border Security Program Expenses	\$1,387,437	\$1,582,662	\$1,989,552	\$2,084,983

**Source:** Secretary of State, *FY2011 Congressional Budget Justifications*, Vol. 1, Department of State Operations (2010) and *FY2012 Congressional Budget Justifications*, Vol. 1, Department of State Operations (2011).

In the FY2012 Budget Request of the President, DOS presents the Consular Affairs visa operations as part of its Border Security Program. As **Table 1** indicates, DOS requested an increase in its Border Security Program from \$1.990 billion in FY2011 to \$2.085 billion in FY2012, and would rely on the use of additional fee receipts to increase the overall funding. The question of whether DOS is adequately funded to process visas expeditiously while maintaining visa security procedures may arise as the budget is debated.<sup>63</sup>

<sup>61</sup> DOS lists its fees at [http://travel.state.gov/visa/temp/types/types\\_1263.html](http://travel.state.gov/visa/temp/types/types_1263.html).

<sup>62</sup> §103 of the Enhanced Border Security and Visa Reform Act (P.L. 107-173)

<sup>63</sup> For legislative tracking of the FY2011 State Department appropriations, see CRS Report R41228, *State, Foreign Operations, and Related Programs: FY2011 Budget and Appropriations*, by Marian Leonardo Lawson, (name redacted), and (name redacted).

## DHS Visa Security Program Funding

The VSP has been growing in terms of funding as well as units located abroad. The FY2009 budget request (the final year of President George W. Bush’s Administration) was \$11.8 million for the VSP, with \$3.4 million to create two additional overseas VSP units in high-risk locations.<sup>64</sup> Congress almost doubled President Bush request of \$11.8 million to \$22.4 million in FY2009. Funding in FY2010 fell short of President Barack Obama’s Administration request of \$32.2 million, as Congress appropriated \$30.7 million for the VSP.<sup>65</sup>

DHS has reported expanding the number of VSP units in high-risk consular posts by two each year in FY2009 and in FY2010, but acknowledges that Congress has required DHS to use the remaining two-year enhancement funds of \$3.4 million it received for expansion by the close of FY2010 pursuant to its five-year expansion plan (discussed above) or the funds will be lost.<sup>66</sup> DHS also stated that 63 ICE special agents were trained to become Visa Security Officers in FY2009.<sup>67</sup>

**Table 2. Department of Homeland Security Visa Security Program Budget Estimates**  
(dollars in thousands)

	FY2009 Actual	FY2010 Actual	FY2011 CR	FY2012 Request
Salaries and Expenses	\$22,354	\$27,614	\$29,489	\$29,489
FTEs	36	45	67	67

**Source:** Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Fiscal Year 2011 Overview Congressional Justification*, (2010) and *Fiscal Year 2012 Overview Congressional Justification*, (2011).

The Obama Administration requested that the VSP be funded at the same level in FY2012 as Congress funded it in FY2011—\$29.5 million.<sup>68</sup> The modest size of the VSP with 67 full-time equivalent staff (FTEs) has led some to question how many VSP units DHS will be able to realistically staff. Some Members of Congress are questioning how long it will take DHS to staff the 40 consular posts it deemed “high-risk” locations with the current level of funding. Congressman Gus Bilirakis, the Ranking Member of the House Homeland Security Subcommittee on Management, Investigations, and Oversight, has called for Congress to shift funding from DHS administrative functions to the VSP.<sup>69</sup> As discussed above, however, others

<sup>64</sup> U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *President’s Fiscal Year (FY) 2009 budget request for U.S. Immigration and Customs Enforcement (ICE)*, Testimony of Assistant Secretary Julie Myers, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., February 2008.

<sup>65</sup> U.S. Department of Homeland Security, *Congressional Budget Justifications, FY2010*, February 2009. [http://www.dhs.gov/xlibrary/assets/dhs\\_congressional\\_budget\\_justification\\_fy2010.pdf](http://www.dhs.gov/xlibrary/assets/dhs_congressional_budget_justification_fy2010.pdf).

