

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214, 215 and 235

[BTS 03-01]

RIN 1651-AA54

Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"); Biometric Requirements

AGENCY: Border and Transportation Security Directorate, Department of Homeland Security.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of Homeland Security (Department or DHS) has established the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT) in accordance with several Congressional mandates requiring that the Department create an integrated, automated entry exit system that records the arrival and departure of aliens; that equipment be deployed at all ports of entry to allow for the verification of aliens' identities and the authentication of their travel documents through the comparison of biometric identifiers; and that the entry exit system record alien arrival and departure information from these biometrically authenticated documents. This rule provides that the Secretary of Homeland Security or his delegate may require aliens to provide fingerprints, photographs or other biometric identifiers upon arrival in or departure from the United States. The arrival and departure provisions are authorized by sections 214, 215 and 235 of the Immigration and Nationality Act (INA).

The Department will apply this rule's requirements only to aliens seeking to be admitted pursuant to a nonimmigrant visa who travel through designated air and sea ports. The rule exempts: aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule; children under the age of 14; persons over the age of 79; classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt; and an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. A **Federal Register** notice

identifying the air and sea ports where biometrics may be collected at time of entry and departure has been published simultaneously with this rule. This rule authorizes the Secretary to establish pilot programs for the collection of biometric information at time of departure and at a limited number of ports of entry, to be identified through notice in the **Federal Register**. The biometrics provided by the aliens will be entered into the automated identification system (IDENT) system, which will be integrated with the entry exit system component of US-VISIT. The alien's biometric and other information will be checked against law enforcement and intelligence data to determine whether the alien is a threat to national security or public safety, or is otherwise inadmissible. An alien's failure to comply with this rule's requirements may result in a finding that he or she is inadmissible to the United States, has violated the terms of his or her admission and maintenance of status, or is ineligible for future visas, admission or discretionary immigration benefits. Due to heightened security concerns related to a continued threat of terrorist acts in the United States, the Department has determined that immediate implementation of this rule is necessary with request for public comments.

DATES: Interim rule effective on January 5, 2004. Written comments must be submitted on or before February 4, 2004.

ADDRESSES: Written comments may be submitted to Patrice Ward, Chief Inspector, Air and Sea Exit Manager, US-VISIT, Border and Transportation Security, Department of Homeland Security, 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209. Submitted comments may be inspected at 425 I St NW., Room 4034, Washington, DC 20536 during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling (202) 298-5200. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552.

FOR FURTHER INFORMATION CONTACT: For US-VISIT requirements under this rule: Patrice Ward, Chief Inspector, Air and Sea Exit Manager, US-VISIT, Border and Transportation Security, Department of Homeland Security, 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209, at (202) 927-5200.

SUPPLEMENTARY INFORMATION:

What Is the US-VISIT Program?

The US-VISIT program is a high priority initiative of the Department that

is designed to improve overall border management through the collection of arrival and departure information on foreign visitors and immigrants who travel through our nation's air, sea and land ports. The goals of US-VISIT are to enhance the security of the United States, its citizens, permanent residents and visitors; to expedite legitimate travel and trade; to ensure the integrity of the U.S. immigration system; and to safeguard the personal privacy of foreign visitors and residents. By recording more complete arrival and departure information, the US-VISIT program will not only meet various Congressional mandates for an integrated, interoperable, and automated entry exit system for aliens as discussed below, but it will also enhance the security and safety of citizens, residents and visitors by verifying foreign national travelers' identities through the comparison of biometric identifiers, by authenticating their travel documents, and by checking their data against appropriate law enforcement and intelligence systems. The terrorist attacks of September 11, 2001, highlighted the need to improve national security by returning integrity to the U.S. immigration system. This requires developing better methods for identifying aliens who are inadmissible to the country as well as those who overstay their lawful admission periods. At the same time, the country needs procedures and systems that facilitate legitimate travel, commerce, tourism, education, international communication, and other benefits that flow from welcoming law-abiding citizens of other countries into the United States. The US-VISIT Program was created to help DHS meet all of these law enforcement and service goals.

What Is the Statutory Authority for the Entry Exit System Component of the US-VISIT Program and for the Collection of Biometric Identifiers From Aliens?

The principal law that mandates the creation of an automated entry exit system that integrates electronic alien arrival and departure information is the *Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA)*, Public Law 106-215 (2000), 114 Stat. 339, codified as amended at 8 U.S.C. 1365a. *DMIA* amended previous legislative requirements for an entry exit system that would record the arrival and departure of every alien who crosses the U.S. borders. See section 110 of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*,

Div. C, Public Law 104–208 (1996), 110 Stat. 3009–558, codified in scattered sections of 8 U.S.C. (later amended by *DMIA*). *DMIA* requires that the entry exit system consist of the integration of all authorized or required alien arrival and departure data that is maintained in electronic format in Department of Justice (DOJ) (now DHS) or Department of State (DOS) databases. 8 U.S.C. 1365a. This integrated entry exit system must be implemented at all air and sea ports of entry by December 31, 2003 using available air and sea alien arrival and departure data as described in the statute. *DMIA* also states that the system must be implemented at the 50 most highly trafficked land border ports of entry by December 31, 2004, and at all ports of entry by December 31, 2005 with all available electronic alien arrival and departure information. *DMIA* also requires DHS to use the entry exit system to match the available arrival and departure data on aliens and to prepare and submit to Congress various reports on the numbers of aliens who have overstayed their periods of admission and on implementation of the system. 8 U.S.C. 1365a(e). *DMIA* authorizes the Secretary of Homeland Security, in his discretion, to permit other Federal, State, and local law enforcement officials to have access to the entry exit system for law enforcement purposes. 8 U.S.C. 1365a(f).

In addition, section 217(h) of the *Visa Waiver Permanent Program Act of 2000* (VWPPA), Public Law 106–396 (2000), 114 Stat. 1637, codified as amended at 8 U.S.C. 1187(h), requires the creation of a system that contains a record of the arrival and departure of every alien admitted under the Visa Waiver Program (VWP) who arrives and departs by air or sea. The requirements of *DMIA* effectively result in the integration of this VWP arrival/departure information into the primary entry exit system component of the US–VISIT program.

In late 2001 and 2002, Congress passed two additional laws affecting the development of the entry exit system, in part, in response to the events of September 11, 2001. Section 403(c) of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act)*, Public Law 107–56 (2001), 115 Stat. 353, codified as amended at 8 U.S.C. 1379, required the Attorney General and the Secretary of State jointly, through the National Institute of Standards and Technology (NIST), and in consultation with the Secretary of the Treasury and other appropriate Federal law enforcement and intelligence agencies,

and in consultation with Congress, to develop and certify a technology standard, including appropriate biometric identifier standards, that can be used to verify the identity of visa applicants and persons seeking to enter the United States pursuant to a visa and to do background checks on such aliens. In developing the entry exit system required by *DMIA*, section 414(b) of the *USA PATRIOT Act* directed the Attorney General and the Secretary of State to “particularly focus on the utilization of biometric technology; and the development of tamper-resistant documents readable at ports of entry.” 8 U.S.C. 1365a note.

