

Homeland Security

Securing Our Nation's Borders

Part I – DHS & New Visa Policy and Oversight Role

Part II – DHS & Foreign Nationals in the United States

Joint Meeting of User Facility Administrators & User Executive Committee Chairs (UEC)

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Part I

Homeland Security's New Role in the Visa Process

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Homeland Security Act

- Sections 402(4) and 428 of the Homeland Security Act (HSA) give Secretary Ridge and the Department of Homeland Security (DHS) a new role in the visa process.
- Congress charged Secretary Ridge with responsibility for establishing and administering rules, in accordance with section 428, governing the granting of visas or other forms of permission, including parole, to enter the United States.
- Border and Transportation Security Directorate (BTS) Under secretary Asa Hutchinson is the lead for DHS on section 428.



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Section 428 Memorandum of Understanding

- On September 26, 2003, Secretary Powell and Secretary Ridge signed the Memorandum of Understanding between DHS and the Department of State (DOS), implementing section 428 of the HSA.
- The MOU became effective upon publication in the Federal Register, September 30, 2003.
- By signing the MOU, DHS and DOS have pledged to work cooperatively to create and maintain an effective, efficient visa process that secures America's borders from external threats while ensuring that our doors remain open to legitimate travel.



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Section 428 DHS-DOS MOU – (Continued)

- DHS will now establish most visa policy, have final approval over most DOS-initiated guidance, review implementation of visa policy, and provide additional direction as directed in the MOU.
- Visa policy refers to policy decisions that affect the visa process as a whole as well as guidance that may affect individual visa determinations.
- DHS visa guidance will include federal regulations, Foreign Affairs Manual provisions (including all interpretive and procedural notes), and cables to diplomatic and consular posts.



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Section 428 DHS-DOS MOU – (Continued)

- DHS will have final say over policy areas of interest, including:
 - (1) classification, admissibility and documentation (with the exception of some classification and admissibility regulations over which the Secretary of State has final say, such as those relating to A and G visas);
 - (2) place of visa application;
 - (3) personal appearance; and
 - (4) visa validity periods and multiple entry visas.

- DHS also has final responsibility over visa guidance prescribing information, evidence, or other documentation collected to establish eligibility for a visa, admissibility to the U.S., and to classify a foreign national as a nonimmigrant or immigrant.



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Section 428 DHS-DOS MOU – (Continued)

- DHS may assign personnel to diplomatic and consular posts where visas are issued unless it is determined that such an assignment would not promote homeland security.
- The HSA specifically mandates a DHS presence in Saudi Arabia to review all visa applications prior to adjudication. DHS, in consultation with DOS, will identify other diplomatic and consular posts where a DHS presence is warranted.
- DHS may refuse or revoke a visa in accordance with law. DHS does not have the authority to reverse a consular officer's decision to refuse a visa.



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Section 428 DHS-DOS MOU – (Continued)

•DHS officers assigned to diplomatic and consular posts will perform certain functions, including:

- (1) Provide expert advice and training to consular officers regarding specific security threats relating to adjudication of a visa application;
- (2) Review visa applications (either on initiative of DHS or referral from consular officer adjudicating application);
- (3) Conduct investigations involving visa matters in accordance with the MOU;
- (4) Provide training on national security and immigration related concerns.



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Section 428 DHS-DOS MOU – (Continued)

- The Office of International Enforcement (OIE), a distinct entity within BTS, is responsible for overseeing management and implementation of the visa MOU and for assignment of DHS personnel to select consular posts.
- BTS and the U.S. Citizenship and Immigration Services (CIS) will coordinate on visa policy, with input from the OIE on operational aspects that affect such policy.



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DHS Role in the Visa Process

- DHS' primary role is to ensure that homeland security requirements are fully reflected in the visa process. DOS continues to lead and manage the consular corps and visa process and execute U.S. foreign policy.
- DHS and DOS have developed a cooperative partnership to examine aspects of the visa process and tighten any vulnerabilities that may exist in the visa process abroad.
- DHS and DOS have already consulted on a variety of issues, including criteria for visa clearances under Visas Condor and Mantis; streamlining of clearance procedures; and interview requirements for visa applicants.



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DHS Role in the Visa Process – (Cont'd)

- DHS and DOS participate in ongoing interagency working groups addressing issues that affect entry procedures and admission of foreign nationals to the United States such as upcoming biometrics deadlines and entry-exit system, US VISIT.
- DHS intends to examine various aspects of the visa process to determine which areas need improvement.
- The review is a high priority for DHS and will require collaboration with DOS, other executive branch departments, and various stakeholders in the business community and public and private sector.