<sup>66</sup> In the FY2007 Supplemental Appropriations Act, Congress appropriated \$5 million to the VSP to enhance its Security Advisory Opinion Unit. House and Senate Committees on Appropriations, “Summary of the Fiscal 2007 Supplemental Funding Legislation,” press release, April 23, 2007.

<sup>67</sup> U.S. Department of Homeland Security Immigration and Customs Enforcement, *Fiscal Year 2011 Overview Congressional Justification*, February 2010.

<sup>68</sup> The initial FY2011 Continuing Resolution set the VSP at \$30,686,000, but it was cut by \$1,197,000 in the final FY2011 CR. For legislative tracking of the FY2011 Department of Homeland Security appropriations, see CRS Report R41189, *Homeland Security Department: FY2011 Appropriations*, coordinated by (name redacted).

<sup>69</sup> Mickey McCarter, “Bilirakis Demands Funding for More Visa Security Units,” *Homeland Security Today*, March 3, (continued...)

note that the expansion of the VSP has been stymied as much by questions of how much added-value it brings and the inter-department negotiations, as it has been by funding.<sup>70</sup> For example, several Republican Senators reported that the application for Yemen has been pending since September 2008, and applications for Tel Aviv, Jerusalem, Frankfurt and Amman have been waiting for approval since September 2009.<sup>71</sup>

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(...continued)

2010.

<sup>70</sup> OIG, *Visa Security Program*, July 2008.

<sup>71</sup> Letter from Charles Grassley, Senator, Jeff Sessions, Senator, and Orin Hatch, Senator, et al. to Janet Napolitano, Secretary of Homeland Security, January 14, 2010.

## **Appendix A. Legislative History of the Visa Functions in the Homeland Security Act of 2002**

When the 107<sup>th</sup> Congress weighed the creation of the Department of Homeland Security, considerable debate surfaced about whether or not any or all visa issuance functions should be located in the new department. Enactment of P.L. 107-296 addressed most of these issues, but a few concerns remained after the implementation of the act. Varied viewpoints are discussed below.

As announced on June 6, 2002, the Administration’s proposal for a homeland security department would have included Immigration and Naturalization Service (INS) among the agencies transferred to a new homeland security department. The stated goal of the Administration’s proposal was to consolidate into a single federal department many of the homeland security functions performed by units within various federal agencies and departments. The Administration would have placed all functions of INS under the border and transportation security division of the proposed department. The narrative of the June 6, 2002, plan did not go into details, however, it appeared that under the plan Consular Affairs in the Department of State would have retained its visa issuance responsibilities. This proposal precipitated considerable discussion on where the visa issuance should be located.

### **Option: Locating all Functions in DHS**

Voices in support of moving Consular Affairs’s visa issuance responsibilities to the proposed DHS asserted that consular officers emphasize the promotion of tourism, commerce, and cultural exchange and are lax in screening foreign nationals who want to come to the United States. Media reports of the “Visa Express” that DOS established in Saudi Arabia to allow travel agents to pre-screen nonimmigrants raised considerable concern, especially reports that several of the September 11 terrorists allegedly entered through “Visa Express.” Critics argued that visa issuance was the real “front line” of homeland security against terrorists and that the responsibility for this function should be in a department that did not have competing priorities of diplomatic relations and reciprocity with foreign governments.

Some argued that keeping the INS adjudications and Consular Affairs visa issuances in different departments would perpetuate the types of mistakes and oversights that stem from inadequate coordination and competing chains of command. Most importantly, they emphasized the need for immigration adjudications and visa issuances—as well as immigration law enforcement and inspections activities—to be under one central authority that has border security as its primary mission.