The legislative requirements for biometric identifiers to be utilized in the context of the entry exit system were significantly strengthened with passage of the *Enhanced Border Security and Visa Entry Reform Act of 2002* (“*Border Security Act*” or *EBSVERA*), Public Law 107–173 (2002), 116 Stat. 553, codified in scattered sections of 8 U.S.C. 302(a)(1) of the *Border Security Act* states that the entry exit system must use the technology and biometric standards required to be certified by section 403(c) of the *USA PATRIOT Act*. Section 303(b)(1) requires that “[n]o later than October 26, 2004,” only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers may be issued to aliens by DHS and DOS. 8 U.S.C. 1732(b)(1). This section, however, does not invalidate unexpired travel documents that have been issued by the U.S. government that do not use biometrics. Section 303(b)(1) further states that the Secretaries of Homeland Security and State must jointly establish document authentication and biometric identifier standards for alien travel documents from among those recognized by domestic and international standards organizations. *Id.*

Section 303(b)(2) requires that “[n]o later than October 26, 2004,” all ports of entry must have equipment and software installed “to allow biometric comparison and authentication of all United States visas and other travel and entry documents issued to aliens, and passports” that are required to be issued by VWP countries. 8 U.S.C. 1732(b)(2). The current statutory language also requires that by that same date, VWP countries must have a program in place to issue tamper-resistant, machine-readable, biometric passports that comply with biometric and document identifying standards established by the International Civil Aviation Organization (ICAO). 8 U.S.C. 1732(c)(1). The statute also states that

on or after October 26, 2004, any alien applying for admission under the VWP must present a passport that is machine-readable, tamper-resistant and that uses ICAO-compliant biometric identifiers, unless the unexpired passport was issued prior to that date. 8 U.S.C. 1732(c)(2). The entry exit system must include a database that contains alien arrival and departure data from the machine-readable visas, passports, and other travel and entry documents. 8 U.S.C. 1731(a)(2). In developing the entry exit system, the Secretaries of Homeland Security and State must also make interoperable all security databases relevant to making determinations of alien admissibility. 8 U.S.C. 1731(a)(3).

In addition, the entry exit system component must share information with other systems required by the *Border Security Act*. Section 202 of the *Border Security Act* addresses requirements for an interoperable law enforcement and intelligence data system and requires the integration of all databases and data systems that process or contain information on aliens.

The US–VISIT program requirements that foreign nationals provide biometric identifiers when they seek admission to the United States are further supported by the Department’s broad authority to inspect aliens contained in section 235 of the *INA*, 8 U.S.C. 1225. Pursuant to section 215(a) of the *INA*, the President also has the authority to regulate the departure of aliens, as well as their arrival. President Bush has issued Executive Order titled Assignment of Functions Relating to Arrivals In and Departures From the United States delegating his authority to promulgate regulations governing the departure of aliens from the United States. In accordance with section 215 and with this new Executive Order, the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to issue this rule which requires certain aliens to provide requested biometric identifiers and other relevant identifying information as they depart the United States. For nonimmigrant aliens, the Department may also make compliance with the departure procedures a condition of their admission and maintenance of status while in the country under *INA*, section 214.

Many other provisions within the *INA* also support the implementation of the US–VISIT program, such as the grounds of inadmissibility in section 212, the grounds of removability in section 237, the requirements for the VWP program in section 217, the electronic passenger manifest requirements in section 231,

and the authority for alternative inspection services in sections 286(q) and 235 of the INA and section 404 of the *Border Security Act*. These are but a few of the most significant provisions that support US-VISIT from among numerous other immigration and customs statutes.

Is DHS Meeting the December 31, 2003 DMA Deadline for Implementing the Integrated Entry Exit System at the Air and Sea Ports of Entry?

Yes. By integrating all the available arrival and departure data on aliens who arrive through the air and sea ports of entry that currently exists in the electronic systems of DHS and DOS and deploying the integrated system at those ports of entry, the Department has met the first DMA deadline of December 31, 2003. The Department is accomplishing this first phase through the integration of the arrival and departure data contained in the Advance Passenger Information System (APIS) and the Arrival Departure Information System (ADIS), as well as other systems related to air and sea inspections. APIS and ADIS include the information captured from electronic passenger manifest data received from carriers, information on VWP aliens, and information on visa applicants and recipients received through the DataShare program with DOS.

What Changes Does This Interim Rule Make?

Through an amendment to 8 CFR 235.1(d), the Department may require aliens who are arriving at United States air and sea ports of entry to provide fingerprints, photographs, or other biometric identifiers to the inspecting officer. The Department will collect fingerprints and photographs from aliens applying for admission pursuant to a nonimmigrant visa upon their arrival at air and sea ports of entry and upon departure if they exit through certain locations. Departure inspection will be conducted through pilot programs at a limited number of departure ports, identified by notice in the **Federal Register**. The rule exempts: (i) Aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of

State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. Although the biometric requirements in this rule will initially only apply to nonimmigrant visa-holders who travel through designated air and sea ports, the Department anticipates expanding the program, through separate rulemaking to include other groups of aliens and more ports in order to eventually have the capability to verify the identities of most foreign national travelers through biometric comparisons as envisioned by the *USA PATRIOT Act* and the *Border Security Act*.

At amended 8 CFR 235.1(d)(ii), the rule states that failure by an alien to provide the requested biometrics necessary to verify his or her identity and to authenticate travel documents may result in a determination that the alien is inadmissible under section 212(a)(7) of the INA for lack of proper documents, or other relevant grounds in section 212 of the Act.

New rule 8 CFR 215.8 states that the Secretary of Homeland Security may establish pilot programs at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary may require aliens who are departing from the United States from those ports to provide fingerprints, photographs, or other biometric identifiers, documentation, and such other such evidence as may be requested to determine an alien's identity and whether he or she has properly maintained his or her status while in the United States.

This rule also amends 8 CFR 214.1(a) to state that if a nonimmigrant alien is required under section 235.1(d) to provide biometric identifiers, the alien's admission is conditioned on compliance with any such requirements. Similarly, if the alien is required to provide biometrics and other information upon departure pursuant to 8 CFR 215.8, the nonimmigrant alien's failure to comply may constitute a failure of the alien to maintain the terms of his or her immigration status.

Finally, the rule makes clear by amending 8 CFR 235.1(f) that all nonimmigrant aliens will be issued the Form I-94, Arrival Departure Record regardless of whether they come through an air, sea or land port of entry, unless they are otherwise exempted from the I-94 requirement. This amendment clarifies that air and sea carrier passengers will continue to be issued I-94s which must be surrendered

upon departure unless the I-94 was issued for multiple entries by the alien.

What Is a "Biometric Identifier?"

As used in this rule, a "biometric identifier" is a physical characteristic or other attribute unique to an individual that can be collected, stored, and used to verify the claimed identity of a person who presents himself or herself to a border inspector. To verify identity, a similar physical characteristic or attribute is taken from the person who presents himself or herself and it is compared against the previously collected identifier. Examples of biometric identifiers include, but are not limited to, the face (*i.e.*, captured in a photograph), fingerprints, hand geometry measurements, handwriting samples, iris scans, retina scans, voice patterns, and other unique characteristics.

Why Is This Interim Final Rule Necessary and Why Was It Not Issued as a Proposed Rule for Notice and Comment?

The Department has determined that the national security and public safety interests of the nation necessitate the implementation of this rule as an immediately effective interim rule with provision for public comment after the effective date. The collection of biometrics from foreign nationals seeking to enter or depart the United States will greatly enhance the Government's ability to identify persons who are a threat to the public and to national security. The longer the Department delays in collecting biometrics from visa-holders and eventually other foreign nationals, the greater chance that a person who has been previously identified as a threat to the public may not be timely identified through his fingerprints, photographs or other biometrics and may enter the United States without his true identity being detected.

The Department has further determined that this rule is necessary to give effect to the legislative mandates for utilization of biometric identifiers in the entry exit system component of the US-VISIT program as described in the *USA PATRIOT Act* and the *Border Security Act*, as previously discussed. Unless it collects biometric identifiers from the aliens who present themselves at inspection and on departure, the Department would be unable to compare the biometrics associated with the travel document presented (*e.g.*, a visa) against the bearer's characteristics or against DHS or DOS records of any previously taken biometrics associated with the alien's name. In other words,

the Department would not be able to verify the alien's identity fully or authenticate his documents as envisioned by Congress when it passed the two laws.

