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

March 4, 2004

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

Summary

Since the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States on temporary visas despite provisions in immigration laws that bar the admission of terrorists. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to further terrorist attacks have led many to call for revisions in the policy as well as changes in who administers immigration law.

Foreign nationals 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. Prior to establishment of the Department of Homeland Security (DHS), two departments — the Department of State (DOS) Bureau of Consular Affairs and the Department of Justice (DOJ) Immigration and Naturalization Service (INS) — each played key roles in administering the law and policies on the admission of aliens. Although DOS's Consular Affairs remains responsible for issuing visas, DHS's Bureau of Citizenship and Immigrant Services approves immigrant petitions, and DHS's Bureau of Customs and Border Protection inspects all people who enter the United States. In FY2002, DOS issued approximately 6.2 million visas and rejected over 2.2 million aliens seeking visas.

When the President's proposal to establish DHS (H.R. 5005, 107th Congress) was debated, his initial plan to give the DHS Secretary exclusive authority through the Secretary of State to issue or refuse to issue visas was a thorny point. The House Select Committee on Homeland Security approved compromise language on visa issuances in H.R. 5005 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 hearings. An amendment to move the consular affairs visa function to DHS failed when the House passed H.R. 5005. The Homeland Security Act of 2002 (P.L. 107-296) retained the 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.

Signing of a 2003 memorandum of understanding (MOU) that implements the working relationship between DOS and DHS's three immigration-related bureaus sparked immediate debate. Some have expressed the view that DOS retains too much control over visa issuances under the MOU, 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 procedures are adequately funded may also arise as the FY2005 budget is considered. This report will be updated as significant developments occur.

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

Introduction

Since the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens (i.e., noncitizens or foreign nationals) who apparently entered the United States on temporary visas. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to further terrorist attacks have led many to call for revisions in the visa policy and possibly changes in who administers immigration law.¹

Foreign nationals not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted.² Under current law, three departments — the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ) — each play key roles in administering the law and policies on the admission of aliens.³ 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, 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.⁴

This report addresses policies on immigration visa issuances, options to reassign this function to the Department of Homeland Security (DHS) that were considered

¹ For background and analysis of visa issuance policy and activities, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

² 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.

³ 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.

⁴ For an analysis of the transfer of immigration functions and activities to a new 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 Ruth Ellen Wasem.

prior to passage of the Homeland Security Act of 2002 (P.L. 107-296), and current administration of visa policy. It opens with an overview of visa issuances, with brief sections on procedures for aliens coming to live in the United States permanently and on procedures for aliens admitted for temporary stays.⁵ A summary of the grounds for excluding aliens follows. The report provides a legislative history of the debate to transfer visa issuance policy functions to DHS and analyzes legislative proposals in the 107th Congress to reassign the visa issuance activities. A discussion of the current division of responsibilities between DHS and DOS and the ongoing issues in the 108th Congress conclude the report.

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 residents (LPRs).⁶ Illegal aliens or unauthorized aliens include those noncitizens who either entered the United States surreptitiously (i.e., entered without inspection, or who violated the terms of their visas).

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.