### **Option: Locating Functions in Different Agencies**

Proponents of retaining visa issuances in Consular Affairs asserted that only consular officers in the field would have the country-specific knowledge to make decisions about whether an alien was admissible and that staffing 250 diplomatic and consular posts around the world would stretch the proposed homeland security department beyond its capacity. They also pointed out that under current law, consular decisions are not appealable and warned that transferring this adjudication to homeland security might make it subject to judicial appeals or other due process considerations. The MRV fees, as some point out, have become an important funding stream,

contributing almost 10% of DOS total budget. They maintained that the problems Consular Affairs evidenced in visa issuances have already been addressed by strengthening provisions in the USA PATRIOT Act (P.L. 107-56) and the Enhanced Border Security and Visa Reform Act (P.L. 107-173).

Those who supported retained immigrant adjudications and services in DOJ and visa issuances in DOS point to the specializations that each department brings to the functions. They asserted that the “dual check” system in which both INS and Consular Affairs make their own determinations on whether an alien ultimately enters the United States provides greater security. Proponents of the joint DOJ-DOS responsibilities argued that failures in intelligence gathering and analysis, not lax enforcement of immigration law, were the principal factors that enabled terrorists to obtain visas. Others opposing the transfer of INS adjudications and Consular Affairs visa issuances to DHS maintained that DHS would be less likely to balance the more generous elements of immigration law (e.g., the reunification of families, the admission of immigrants with needed skills, the protection of refugees, opportunities for cultural exchange, the facilitation of trade, commerce, and diplomacy) with the more restrictive elements of the law (e.g., protection of public health and welfare, national security, public safety, and labor markets).

### **Homeland Security Act**

Representative Dick Armey, Majority Leader and Chair of the Select Committee on Homeland Security, introduced the President’s proposal as H.R. 5005, the Homeland Security Act of 2002. H.R. 5005 would have transferred all of the functions of INS to the newly created department under its Border Security and Transportation Division. As introduced, H.R. 5005 would have bifurcated visa issuances so that DHS would set the policies and DOS would retain responsibility for implementation.

During the week of July 8, 2002, the House Committees on Judiciary, International Relations, and Government all approved language on visa issuances that retained DOS’s administrative role in issuing visas, but added specific language to address many of the policy and national security concerns raised during their respective hearings. Breaking with the Administration, the House Judiciary Committee approved language that would have placed much of INS’s adjudication and service responsibilities—including its role in approving immigrant petitions—with a new Bureau of Citizenship and Immigration Services headed by an Assistant Attorney General at DOJ.

When the House Select Committee on Homeland Security marked up H.R. 5005 on July 19, 2002, it approved language on immigrant processing and visa issuances consistent with the House Judiciary Committee recommendations. As reported, H.R. 5005 clarified that the Secretary of DHS would have issued regulations regarding visa issuances and would have assigned staff to consular posts abroad to provide advice and review and to conduct investigations, and that Consular Affairs would have continued to issue visas. It would have further expanded the exclusion authority of the Secretary of State by permitting the Secretary to exclude an alien when necessary or advisable in the foreign policy or security interests of the U.S., giving the Secretary of State an authority even broader than that in law before the 1990 Immigration Amendments reformed the grounds for exclusion. It also would have clarified that decisions of the consular officers are not reviewable.

During the floor debate on H.R. 5005, only one immigration-related amendment was considered, and it would have moved the consular visa function to DHS. The amendment offered by Representative David Weldon failed, and the House went on to pass H.R. 5005 on July 26, 2002.

**Table A-1** summarizes what department would be responsible for visa issuance activities under the various bills.<sup>72</sup>

The National Homeland Security and Combating Terrorism Act of 2002 reported by the Senate Governmental Affairs Committee (S. 2452) on June 24, 2002, included the immigration enforcement functions of INS and the Office of International Affairs but did not transfer any of the other immigration services and visa issuance functions. Representative Mac Thornberry sponsored H.R. 4660, a bill similar to S. 2452 as introduced, that would have created a homeland security department but also did not transfer any of the immigration adjudications and visa issuances functions.