Congress has stated that "no later than October 26, 2004," biometrics must be utilized with all travel and entry documents that DHS and DOS issue to aliens and that machines capable of verifying the identities of foreign travelers and authenticating their documents through biometrics must be at all ports of entry. 8 U.S.C. 1732(b). The Secretary of Homeland Security has determined that waiting until the last minute (*i.e.*, October 26, 2004) to begin collecting biometrics and verifying the documents and identities of aliens who cross our borders would be highly detrimental to the security of the country. Moreover, the Department believes that it makes practical sense to implement the integrated entry exit system with air and sea arrival/departure data on foreign travelers at the same time as a biometric component is introduced to the system to provide the enhanced security benefits that biometrics will provide to verify identity. For these reasons, the Department has determined that it must immediately begin collecting biometrics from a limited group of aliens, *i.e.*, nonimmigrant visa holders who enter through the air and sea ports, and expand to other categories and locations as rapidly as possible.

The Department does encourage and welcome public comments on this rule and the manner in which it will be implemented. The Department will fully consider all comments submitted by the comment period as it prepares a final rule and before it expands the program to other categories of foreign nationals. See discussion of the "Good Cause Exceptions" below.

What Categories of Aliens Are Affected by This Rule?

This interim rule applies only to aliens applying for admission pursuant to a nonimmigrant visa who arrive in or depart from the United States through designated air and sea ports. The rule exempts: (i) Aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of

State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. However, as a routine matter, only nonimmigrant visa-holders will be affected by this rule.

What Biometrics Will Be Collected and Will They Ever Change?

The Department initially plans to take a digital photograph and two fingerprints from each nonimmigrant alien who presents a visa at designated air or sea ports of entry. The Department, however, reserves its right to expand the types of biometric identifiers required in the future where doing so will improve the border management, national security, and public safety purposes of the entry exit system. Additional biometric requirements will be implemented in compliance with section 403(c) of the *USA PATRIOT Act*.

How Did DHS Determine Which Biometric Identifiers Would Be Collected for US-VISIT Purposes?

The Department has chosen to collect two fingerprints and photographs, in part, because they currently are less intrusive than other forms of biometric collections and because the combination of these biometric identifiers are an effective means for verifying a person's identity. Also, historically fingerprints and photographs have been the biometrics of choice within the law enforcement communities and the travel industry. As the deployment of more comprehensive technologies becomes feasible, however, the Department may collect additional biometric data to improve its ability to verify the identity and determine the admissibility of nonimmigrant aliens.

As required by section 403(c) of the *USA PATRIOT Act* and section 302(a)(1) of the *Border Security Act*, the Department of Justice and the former Immigration and Naturalization Service (INS) worked closely with NIST, DOS, other agencies and Congress to study and select fingerprints and digital photographs as the biometric identifiers that will be used in conjunction with the entry exit system. A report on the biometric standards selected was delivered to Congress in January 2003. See "Use of Technology Standards and Interoperable Databases with Machine-Readable, Tamper-Resistant Travel Documents," Report to Congress from U.S. Department of Justice, U.S. Department of State, and the National Institute of Standards and Technology (January 2003).

How Will a Person's Fingerprints and Photographs Be Collected?

On arrival at air and sea ports of entry, inspectors will scan two fingerprints of the foreign national with an inkless device and will take a digital photograph of the person. This information, as well as other information that the person provides, will then be used to assist the border inspector in determining whether or not to admit the traveler. Upon exit from the United States at designated air and sea ports, the foreign national traveler will go to a work station or kiosk to scan his travel documents, have his photograph compared, and to provide his fingerprints on the same type of inkless device that is used at entry.

What If an Individual Cannot Provide Clear Fingerprints or Photographs or Is Disabled in Such a Way That He or She Is Unable To Provide the Biometric Information?

The Department will make reasonable efforts that are also consistent with the Government's need to verify an alien's identity to accommodate any person with disabilities which prevent him or her from complying with the requirements of this rule for fingerprinting, photographs or other biometric collections. We will follow all required procedures that are applicable to government action under the *Americans With Disabilities Act*, codified as amended at 42 U.S.C. 12101 *et seq.* and the *Federal Rehabilitation Act*, codified as amended at 29 U.S.C. 701 *et seq.* In cases where a satisfactory fingerprint, for example, cannot be taken, the inspecting officer may accept another biometric identifier that will reasonably identify the person or sufficient additional information from the alien from which the officer can determine the individual's identity. In some instances where the identity of a person with disabilities does not appear to be truly at issue, the requirement for fingerprints or other biometric identifier may be waived in the discretion of the inspecting officer. The Department will ensure that procedures for handling the collection of biometric information from persons with disabilities are covered in any internal field guidance it may issue to implement this rule. In addition, the Department welcomes public comment on methods for properly handling situations where persons with disabilities are not able to provide the requested biometrics, but that still permit the Department to make the necessary identity and admissibility determinations.

How Will the Biometric Information Be Used?

The fingerprints and photograph(s) of the alien will be entered initially into an existing system called IDENT. The alien's fingerprints and photographs will be compared against the biometric information already stored in IDENT to determine whether there is any information that would indicate the alien is an imposter or otherwise inadmissible. In addition, IDENT and the other technology associated with US-VISIT will permit the inspecting officer to compare the alien's fingerprints and photographs with any such biometric information previously captured.

DOS is currently implementing a program on a phased-in basis for taking fingerprints of many categories of visa applicants who have been approved or denied and storing those fingerprints and photographs in IDENT. This DOS-collected biometric information may also be accessed through the Interagency Border Inspection System (IBIS) by inspectors at the ports of entry in the United States. The inspecting officer will be able to compare the biometrics associated with the person who applied for the visa at the consular office abroad against the biometrics of the person who is present at the port of entry. Once the machine readers are in place at the ports of entry, this process will be fully automated and the visas and certain other travel documents will be capable of being scanned and compared electronically. An alien's name, biometric information and other identifying information will also be checked against various law enforcement and intelligence data for information that may identify him or her as inadmissible to the United States or as a threat to national security or the public safety. In the air and sea context, much of the information on the alien is already collected via the electronic passenger manifest process required by section 402 of the *Border Security Act*, codified as amended at INA, section 231; 8 U.S.C. 1221. Customs and Border Protection (CBP) officers currently have access to the passenger's complete name, nationality, date of birth, citizenship, gender, passport number and country of issuance, U.S. visa number, if applicable, alien registration number, if applicable, country of residence, and complete address while in the United States. U.S. inspectors receive the information prior to the alien's arrival through the Advance Passenger Information System (APIS) and the Arrival Departure Information System (ADIS), and it is run against the

IBIS which contains "lookouts" on individuals submitted by more than 20 law enforcement and intelligence agencies. Thus, by the time the person gets to an air or sea port of entry, inspectors have identified aliens that need to be scrutinized more closely as well as aliens who may be inadmissible and whether other law enforcement agencies should be notified of any individual's presence.

Are Travelers Who Come Under the Visa Waiver Program (VWP) Affected by This Rule?

At this time, travelers who seek to enter under the VWP are not affected by this rule. However, under current law, an alien will not be admitted under the VWP on or after October 26, 2004, without a machine-readable, tamper-resistant passport that meets ICAO biometric standards for photographs, unless his passport is unexpired and was issued prior to that date. 8 U.S.C. 1732(c)(2). The machines that DHS must have in place at all ports of entry by that same date will also be capable of reading the ICAO-compliant biometrics in any VWP alien's passport. 8 U.S.C. 1732(b)(2).

Will Canadian or Mexican Citizens Have To Provide Biometric Identifiers When They Travel To or From the United States?