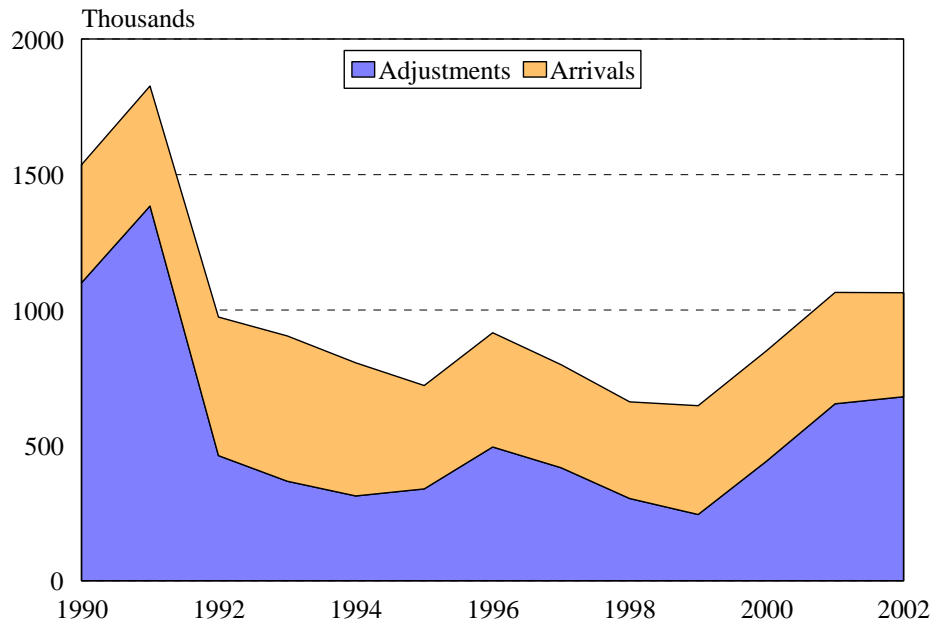
Petitions for immigrant (i.e., LPR) status are first filed with USCIS by the sponsoring relative or employer in the United States. If the prospective immigrant is already residing in the United States, the USCIS handles the entire process, which is called “adjustment of status.” If the prospective LPR does not have legal residence

⁵ For a broader discussion, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

⁶ For background and further discussion of humanitarian cases, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno and Katherine Bush; and CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

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. As **Figure 1** depicts, many LPRs are adjusting status from within the United States rather than receiving visas issued abroad by Consular Affairs. The spikes in FY1990 and FY1991 are due to the legalization programs of the Immigration Reform and Control Act of 1986.

Figure 1. Immigrants Arriving or Adjusting Status, FY1990-FY2002

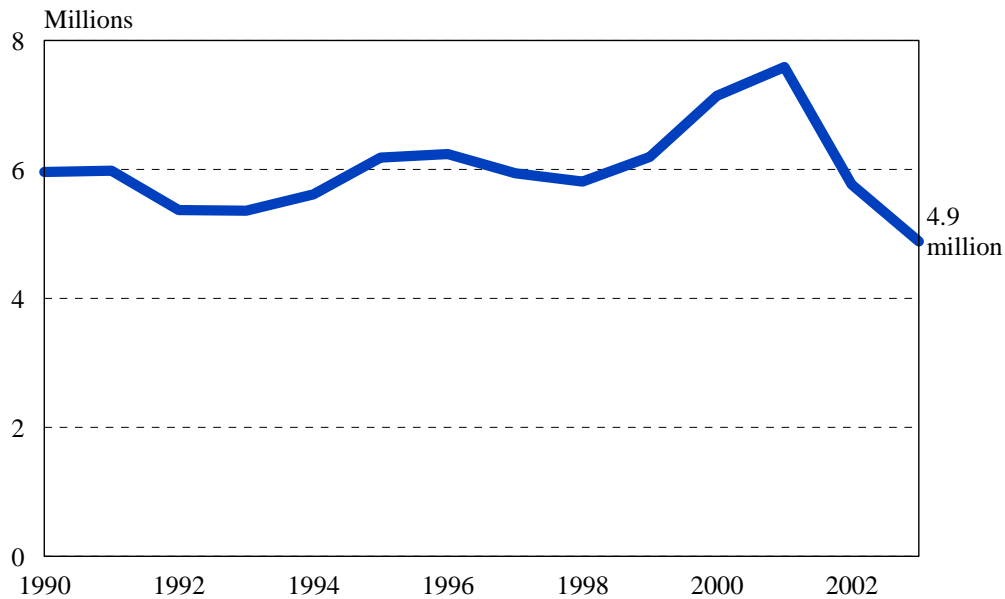


Source: CRS presentation of published USCIS data.

Nonimmigrant Visas

Aliens seeking to come to the United States temporarily rather than to live permanently are known as nonimmigrants.⁷ 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 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.

⁷ For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem. (Hereafter cited as RL31381, *Temporary Admissions*.)

Figure 2. Nonimmigrant Visas Issued, FY1990-FY2003

Source: CRS presentation of DOS Bureau of Consular Affairs data.