**Table A-1. Visa Issuance Policy Roles and Tasks: Comparison of Major Homeland Security Proposals**

<b>Task/Role</b>	<b>INA</b>	<b>S. 2452</b>	<b>S.Amdt. 4471</b>	<b>H.R. 5005 Introduced</b>	<b>H.R. 5005 Passed</b>	<b>P.L. 107-296</b>
Issuing nonimmigrant visas abroad	State	State	Homeland regulates; State issues	Homeland sets policy; State administers	Homeland regulates; State issues	Homeland regulates; State issues
Changing nonimmigrant visas	Justice	Justice	Homeland	Homeland	Justice	Homeland
Approving immigrant (LPR) petitions	Justice	Justice	Homeland	Homeland	Justice	Homeland
Issuing immigrant visas	State	State	Homeland regulates; State issues	Homeland sets policy; State administers	Homeland regulates; State issues	Homeland regulates; State issues
Adjusting immigrant (LPR) status	Justice	Justice	Homeland	Homeland	Justice	Homeland

The Senate Government Reform Committee acted on a substitute for S. 2452 on July 24, 2002, and that language became S.Amdt. 4471. S.Amdt. 4471 differed somewhat on the issues of immigration adjudications and visa issuances from the Administration’s proposal and H.R. 5005 as passed. The Senate amendment would have transferred all of INS to a newly created DHS under two new bureaus (the Bureau of Immigration Services and the Bureau of Enforcement and Border Affairs) in a Directorate of Immigration Affairs. Similarly to H.R. 5005 as passed, the Senate amendment would have given the Secretary of DHS authority to issue regulations on visa policy; however, it would have permitted the Secretary of the new department to delegate the authority to the Secretary of State. In contrast to the House-passed bill and S. 2452 as introduced, S.Amdt. 4471 would have established an Under Secretary for Immigration Affairs in DHS who

<sup>72</sup> For discussion of the issues and options for transferring immigration functions and activities to DHS, see CRS Report RL31560, *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*; and CRS Report RL31584, *A Comparative Analysis of the Immigration Functions in the Major Homeland Security Bills*, both by Lisa M. Seghetti and (name redacted). (Archived reports available upon request.)



would have handled immigration and naturalization functions as well as immigration enforcement and border functions.

On November 13, 2002, Majority Leader Armev introduced and the House passed H.R. 5710 as a compromise bill to establish a Department of Homeland Security. Among its many provisions, H.R. 5710 retained the language clarifying that—although DOS’s Consular Affairs would continue to issue visas—the Secretary of DHS would issue regulations regarding visa issuances and would assign staff to consular posts abroad to advise, review, and conduct investigations. It also would permit the Secretary of the new department to delegate the authority to the Secretary of State. H.R. 5710 would transfer all of INS to two new bureaus in DHS: the Bureau of Citizenship and Immigration Services and the Bureau of Border Security. The former would report directly to the Deputy Secretary for Homeland Security, while the latter would report to the Under Secretary for Border and Transportation Security. Language similar to H.R. 5710 passed the Senate on November 19, 2002, as S.Amdt. 4901 to H.R. 5005. The House agreed to the Senate amendment on November 22, and the President signed it as P.L. 107-296 on November 25, 2002.

## **Appendix B. Legislation on the 9/11 Commission Recommendations Pertaining to Visa Security**

The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) offered its assessment of how visa and immigration inspection failures contributed to the terrorist attacks. The 9/11 Commission contended that “(t)here were opportunities for intelligence and law enforcement to exploit al Qaeda’s travel vulnerabilities.” The report went on to state: “Considered collectively, the 9/11 hijackers

- included known al Qaeda operatives who could have been watchlisted;
- presented fraudulent passports;
- presented passports with suspicious indicators of extremism;
- made detectable false statements on visa applications;
- made false statements to border officials to gain entry into the United States; and
- violated immigration laws while in the United States.”<sup>73</sup>