This rule does not affect foreign nationals entering the U.S. through land ports of entry. Aliens entering through land ports of entry need only meet the current requirements in the law. However, the rule does apply to Canadian and Mexican citizens who enter through air and sea ports of entry as outlined below. At present, the Department will not apply the biometric collection requirements of this rule to those Canadian citizens who travel on temporary visits to the United States and who do not apply for admission pursuant to a nonimmigrant visa. As usual, Canadians who are lawful permanent residents of the United States must possess a Permanent Resident Card (PRC) or other evidence of their permanent resident status; they will not, however, be routinely fingerprinted or photographed. The Department, as it always has, reserves the right to require fingerprints or other identifying information from any individual whom it has reason to believe may not be who he or she claims.

Mexicans currently must present visas, Border Crossing Cards (BCC), or other appropriate evidence of their immigration status to enter the United States. Since October 1, 2002, the law

has required that a biometric characteristic (e.g., face, fingerprint) of a bearer of a BCC must be matched against the biometric on the BCC before the bearer may be admitted. See 8 CFR 212.1(c)(3). This requirement remains applicable at all ports of entry. Machines have been deployed at the ports of entry to allow for the automated comparison of the fingerprints of BCC bearers against their documents. Under this rule and the Department's first implementation phase for US-VISIT biometrics collection, nonimmigrant Mexican visa holders will be required to provide fingerprints and photographs if they enter or exit at the designated ports.

Which United States Ports of Entry Will Be Involved in the Collection of Biometrics and in Verifying the Identities of Aliens and Authenticating Their Documents?

The notice that is published elsewhere in this issue of the **Federal Register** identifies the airports and the seaports where nonimmigrants who apply for admission pursuant to a nonimmigrant visa will be required to provide biometric information at time of arrival and departure. The names of all the affected ports of entry will not be repeated here for the sake of brevity.

The Department intends to implement departure inspection through pilot programs at a limited number of departure ports. The Department has identified thirty departure ports as candidates at which it will next implement biometric collection. The Department anticipates that, within the next few months, it will implement departure biometric collection at approximately fifteen of those ports of entry. This rule therefore authorizes the Secretary to establish pilot programs for departure inspection at up to fifteen air and sea ports, to be identified through notice in the **Federal Register**.

Through those pilot programs, the Department will test different methods to collect the required information from nonimmigrant aliens as they depart the United States through the designated ports of entry. The Department is currently exploring several different methods and processes, including but not limited to self-serve kiosks and hand-held scanners. The pilot program will enable the Department to conduct a cost benefit analysis of the different processes. The Department welcomes comments on how to implement biometric collection at time of departure. After reviewing the reliability, efficiency, and cost of those pilot programs, and receiving comments from the public regarding the departure

inspection process, the Department will undertake new rulemaking to allow the Secretary to expand biometric collection to all departure ports.

Will Foreign Travelers' Biometrics Be Collected, Their Identities Verified, and Their Documents Authenticated on Departure From the United States?

Yes. Aliens subject to this rule who exit through designated air and sea ports where pilot programs are implemented will be required to "check out" at work stations in those air and sea ports and to provide requested information and biometrics. The information that a traveler provides on departure will be verified and matched against any available information that he or she provided upon inspection and that was stored in the systems that comprise US-VISIT. This information will also be used to identify persons who have overstayed their authorized periods of admission, to compile the overstay reports required by *DMIA*, and where applicable, considered in DOS and DHS determinations on whether the person is eligible for future visas, admission or other discretionary immigration benefits.

Will There Be Any Assistance for Travelers During the Exit Process?

The exit collection mechanism at special work stations or kiosks will be structured to include international instructional icons, illustrating how the alien will submit biometrics and travel documents for scanning. DHS or contract personnel will be available, at initial stages, to assist travelers covered by the first increment of US-VISIT in learning how the exit process works.

Is a Nonimmigrant Visa Holder Required To Enter or Exit Through One of the Ports Designated for Biometric Processing in the Federal Register Notice?

Certain individuals remain subject to the National Security Entry Exit Registration System (NSEERS) regulations to depart through specific ports and undergo special departure procedures. See 8 CFR 264.1(f)(8). The most recent **Federal Register** notice listing the NSEERS ports of departure can be found at 68 FR 8967. This rule does not alter or amend that list.

Nonimmigrant visa holders, except those subject to NSEERS, may continue to depart the United States through any port, even those locations where biometrics are not currently being collected on exit. The Department recommends that any alien whom the Secretary designates to be covered by this rule's departure requirements and

who chooses to depart from a location where US-VISIT departure procedures are not in place may wish to preserve any evidence that he or she did indeed depart the United States. Such evidence could include a passport stamp of admission to another country or a used airline ticket showing the person left the United States in a timely manner. Such information may be useful to show to a consular or immigration officer in case there is ever any future question about whether the alien properly left the United States. Individuals who have an I-94 Arrival Departure Record that must be surrendered upon departure should be certain to return this form promptly to the appropriate DHS division as required on the form to ensure that the individual's departure will be entered into appropriate DHS systems. In addition, the departure of individuals who leave on air or sea carriers that submit electronic passenger departure manifests to DHS/CBP will be recorded in DHS systems and should help to prove when the alien departed. However, not all carriers are currently able to submit this information electronically. The Department recognizes that there may be some interim confusion about whether covered foreign nationals overstayed their last periods of admission where there is no evidence in the US-VISIT systems of their departure. The Department anticipates that as departure procedures are expanded to all air, sea and land border ports, such confusion and potential for inaccurate determinations that a person overstayed will be significantly reduced.

Are There Any Additional Fees Imposed Upon Travelers as a Result of This Rule?

No, there are no additional fees for travelers required by this interim rule. DOS and DHS may need to adjust the fees for visas and other immigration documents that utilize biometrics in the future, but the Departments will follow all required *Administrative Procedure Act (APA)* procedures for notice and comment and any other applicable legal requirements if the fees change.

How Much Will the Biometric Collection Procedures Cost DHS and What Is the Source of the Funding?

In FY 2003, the US-VISIT program spent \$190 million for the biometrics portion of the program. For FY 2004, the cost of implementing the biometric collection and verification procedures at air and sea ports of entry and departure locations is anticipated to be approximately \$103 million. The funds for the equipment and other

requirements to support the biometric procedures come from the approximately \$380 million that Congress appropriated in FY 2003 for development of the entry exit system component of US-VISIT and from the \$330 million total appropriated for FY 2004.

What May Happen If an Alien Refuses To Provide the Required Biometric Identifiers at Time of Entry?

This rule provides that an alien who refuses to provide biometric identifiers when seeking admission to the United States in order to assist inspectors in verifying his or her identity and authenticating his or her travel documents may be deemed inadmissible under INA, section 212(a)(7) (failure to provide appropriate documents), or other applicable grounds of inadmissibility in INA, section 212. For example, the inspector may deny admission under INA, section 212(a)(7) if he or she is unable to determine whether the applicant is presenting a document that is truly his and the inspector is unable to collect a biometric that can be verified against the fingerprints and photographs associated with the document. The rule does not attempt to identify every ground of inadmissibility that may apply because each case may present different circumstances that skilled inspectors are trained to assess and adjudicate. The rule does not change any of the existing criteria for inadmissibility, but allows inspectors to consider a failure to provide requested biometric identifiers as a factor in their admissibility determinations. In some circumstances, such as an individual who cannot physically provide clear fingerprints, a failure to do so will not necessarily result in an inadmissibility determination, provided that the inspector is otherwise satisfied that the person is who he claims to be and has appropriate authorization to enter the country. This rule also amends 8 CFR 214.1(a) to state that if a nonimmigrant alien is required under 8 CFR 235.1(d) to provide biometric identifiers, the alien's admission is conditioned on compliance with any such requirements.

What May Happen If an Alien Fails To Provide the Required Biometric Identifiers at the Time of Departure From the United States?