Nonimmigrant visas issued abroad dipped to 5.8 million in FY2002 after peaking at 7.6 million in FY2001. Preliminary FY2003 data indicate a further drop to 4.9 million nonimmigrant visas issued. Over the past 12 years, as **Figure 2** illustrates, DOS has typically issued about 6 million nonimmigrant visas annually. Depending on reciprocal agreements with foreign governments, nonimmigrant visas may be valid for several years and may permit multiple entries. USCIS reported 33.7 million nonimmigrant entries in FY2000 and 27.9 million in FY2002.⁸

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 27 countries (e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland). The USCIS reported that 17 million nonimmigrants entered the United States through VWP in FY2001 and that 13 million nonimmigrants entered through VWP in FY2002.⁹ Since aliens entering through VWP do not have visas, CBP inspectors at the port of entry perform the background checks and make the determination of whether the VWP alien is admissible.

⁸ For additional analysis, see RL31381, *Temporary Admissions*.

⁹ See CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

Grounds for Exclusion

All aliens must undergo reviews performed by DOS consular officers abroad and CBP inspectors upon entry to the U.S. These reviews are intended to ensure that they are not ineligible for visas or admission under the grounds for inadmissibility spelled out in INA.¹⁰ These 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. Over 75 million records of visa applications are now automated in the CCD, with some records dating back to the mid-1990s. Since February 2001, the CCD stores photographs of all visa applicants in electronic form, and more recently the CCD has begun storing finger prints of the right and left index fingers. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may impact on the issuance of the visa. 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) and TIPOFF databases.¹¹

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.¹² Consular officers also send suspect names to the FBI for a name check program called Visa Condor that requires a consular officer abroad to refer selected visa cases, identified by law enforcement and intelligence information, for greater review by intelligence and law enforcement agencies.¹³ With procedures distinct from the terrorist watch lists, consular officers screen visa applicants for

¹⁰ §212(a) of INA.

¹¹ The State Department’s CLASS and TIPOFF terrorist databases interface with the Interagency Border Inspection System (IBIS) used by the DHS immigration inspectors. IBIS also interfaces with the FBI’s National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), and the Non-Immigrant Information System (NIIS).

¹² For background and analysis, see CRS Report RL32120, *The ‘FTO List’ and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Cronin.

¹³ 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, Oct. 23, 2003. (Hereafter cited as Senate Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms*.)

employment or study that would give the foreign national access to controlled technologies, known as Visa Mantis.

Some provisions may be waived or are not applicable in the case of nonimmigrants, refugees (e.g., public charge), and other aliens. All family-based immigrants and employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.

Fees and Funding Levels

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 \$335, and the nonimmigrant processing fee is \$100.¹⁴ Moreover, the 107th 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.¹⁵

Table 1. Appropriations for Overseas Visa Services, Consular Affairs

Fiscal years	Appropriations
FY2004	\$0
FY2003	\$0
FY2002	\$12,439,000
FY2001	\$12,235,000
FY2000	\$11,902,000
FY1999	\$9,178,000
FY1998	\$20,026,000

Source: DOS Congressional Presentation Documents, FY1999-FY2005.

The largest amount of direct appropriations for overseas visa services was \$20 million in FY1998, as **Table 1** indicates. According to DOS documents, none of the FY2003 and FY2004 appropriations went to overseas visa services. Beginning in FY2003, however, consular operating expenses were shifted from the Diplomatic and

¹⁴ DOS lists its fees at [<http://travel.state.gov/vofees.html#temp>].

¹⁵ §103 of the Enhanced Border Security and Visa Reform Act (P.L. 107-173).

Consular Programs appropriation to funding by MRV fees.¹⁶ The overall budget authority line item for “Conduct of Consular Relations” grew from \$589 million in FY2003 to \$789 million in FY2004.¹⁷

The funding for the visa activities within the Bureau of Consular Affairs comes from the various fee accounts as presented in **Table 2**. Not all of the fee monies listed in **Table 2**, however, are used for Consular Affairs’ visa activities.