The report maintained that border security was not considered to be a national security matter prior to 9/11, and as a result neither the State Department’s consular officers nor the former Immigration and Naturalization Service’s inspectors and officers were considered full partners in national counterterrorism efforts.<sup>74</sup>

The 9/11 Commission made several recommendations that underscore the urgency of implementing legislative provisions on visa policy and immigration control that Congress enacted several years ago. They also suggested areas in which Congress could take further action. The specific recommendations were as follows:

- Targeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility.
- The U.S. border security system should be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors.
- The Department of Homeland Security, properly supported by the Congress, should complete, as quickly as possible, a biometric entry-exit screening system, including a single system for speeding qualified travelers.
- The U.S. government cannot meet its own obligations to the American people to prevent the entry of terrorists without a major effort to collaborate with other governments.<sup>75</sup>

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<sup>73</sup> U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Executive Summary, pp. 13-14, July 2004.

<sup>74</sup> *The 9/11 Commission Report*, Executive Summary, p. 14, July 2004.

<sup>75</sup> For a discussion of these recommendations, see *The 9/11 Commission Report*, Chapter 12.4, pp. 383-389, July 2004.

Other 9/11 Commission recommendations, notably those related to intelligence policy and structures, have been the focus thus far of congressional consideration and media attention. The 9/11 Commission prepared a subsequent report that deals expressly with immigration issues.<sup>76</sup>

During the 108<sup>th</sup> Congress, legislation implementing the 9/11 Commission recommendations (S. 2845, H.R. 10, S. 2774/H.R. 5040 and H.R. 5024) had various provisions that would affect visa issuances. The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), a compromise version of these bills that included some—but not all—of the immigration provisions under consideration, was signed on December 17, 2004.

Most notably, House-passed S. 2845 would have expanded the terror-related grounds for inadmissibility and deportability to include additional activities, such as receiving military-type training by or on behalf of a terrorist organization.<sup>77</sup> P.L. 108-458 would make deportable any alien who has received military training from or on behalf of an organization that, at the time of training, was a designated terrorist organization.

Among the other provisions in the 9/11 Commission implementation bills were: acquire and deploy technologies (e.g., biometrics) to detect potential terrorist indicators on travel documents; establish an Office of Visa and Passport Security; and train consular officers in the detection of terrorist travel patterns. H.R. 10 (as reported by the House Judiciary Committee on September 27 and passed by the House as S. 2845 on October 8, 2004) included provisions to establish an Office of Visa and Passport Security in the Bureau of Diplomatic Security of the Department of State to target and disrupt individuals and organizations at home and in foreign countries that are involved in the fraudulent production, distribution, or use of visas, passports and other documents used to gain entry to the United States. It also would have clarified that all nonimmigrant visa applications are reviewed and adjudicated by a consular officer, and would assign anti-fraud specialists to the top 100 posts that experience the greatest frequency of fraudulent documents. P.L. 108-458 establishes a Visa and Passport Security Program within the Bureau of Diplomatic Security at the Department of State.

As passed by the Senate on October 8, 2004, S. 2845—as well as House-passed H.R. 10—would increase the number of consular officers by 150 over the preceding year, annually FY2006 through FY2009. Both bills also had provisions aimed at improving the security of the visa issuance process by providing consular officers and immigration inspectors greater training in detecting terrorist indicators, terrorist travel patterns and fraudulent documents.<sup>78</sup> These provision were retained by the conferees in P.L. 108-458.

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<sup>76</sup> U.S. National Commission on Terrorist Attacks Upon the United States, *Monograph on 9/11 and Terrorist Travel*, August 2004.

<sup>77</sup> CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by (name redacted) and (name redacted).

<sup>78</sup> CRS Report RL32616, *9/11 Commission: Legislative Action Concerning U.S. Immigration Law and Policy in the 108<sup>th</sup> Congress*, by (name redacted) and (name redacted).

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