An alien who fails to comply with the departure requirements may be found in violation of the terms of his or her admission, parole, or other immigration status. This rule states that an alien who is covered by the requirements to

provide biometrics on departure at new 8 CFR 215.8 may be found to have overstayed the period of his or her last admission if the available evidence indicates that he or she did not leave the United States when required to do so. A determination that the alien previously overstayed may result in a finding of inadmissibility for accruing prior unlawful presence in the United States under section 212(a)(9) of the INA, provided that the accrued unlawful time and other prerequisites of that statute are met, or that the alien is otherwise ineligible for a visa or other authorization to reenter the United States. An overstay finding could also trigger consequences for a nonimmigrant visa holder under section 222(g) of the INA. If the person is deemed to have overstayed his authorized period of admission, his visa (including a multiple entry visa) would be deemed void under section 222(g). Section 222(g) further states that where a visa is void because the alien overstayed, he or she is ineligible to be readmitted to the United States as a nonimmigrant except on another visa issued in the consular office located in the country of the alien's nationality, or where there is no DOS office in the country, in such other consular office as the Secretary of State shall specify. The requirement of obtaining a new visa from the consular office in the country of the alien's nationality may be waived where extraordinary circumstances are found. 8 U.S.C. 1202(g).

The Department intends to focus its enforcement of departure requirements in this rule on cases where the alien willfully and unreasonably fails to comply with this regulation. The rule provides that an alien's failure to follow the departure procedures may be considered by an immigration or consular officer in making a discretionary decision on whether to approve or deny the alien's application for a future immigration benefit. The rule does *not*, however, state that an alien's failure to comply with departure procedures in every instance will necessarily result in a denial of a future visa, admission or other immigration benefit. For example, no alien will be penalized for failing to provide biometrics on departure where the Department has not yet implemented the departure facilities or procedures at the specific port where the person chooses to depart. There may well be instances where a consular officer or inspector, in his or her discretion and after reviewing the totality of the circumstances, determines that an alien's previous failure to comply with

the departure procedures does not result in a finding of inadmissibility or the denial of an immigration benefit.

Will Biometric Collection Create Inspection Delays at Ports of Entry and Departure?

The Department is aware of this concern and is taking all possible steps to prevent congestion and delays in immigration and customs processing at the ports of entry and the departure locations. On entry, the Department anticipates that an average of only 15 additional seconds per nonimmigrant visa holder will be needed to complete processing as a result of the added biometric procedures. The Department arrived at this estimate after piloting the process on a voluntary compliance basis at Atlanta's Hartsfield International Airport. Individuals who are not required to provide biometrics at this time (e.g., U.S. citizens, permanent residents, persons not required to have visas) may be routed through separate processing lines at the air and seaports so as to further alleviate congestion. Individuals who require more in depth scrutiny will, as usual, be taken to secondary inspection areas so as not to delay primary inspection processing for other travelers. The Department does not believe that significant delays will occur at the air and sea ports as a result of the new biometric collection and verification procedures. The Department further believes that the limited departure processing at the air and sea ports can be accommodated within the pre-boarding time period that carriers currently recommend travelers allow before their scheduled departure and that their travel should not be delayed.

While the Department does not anticipate longer wait times at ports of entry due to US-VISIT processing, a number of mitigation strategies have been developed, not unlike those already available to CBP under other conditions which result in backups. However, as the US-VISIT program expands, the Department will continually reassess the issue of delays to reduce any negative effects.

Will Legitimate Travel, Commerce, and Tourism Be Negatively Affected by This Rule?

As noted above, the Department does not believe that immigration and customs processing will be significantly delayed at the ports of entry or the departure locations. The Department believes that over time, the US-VISIT system will facilitate travel for those with biometrically-enhanced travel documents and others for whom the system contains travel records. Public

comments are invited on ways that delays and negative effects on travel, trade, commerce, tourism and other desired aspects of immigration can be alleviated or minimized.

Are United States Citizens and Lawful Permanent Residents Required To Provide Biometric Identifiers?

No, United States citizens and lawful permanent residents will not be required to provide biometric identifiers under this rule. U.S. citizens must continue to present passports as required by 22 CFR 53, unless an exception under that regulation applies. Lawful permanent residents must present documents evidencing their status as described in 8 CFR 211.

Will Other Countries Impose Similar Biometric Requirements on United States Citizens?

Each country maintains the right to establish its own procedures and requirements for entry by foreign visitors. The Department, in coordination with DOS, will work with other governments that wish to institute programs of biometric identification in order to ensure that they are fair, efficient, accurate and no more intrusive than necessary.

Will Any Visa-Holders Be Exempt From the Fingerprinting and Photographing Requirements of This Rule?

The rule exempts: (i) Aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. An immigration inspector retains discretion to collect an alien's biometrics if, in the inspector's discretion, such action is necessary to determine the exact age of the alien and whether he or she is exempt from the requirements of this rule.

Will Other Nonimmigrants for Whom Ten-Print Fingerprinting for Registration Purposes Has Been Waived by Existing Regulations be Required to Provide Two-Print Fingerprints and a Photograph Under This Rule Governing Identity Verification on Arrival and Departure From the United States?

The Department has determined that most nonimmigrant visa-holders for whom ten-print fingerprinting has been waived for registration purposes under 8 CFR 264.1(e)(1–2) must nevertheless comply with the requirements of this interim rule for the collection of biometrics (two fingerprints and a photograph) for purposes of entry and exit inspection. This includes nonimmigrants who are in the United States for less than one year, as well as nonimmigrants who are citizens of countries that do not fingerprint U.S. citizens who temporarily reside in their countries.

The ten-print fingerprinting that has been waived for these categories of nonimmigrants under 8 CFR 264.1(e)(1–2) is done for purposes of alien registration under INA, sections 262–266 and is *not* the same as the collection of two fingerprints and a photograph for identity verification and document authentication at arrival and departure inspection that is required under this interim rule. The biometric collections for arrival and departure inspection purposes are authorized instead by INA, section 235, 214, 215, and are further supported by the mandates for biometrics in section 303 of the *Border Security Act* and sections 403(c) and 414 of the *USA PATRIOT Act*.

DHS believes that the national security of the country, public safety and the integrity of the immigration system necessitate requiring most nonimmigrant visa holders to provide fingerprints and photographs for identity checks, law enforcement background checks, and determinations of admissibility.

Do the Requirements for the Collection of Biometric Identifiers Violate the Statutory “No New Documents or Data Collection” Prohibition in the DMIA?

No, the Department has determined that there is no conflict between this rule and *DMIA*. *DMIA* does state that “[n]othing in this section [codified at 8 U.S.C. 1365a] may be construed ‘to permit the [Secretary of Homeland Security] or the Secretary of State to impose any new documentary or data collection requirements on any person in order to satisfy the requirements of this section * * *.’” 8 U.S.C. 1365a(c)(1). However, the provision in

DMIA that immediately follows that subsection states that “[n]othing in this section shall be construed to reduce or curtail any authority of the [Secretary of Homeland Security] or the Secretary of State under any other provision of law.” 8 U.S.C. 1365a(c)(2)(emphasis added). The biometric requirements of this interim rule are supported by statutory authority outside of the four corners of *DMIA* and thus fall within *DMIA*’s own “no reduction of authority” provision. Most importantly, Congress has expressly stated in sections 403(c) and 414 of the *USA PATRIOT Act* and sections 302–303 of the *Border Security Act*, laws passed after *DMIA* and after the terrorist attacks on September 11, 2001, that DHS and DOS should “particularly focus on the utilization of biometric technology” in developing the entry exit system; that alien identities be verified through biometric comparisons based on certified biometric standards developed through NIST; that travel and entry documents issued to aliens utilize biometrics; and that those documents be authenticated by machine-readers at ports of entry that will capture information on the aliens’ arrival and departure for inclusion in the entry exit system. In addition, this rule is supported by other authority in sections 214, 215 and 235 of the INA, which has not been curtailed or reduced by *DMIA*. For these reasons, this rule does not violate the proscription against new documentary or data collections in *DMIA*.