Table 2. Visa-Related Fee Collections, FY2004-FY2005

Fee account	Fiscal years	Total collections available	Current year allocations
Machine-Readable Visa	FY2005 (request)	\$663,488,000	\$661,480,000
	FY2004 (estimate)	\$687,467,000	\$630,891,000
Visa Fingerprint	FY2005 (request)	\$7,917,000	\$1,000,000
	FY2004 (estimate)	\$6,617,000	\$1,000,000
Affidavit of Support	FY2005 (request)	\$28,008,000	\$16,800,000
	FY2004 (estimate)	\$30,008,000	\$14,000,000
Diversity Lottery	FY2005 (request)	\$8,842,000	\$5,100,000
	FY2004 (estimate)	\$8,442,000	\$5,100,000
Border Security	FY2005 (request)	\$100,000	\$100,000
	FY2004 (estimate)	0	0

Source: CRS presentation data from the U.S. Department of State, *Budget in Brief, FY2005*.

Legislative Issues in 107th Congress

Reassigning Visa Issuance Functions

When the 107th 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 agency. Enactment of P.L. 107-293 resolved most of these issues, but similar concerns may arise as the 108th Congress oversees the implementation of the Act. Varied viewpoints are discussed below.

¹⁶ CRS Report RL31370, *State Department and Related Agencies: FY2003 Appropriations*, by Susan Epstein.

¹⁷ U.S. Department of State, *Budget in Brief, Fiscal Year 2005*. For more background and analysis, see CRS Report RL31809, *Appropriations for FY2004: Commerce, Justice, State, the Judiciary, and Related Agencies*, coordinated by Susan Epstein.

As announced on June 6, 2002, the Administration's proposal for a homeland security department would have included 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 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 Arme, 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 3** summarizes what department would be responsible for visa issuance activities under the various bills.¹⁸

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 3. Visa Issuance Policy Roles and Tasks: Comparison of Major Homeland Security Proposals

Task/role	INA	S. 2452	S.Amdt. 4471	H.R. 5005 introduced	H.R. 5005 passed	P.L. 107-296
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

¹⁸ 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 Ruth Ellen Wasem.

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

On November 13, 2002, Majority Leader Arney 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.

Current Division of Responsibilities

As discussed above, the Homeland Security Act contained language stating that DHS is responsible for formulating regulations on visa issuances and may assign staff to consular posts abroad to advise, review, and conduct investigations. It also stated that DOS's Consular Affairs continues to be responsible for issuing visas. The Act required DHS and DOS to reach an understanding on how the details of this division of responsibilities would be implemented.¹⁹

On September 28, 2003, Secretary of State Colin Powell and Secretary of Homeland Security Thomas Ridge signed the memorandum of understanding (MOU) implementing §428 of the Homeland Security Act.²⁰ The MOU describes each department's responsibilities in the area of visa issuances. In spelling out how these provisions are being implemented between DOS and DHS, the MOU is also raising a few concerns.

State's Continuing Role

Among its major elements, the MOU states that DOS may propose and issue visa regulations subject to DHS consultation and final approval. It further states that

¹⁹ For further analysis of visa issuance policies, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

²⁰ The text of the MOU can be found at [<http://www.travel.state.gov/MOUwithDHS.html>].

DHS shall assign personnel to diplomatic posts, but that DOS will determine who, how many, and the scope of their functions.

At a hearing in September 2003 that focused on the MOU, 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.²¹

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.”²²

DHS’s New Role

As a result of the Homeland Security Act, the immigration components of DHS now have greater responsibilities abroad than did the former INS. To this end, Secretary Ridge has established an Office of International Enforcement (OIE) in BTS to oversee DHS’s activities under the MOU with DOS. Under Secretary of Homeland Security Asa Hutchinson described the creation of OIE in testimony.

The Office of International Enforcement (OIE), an independent office within my directorate, will oversee management and implementation of the visa MOU and manage the assignment of DHS personnel to consular posts. This new office reports directly to me and I have designated Renee J. Harris to be Acting Director of OIE. OIE will perform a variety of functions, including reviewing and implementing visa guidance in areas of interest to DHS, and will handle operational duties related to the section 428 process for BTS. I have also firmly

²¹ 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.