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DHS Role in the Visa Process – (Cont'd)

- DHS is committed to ensuring that every initiative or decision that may affect visa issuance or travel and entry into the United States always involves careful consideration of the impact of national security requirements on traveling public and U.S. industry.
- The ultimate goal is to adopt visa policies and procedures that emphasize security as well as efficiency.

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Part II

Foreign Nationals In the United States Maintenance of Status

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Maintenance of Status - Terminology

Maintaining status

Remaining within authorized Arrival/Departure Record (Form I-94) time period and acting consistent with the purpose of entry.

Extending Status

Foreign national remains in the same status (e.g. H-1B gets additional time in H status). Process of requesting that CIS extend status and the authorized period of stay beyond the period reflected on the I-94. Result: Approval notice with new I-94 reflecting the same status.



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Maintenance of Status – Terminology (Cont'd)

Changing status

Foreign national changes status (e.g. F-1 student to H-1B specialty worker). Process of requesting that CIS change status and extend the authorized period of stay beyond I-94 period. Result: Approval notice with new I-94 reflecting the new status.

Violating status

Acting inconsistent with authorized status (i.e. “moon-lighting”, terminating employment).

Out of status

Remaining beyond your authorized period of stay as reflected on the I-94 (i.e., overstay)



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Common Violations of Status

- Unauthorized employment - working in a capacity not authorized by the non immigrant visa status
- Termination of employment w/o leaving U.S. or filing for Extension of Stay or Change of Status application
- Activities that differ materially from purpose of entry
- Material changes in employment w/o notifying CIS
- Failure to file Form AR-11 (change of address)



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Unauthorized Employment

- Common misperceptions about employment eligibility:

- Employment not authorized for B-2 visitors.

- B-1 business activities are limited in scope.

- F-1 students not authorized for employment unless granted period optional practical training (OPT) and given EAD card

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Unauthorized Employment – (Cont'd)

- Common misperceptions about employment eligibility – (Cont'd):

- Family members in a derivative nonimmigrant status are generally not authorized for employment (exception L-2 and E-2 spouses).
- H-1B visa holders are permitted concurrent employment only with separate authorization.
- Adjustment of Status applicants cannot “port” to a different employer without an EAD or currently valid NIV status.



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“Gaps” in Authorized Employment

- Generally, termination of employment will render a foreign national out of status and subject to removal.
- Certain foreign nationals with pending adjustment of status applications or applications to change or extend status are considered to be in a period of authorized stay. Generally, such foreign nationals are not subject to removal.
- Adjustment of status applicants are considered to be in a period of authorized stay.

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“Gaps” in Authorized Employment – (Cont’d)

- For non-immigrants, the regulations provide the flexibility to change status to B-2 (visitor) if the foreign national remains a bona fide nonimmigrant to cover a “gap” in employment.
- For non-immigrants, CIS has discretion, where warranted, to apply some time frame to file change of status or extension of status request in connection with a new employer after termination of the initial employment.



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Consequences of Failing to Maintain Status

- Inability to extend or change nonimmigrant status (except where excused by CIS)
- Inability to adjust status to get “green card” (limited exceptions, 245(k), 245(i))
- 237 Removal (deportation)



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Consequences of Overstaying

- 222 (g) - Visa voidance and requirement that all future visas be obtained in home country
- 212(a)(9)(B)(i) “Unlawful presence”
 - Overstay of more than 180 days: 3 year bar to reentry
 - Overstay of more than 1 year: 10 year bar to reentry



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Avoiding Maintenance of Status Issues

Adjustment (“green card”) applicants:

Apply for Advance Parole, Employment Authorization Document (“EAD”). Allow ample time for Advance Parole and EADs so that there will be no gap for employment authorization or ability to travel. If principal works on “EAD”, family needs to travel on advance parole.

Non-immigrants:

Apply in timely fashion for status extension or change of status. Do not travel while change of status application is pending. It will be considered abandoned. Make sure a passport and visa will still be valid upon return to the United States. Your visa must reflect your status (e.g., H-1B cannot enter on an F-1 visa).



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Avoiding Overstay Issues

- Schedule personal reminder to begin process to extend petitions six months in advance of petition expiration to avoid travel restrictions.
- Each foreign national should review I-94 card on each entry.
- Set up system to carefully track I-94 cards for principal and family members.

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