What Persons or Entities Will Have Access to the Biometric and Other Information Collected on Aliens Under the US-VISIT Program?

The biometric and other information available in IDENT, APIS, ADIT and the other systems associated with the US-VISIT program will be available to CBP officers at ports of entry, special agents in the Bureau of Immigration and Customs Enforcement (ICE), adjudications staff at U.S. Citizenship and Immigration Services (USCIS), to DOS consular officers and other staff involved with the adjudication of visa applications at overseas posts, and to other DHS, BTS, ICE, CIS, CBP, appropriate officers of the United States Intelligence Community, and DOS personnel and attorneys when needed for the performance of their duties. Other employees and divisions of DHS, such as the Transportation Security Administration (TSA), may also have access to the biometric and other information on aliens. In addition, section 414(c) of the *USA PATRIOT Act* directs that the information in the entry exit system component of the US-VISIT

program must be available to other federal law enforcement officers, such as agents of the Federal Bureau of Investigation (FBI), through system interfaces or other technology means for purposes of identifying and detaining individuals who are threats to United States national security. The Secretary of Homeland Security, in his discretion, may also make the information available to State and local law enforcement agencies, to assist them in carrying out their law enforcement responsibilities. See 8 U.S.C. 1365a(f); see also 8 U.S.C. 1722(a)(5). The Department will only share biometric information with other foreign governments where permitted by law and necessary for intelligence and law enforcement interests consistent with United States interests.

How Will DHS Protect the Biometric and Other Information Provided by Foreign Travelers and Ensure That Their Privacy Interests Are Not Violated?

US-VISIT records will be protected consistent with all applicable privacy laws and regulations. Personal information will be kept secure and confidential and will not be discussed with, nor disclosed to, any person within or outside the US-VISIT program other than as authorized by law and as required for the performance of official duties. In addition, careful safeguards, including appropriate security controls, will ensure that the data is not used or accessed improperly. The DHS Chief Privacy Officer will review pertinent aspects of the program to ensure that these proper safeguards and security controls are in place. The information will also be protected in accordance with the Department’s published privacy policy for US-VISIT.

The Department’s Privacy Office will exercise oversight of the US-VISIT program to ensure that the information collected and stored in IDENT and other systems associated with US-VISIT is being properly protected under the privacy laws and guidance. US-VISIT will also have its own Privacy Officer to handle specific inquiries and to provide additional oversight of the program.

Finally, the Department will maintain secure computer systems that will ensure that the confidentiality of individuals’ personal information is maintained. In doing so, the Department and its information technology personnel will comply with all laws and regulations governing government systems, such as the *Federal Information Security Management Act of 2002*, Title X, Public Law 107–296, 116 Stat. 2259–2273 (2002) (codified in scattered sections of 6, 10, 15, 40, and

44 U.S.C.); *Information Management Technology Reform Act (Clinger-Cohen Act)*, Public Law 104–106, Div. E, codified at 40 U.S.C. 11101 *et seq.*; *Computer Security Act of 1987*, Public Law 100–235, 40 U.S.C. 1441 *et seq.* (as amended); *Government Paperwork Elimination Act*, Title XVII, Public Law 105–277, 112 Stat. 2681–749–2681–751 (1998) (codified, as amended, at 44 U.S.C. 101; 3504 note); and *Electronic Freedom of Information Act of 1996*, Public Law 104–231, 110 Stat. 3048 (1996) (codified, as amended, at 5 U.S.C. 552.)

How Is the US–VISIT Program Different From the National Security Entry Exit Registration System (NSEERS) Program and Are Any Aspects of NSEERS Continued Under US–VISIT?

Foreign nationals who are subject to the US–VISIT biometric collection requirements of this rule are only required to follow the specified procedures on entry and exit where the Department has implemented the procedures and publicly announced them, as it has with respect to nonimmigrant visa-holders who travel through designated air and sea ports. Certain aliens whose presence in the United States warrants monitoring for national security or law enforcement reasons remain subject to the NSEERS special registration procedures at 8 CFR 264.1(f) and its implementing notices. See 68 FR 67578. The special entry and exit registration procedures under NSEERS will meet the requirements of this US–VISIT rule for entry and exit inspection for persons who are also subject to NSEERS.

Under the original NSEERS program, special registrants had to comply with both arrival and departure requirements for biometrics collection and additional questioning, and also with a requirement to re-register after 30 days and on an annual basis. The mandatory 30-day and annual re-registrations were suspended on December 2, 2003. See 68 FR 67578. In addition, when the NSEERS program began, it included a requirement that foreign nationals from NSEERS-delineated countries already in the United States comply with a domestic or “call-up” registration. The “call-up” component has expired. Neither the re-registration or “call-up” registration is relevant to the US–VISIT program at this time.

However, nonimmigrants subject to NSEERS and to this US–VISIT rule who do not comply with the procedures for fingerprinting and photographing run similar risks that they could be deemed ineligible for future visas, admission or other discretionary immigration

benefits. Compliance with this rule, as with the NSEERS regulations, is deemed a condition of a nonimmigrant’s admission and maintenance of status for purposes of INA, section 214. The information that NSEERS aliens provide on arrival and departure is kept in IDENT and a special NSEERS system that will be integrated with all of the other foreign national arrival and departure data that are required to be kept in the entry exit system component of US–VISIT.

Will the Public Be Permitted To Comment on This Rule and Its Implementation?

Yes. The Department welcomes and encourages the public to comment on all aspects of this rule and its implementation, as well as other aspects of the US–VISIT program that may not be covered by the rule itself. We will consider all comments carefully and anticipate that many of them will help us to improve the program. The Department is particularly interested in comments on the clarity of this rule and how it may be made easier to understand; methods for meeting the US–VISIT program goals; means to communicate the procedures to the public, including any expansions in the application of this rule; ways to reduce any potentially negative effects of the rule on legitimate travel, trade and tourism; uses for the biometric information to be collected; privacy protections for the information; methods for ensuring accuracy of the information collected; procedures for situations where persons with disabilities cannot provide the requested biometric identifiers; and ways to enhance national security and public safety interests.

Members of the public may also wish to follow the activities and recommendations of the congressionally-mandated DMIA Task Force through its Web site at <http://uscis.gov/graphics/shared/lawenfor/bmgmt/inspect/dmia.htm>. The DMIA Task Force, which is comprised of 17 public and private representatives from government, industry, tourism, air and sea carriers, and other areas, makes regular reports on its recommendations for the entry exit system component of US–VISIT, and these reports are transmitted to Congress by the Secretary of Homeland Security in accordance with 8 U.S.C. 1365a(g). The DMIA Task Force also welcomes regular public comments. In addition, members of the public may keep up to date on the progress of the US–VISIT program through the DHS Web site at www.dhs.gov/us-visit.

Good Cause Exceptions for Implementation of Interim Final Rule

Implementation of this rule as an interim final rule with a request for post-effective date public comments is based upon the “good cause” exceptions found at 5 U.S.C. 553(b)(3)(B) and (d)(3). Pursuant to the provisions of 5 U.S.C. 553(b)(3)(B), the Department has determined that delaying implementation of this rule to await public notice and comment is unnecessary, as well as contrary to the public interest and the national security of the nation. It is in the public interest and furthers our national security to implement requirements immediately that will allow for the collection and comparison of biometrics of aliens seeking admission in to the United States. These requirements will greatly enhance the ability of the Department to confirm the identities of nonimmigrant aliens seeking admission into the United States, and will allow for improved biometrics-based searches of watch lists, including law enforcement and intelligence data bases containing information on known and suspected terrorists. Such tools will increase the border security of the United States by helping DHS officers to identify persons who pose a threat to the nation. Before further expansion of the rule’s implementation to more categories of aliens, the Department anticipates that it will have sufficient opportunity to consider the public comments generated by this interim rule, as well as to publish a final rule. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(3), the Department finds that there is good cause for making the rule immediately effective. Therefore this rule is immediately effective upon publication in the **Federal Register**. Although the Department has determined that pre-effective date public notice and comment would be contrary to national security and public safety, the Department strongly encourages the public to comment on the provisions of this rule so that such comments may be carefully considered in the drafting of a final rule.