²² *Ibid.*

committed to working with the Bureau of Citizenship and Immigration Services in developing visa policy.²³

Ms. Harris had been head of the Office of Internal Affairs (OIA) in the former INS. Within USCIS, the OIA remains to handle USCIS's overseas adjudications, the most noteworthy being refugee processing. Other DHS international immigration activities are pre-inspections and investigations (e.g., smuggling, trafficking and orphan petitions).

In congressional testimony during October 2003, C. Stewart Verdery, Jr. DHS Assistant Secretary for Border and Transportation Security Policy and Planning, reported that DHS officers were already in Saudi Arabia reviewing all visa applications prior to adjudication (as required by 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.²⁴

DHS's CBP then inspects aliens who seek to enter the United States. Primary inspection consists of a brief interview with an immigration inspector, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS).²⁵ At 115 airports and 14 seaports, many nonimmigrants are entered into the new US-VISIT system that uses biometric identification (finger scans) to check identity and track presence in the United States.²⁶ Primary inspections are quick (usually lasting no longer than a minute); however, if the inspector is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers

²³ Ibid.

²⁴ 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, Oct. 23, 2003.

²⁵ IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

²⁶ For background and discussion of US-VISIT, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa M. Seghetti.

sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.²⁷

Current Issues

Competing Concerns

Some have expressed the view that DOS retains too much power and control over visa issuances under the MOU. 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. 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.

Others have indicated satisfaction with the MOU, arguing that it strikes the proper balance between the two departments and reflects the bifurcation envisioned in the Act. They maintain that it plays off the strengths of the two departments and allows for refinement of the implementation in the future.²⁸ 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 250 diplomatic and consular posts around the world would stretch DHS beyond its capacity.

FY2005 Funding

DHS Office of International Affairs. Increased staffing and resources for DHS’s role in visa issuances are key elements of the FY2005 budget. In the DHS FY2005 budget request, the Administration is seeking \$14 million in appropriations for the BTS Office of International Affairs and indicates that \$10 million of the request would be for reviewing the visa issuance process. The \$14 million for Office of International Affairs has a corresponding proposal of 90 full-time equivalent (FTEs) employees in FY2005. Comparable FY2004 funding data are not available.

DOS Bureau of Consular Affairs. The FY2005 Budget requests \$909 million, an increase of \$120 million over FY2004 for Consular Relations. The number of FTEs would increase by 123 to 4,106 FTEs. The funding for the visa activities within the Bureau of Consular Affairs comes from the various fee accounts

²⁷ Lookout databases such as TIPOFF, which is integrated with CLASS contain information on aliens who are inadmissible for entry into the United States. NSEERS and SEVIS are also used during secondary inspections. Immigration inspectors may access NAILS II, which is a text-based system that interfaces with IBIS and CLASS.

²⁸ 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.

as presented previously in **Table 2**. The Department of State FY2005 Budget documents specify that \$185 million of the \$909 million FY2005 request for Consular Relations would come from direct appropriations and the remainder would come from various fees, as follows: \$601,249,000 from Machine-Readable Visa (MVR) fees; \$5,100,000 from Diversity Lottery fees; \$1,000,000 from Federal Bureau of Investigation (FBI) fingerprint fees; \$16,800,000 from the Affidavits of Support fees; and \$100,000,000 from fees that would be provided under a proposed Enhanced Border Security Program. Comparable FY2004 funding data are not available.

The question of whether DHS and DOS are adequately funded to process visas expeditiously while maintaining visa security procedures may arise as the FY2005 budget is debated. The modest size of the Office of International Affairs with 90 FTEs has led some to question how many visa security reviews and investigations it will be able to realistically handle. Some are concerned that visa-related fees, such as the MRV fees, be dedicated for use only for visa processing and issuance activities; use of these visa-related fees for other diplomatic and consular functions has raised concerns. On the other hand, past use of the Immigration Examinations Fee²⁹ for investigations by the Office of International Affairs has been called into question by those who think it should be solely used for USCIS adjudications and services

²⁹ §286(m) of the Immigration and Nationality Act. 8 U.S.C. 1356.