Executive Order 12866

Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993), requires a determination as to whether a regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Department has determined that this rule is a “significant regulatory action” under Executive Order 12866,

section 3(f) because there is significant public interest in security issues. Accordingly, this rule has been reviewed and approved by the OMB.

The Department has performed a preliminary analysis of the expected costs and benefits of this interim final rule. The anticipated benefits of the rule include: (1) Improved biometric identification of foreign national travelers who may present threats to public safety and the national security of the United States; (2) enhancement of the Government's ability to match an alien's fingerprints and photographs to other law enforcement or intelligence data associated with identical biometrics; (3) improved identification of individuals who may be inadmissible to the United States; (4) improved cooperation across international, Federal, State, and local agencies through better access to data on foreign nationals; (5) facilitation of legitimate travel and commerce by improving the timeliness and accuracy of the determination of a traveler's immigration status or his or her inadmissibility; (6) ensuring the integrity of the United States immigration system through enhanced enforcement of immigration laws, including collection of more complete arrival and departure data on aliens; and (7) reductions in fraud, undetected imposters and identity theft.

The costs associated with implementation of this rule for nonimmigrant visa holders at air and sea ports of entry include an increase of approximately 15 seconds in inspection processing time per nonimmigrant visa holder over the current approximately one minute. By December 31, 2004, approximately 24 million nonimmigrant visa holders are anticipated to be affected at air and sea ports. This number is comprised of approximately 19.3 million air travelers and approximately 4.5 million sea travelers. The limited 15 second time increase is not anticipated to delay significantly the overall processing of air and sea passengers because persons not required to provide biometrics (e.g., U.S. citizens, lawful permanent residents, and visa-exempt nonimmigrants) may be routed through different inspection lines, thereby easing any impact of the biometrics collection process. While the Department does not anticipate longer wait times at ports of entry due to US-VISIT processing, a number of mitigation strategies have been developed, not unlike those already available to CBP under other conditions which result in backups. The additional costs to the Government and the taxpayers of implementing the

requirements of this rule for the pilot period are estimated to be \$28.5 million for FY 2004. These costs include operation and maintenance for the entry program for three months and the cost of developing ten to fifteen exit sites. The Department believes that the costs described above are outweighed by the benefits of the rule's biometric requirements for immigration enforcement and the potential reduction in threats to national security and public safety. The Department will continually assess its procedures to ensure that any negative effects on legitimate travel, commerce and law abiding foreign visitors and permanent residents will be minimized.

The Department conducted analyses for both the entry and exit components. Based on those analyses, the Department determined which alternatives were best suited for this initial increment of the program.

Entry

Benefits: The goals and benefits of this rule have been defined as:

- Enhance National Security by (1) preventing entry of high-threat or inadmissible nonimmigrant aliens through improved and/or advanced access to data prior to the nonimmigrant's arrival; (2) reducing threat of terrorist attack and illegal immigration through improved identification of national security threats and inadmissible aliens; and (3) improving cooperation across federal, state and local agencies through improved access to nonimmigrant alien data.
- Facilitate legitimate trade and travel through (1) improved facilitation of legitimate travel and commerce by improved timeliness and accuracy of determination of nonimmigrant traveler status; and (2) improved accuracy and timeliness of the determination of nonimmigrant alien's inadmissibility.
- Ensure integrity of our immigration system through (1) improved enforcement of immigration laws through improved data accuracy and completeness; (2) reduction in nonimmigrant aliens remaining in the country under unauthorized circumstances; and (3) utilization of existing IT systems (no new systems) and enhancing information exchanges with federal, state, and local law enforcement and intelligence communities.
- Deploy the Program in accordance with existing privacy laws and policies.

Impact

The impact this rule on the traveling public has been measured by (1) the

number of foreign national travelers affected, (2) the expected average processing time, (3) travelers which are not affected, (4) the effects on the ability of airlines to off-load passengers and assist them through immigration processing, and (5) the additional costs to the traveling public. The number of foreign national travelers affected by implementation of this regulation will be approximately 3 million nonimmigrant visa travelers.

This rule will affect only all travelers who apply for admission or are admitted pursuant to a nonimmigrant visa, subject to the exemptions outlined in this preamble and the codified text of the rule. Additionally, where possible and practical, aliens subject to this rule will be routed through separate lines. Overall, the processing time for aliens subject to this rule will not impact significantly the processing time for the traveling public. There will be little effect on the airlines' abilities to off-load passengers and get these travelers processed through immigration resulting from implementation of this rule. Moreover, there will be no additional costs to the traveling public, airlines or airports resulting from the implementation of this rule.

The expected average processing time per person for whom biometrics will be taken is approximately one minute and fifteen seconds at entry. This compares to one minute for travelers not being processed through the biometric requirements of US-VISIT. The average processing time upon exit is approximately one minute. DHS does not anticipate significant delays in processing on arrival or departure for the traveling public.

Cost Benefit Analysis

Entry

A Cost Benefit Analysis (CBA) was completed in February 2003 and will be updated in February 2004. This update will incorporate lessons learned about any benefits recognized from the initial operating capability provided by Increment 1, implemented pursuant to this rule.

Increment 1, Full Air and Sea and Limited Land Performance with Biographic and Biometric Capabilities, delivers air and sea entry capabilities, constrained by budgetary resources, in accordance with the law and on time. Other alternatives that were examined were (1) Full Operating Capability with Unlimited Budgetary Resources, (2) Full Air and Sea with Biographic Capabilities Only, and (3) Air and Sea Entry and Exit Capabilities Constrained by Budgetary Resources. This

alternative was chosen, because it provides the best capabilities within the funding constraints. Additionally, it was selected because it:

1. Implements Increment 1 capability to air and sea POEs within the statutory timeframe;
2. Delivers biographic to all primary points of inspection and biometric data to all secondary POEs points of inspection;
3. Meets budgetary constraints; and
4. Is more desirable because the data collection includes both biographic and biometric data collection that provides for a more thorough identity review than biographic data alone.

Exit

The US-VISIT Program wishes to pilot alternative information collection systems at selected air and seaports in FY 2004. Three alternative systems have been:

• *Alternative 1*

Gate Solution: Staffing and equipment would be located at all international departure gates. The estimated costs include \$43 million for implementation plus \$72 million annually for system maintenance including 1,350 additional TSA employees.

• *Alternative 2*

Checkpoint Solution: Staffing and equipment located at airport security checkpoints (746 nationwide). The estimated costs include \$62 million for implementation plus \$109 million for system maintenance, including 1,800 TSA employees.

• *Alternative 3*

Workstation (Kiosk) Solution: Equipment and contractors to provide travelers assistance located in departure areas after the security checkpoint. The estimated costs include \$22 million for implementation plus \$37 million for system maintenance including contractor costs.

Alternative 3, Workstation (Kiosk) Solution, was selected as the initial pilot because it was significantly more cost effective than the other two, was less manpower intensive, and eliminated the major concerns of airlines and airport authorities about boarding processes and time issues at gates.

Quantitative Benefits

The intent of this rule is to address identified operational deficiencies and legislative mandates associated with management of the entry and exit of international travelers through the U.S. ports. Among its qualitative benefits, the

US-VISIT System will improve the accuracy and consistency of detecting fraudulent travel documents, verifying traveler identity, determining traveler admissibility, and determining the status of aliens through the use of more complete and accurate data to include the use of biometric data.

The quantitative benefits are targeted as a more effective solution that will allow the most optimal level of throughput and security for travelers. Some of these benefits can be measured, but not in financial terms. We will begin to quantify these benefits as we develop our performance analysis system for delivery in February 2004.

Executive Order 13132 (Federalism)

Executive Order 13132 requires the Department to develop a process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include rules that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” The Department has analyzed this interim final rule in accordance with the principles and criteria in the Executive Order and has determined that it does not have federalism implications or a substantial direct effect on the States. This rule provides for the collection by the federal Government of biometric identifiers from nonimmigrant aliens with visas seeking to enter or depart the United States for purposes of improving the administration of federal immigration laws. States do not conduct activities with which this rule would interfere. For these reasons, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 (Civil Justice Reform)

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. That Executive Order requires agencies to conduct reviews on civil justice and litigation impact issues before proposing legislation or issuing proposed regulations. The order requires agencies to exert reasonable efforts to ensure that the regulation identifies clearly preemptive effects, effects on existing federal laws or regulations, identifies any retroactive effects of the regulation, and other matters. The Department has

determined that this regulation meets the requirements of E.O. 12988 because it does not involve retroactive effects, preemptive effects, or the other matters addressed in the Executive Order.

Unfunded Mandates Reform Act of 1995

Section 202 of the *Unfunded Mandates Reform Act of 1995 (UMRA)*, 2 U.S.C. 1531–1538, requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year (adjusted for inflation with 1995 base year). Before promulgating a rule for which a written statement is needed, section 205 of the *UMRA* generally requires DHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule. Section 205 allows the Department to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes an explanation with the final rule. This interim final rule will not result in the expenditure by State, local, or tribal governments, or by the private sector, of more than \$100 million annually. Thus, the Department is not required to prepare a written assessment under the *UMRA*.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the *Small Business Regulatory Enforcement Fairness Act of 1996*, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Environmental Analysis

The Department has analyzed this interim final rule for purposes of compliance with the *National Environmental Policy Act (NEPA)*, 42 U.S.C. 4321 *et seq.* The Department has prepared a nationwide environmental assessment for the implementation of this program at airports and has determined that it will not result in any significant environmental impacts. The

Department has also prepared a nationwide environmental assessment for seaports. The analysis of potential impacts at seaports indicated that the proposed action is not likely to result in significant environmental impacts. The Department is initially implementing this rule only at air and sea ports, as indicated in the first **Federal Register** notice that accompanies publication of this rule. The Department will comply with any applicable *NEPA* and any other applicable environmental requirements prior to the implementation of this rule at the land ports of entry.

Trade Impact Assessment

The *Trade Agreement Act of 1979*, 19 U.S.C. 2531–2533, prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The Department has determined that this rule will not create unnecessary obstacles to the foreign commerce of the United States and that any minimal impact on trade that may occur is legitimate in light of this rule's benefits for the national security and public safety interests of the United States.

Paperwork Reduction Act

This rule permits the Secretary of Homeland Security or his delegate to require that aliens who cross United States borders must provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival in or departure from this country. These requirements constitute an information collection under the *Paperwork Reduction Act* (*PRA*), 44 U.S.C. 507 *et seq.*, and OMB's implementing regulations at 5 CFR 1320. Accordingly, the Department has submitted an information collection request to OMB for emergency review and clearance under the *PRA*. If granted, the emergency approval is only valid for 180 days. Under the *PRA*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. The OMB control number for the biometric information that will be collected pursuant to this rule is OMB 1600–0006.

Overview of this information collection:

(1) *Type of information collection:* New.

(2) *Title of Form/Collection:* No form. Collection of biometrics will be in electronic or photographic format.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No form number 1600–0006, Border and Transportation Security Directorate, DHS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individual aliens. The categories of aliens are identified in this rule. The first group of affected aliens is nonimmigrant visa holders who seek admission to the United States at the air and sea ports of entry, and certain departure locations, designated in the notice published elsewhere in this issue of the **Federal Register**. The biometric information to be collected is necessary for the Department to begin its compliance with the mandates in section 303 of the *Border Security Act*, 8 U.S.C. 1732 and sections 403(c) and 414(b) of the *USA PATRIOT Act*, 8 U.S.C. 1365a note and 1379, for biometric verification of the identities of alien travelers and authentication of their biometric travel documents through the use of machine readers installed at all ports of entry. The arrival and departure inspection procedures are authorized by 8 U.S.C. 1225 and 1185.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: From January 5, 2004 to January 5, 2005 the number of nonimmigrant visa-holders required to provide biometrics at the air and sea ports of entry is anticipated to be approximately 24 million, comprised of approximately 19.3 million air travelers and 4.5 million sea travelers. The expected average processing time per person for whom biometrics will be collected is approximately one minute and fifteen seconds at entry, with the fifteen seconds being the additional time added for biometric collection over and above the normal inspection processing time. The average additional processing time upon exit is estimated at one minute per person. There are no additional fees for the traveling aliens to pay.

(6) An estimate of the total of public burden (in hours) associated with the collection: Approximately 100,800 burden hours.

If additional information is required contact Steve Yonkers, Privacy Officer, US–VISIT, Border and Transportation Security, Department of Homeland Security, 1616 North Fort Myer Drive,

5th Floor, Arlington, VA 22209 at (202) 927–5200.

During the first 60 days of the period authorized by OMB for this information collection under emergency procedures, the Department will undertake a regular review of the collection pursuant to the *PRA*. Written comments from the public are encouraged and will be accepted until March 5, 2004. Your comments should address one or more of the following points: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. Comments should be directed to Steve Yonkers, Privacy Officer, US–VISIT, Border and Transportation Security, Department of Homeland Security, 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209 at (202) 927–5200.

List of Subjects

8 CFR Part 214

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

8 CFR Part 215

Control of Aliens Departing from the United States.

8 CFR Part 235

Aliens, Immigration, Registration, Reporting and Recordkeeping Requirements.

Amendments to the Regulations

■ For the reasons set forth in the Supplementary Information section, parts 214, 215, and 235 of Title 8 of the Code of Federal Regulations are amended as set forth below:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301–1305; 1372; 1379; 1731–32; sec. 643, Pub. L. 104–208; 110 Stat. 3009–708; section 141 of the

Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931, note, respectively.

■ 2. Part 214.1(a)(3) is revised to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

(a) * * *

(3) *General requirements.* (i) Every nonimmigrant alien who applies for admission to, or an extension of stay in, the United States, must establish that he or she is admissible to the United States, or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act. Upon application for admission, the alien must present a valid passport and valid visa unless either or both documents have been waived. A nonimmigrant alien's admission to the United States is conditioned on compliance with any inspection requirement in § 235.1(d) or of this chapter. The passport of an alien applying for admission must be valid for a minimum of six months from the expiration date of the contemplated period of stay, unless otherwise provided in this chapter, and the alien must agree to abide by the terms and conditions of his or her admission. An alien applying for extension of stay must present a passport only if requested to do so by the Department of Homeland Security. The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

(ii) At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay, or upon abandonment of his or her authorized nonimmigrant status, and to comply with the departure procedures at section 215.8 of this chapter if such procedures apply to the particular alien. The nonimmigrant alien's failure to comply with those departure requirements, including any requirement that the alien provide biometric identifiers, may constitute a failure of the alien to maintain the terms of his or her nonimmigrant status.

(iii) At the time a nonimmigrant alien applies for admission or extension of stay, he or she must post a bond on Form I-352 in the sum of not less than \$500, to ensure the maintenance of his or her nonimmigrant status and

departure from the United States, if required to do so by the Commissioner of CBP, the Director of U.S. Citizenship and Immigration Services, an immigration judge, or the Board of Immigration Appeals.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

■ 3. The authority citation for part 215 is revised to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

■ 4. Part 215 is amended by adding new § 215.8, to read as follows:

§ 215.8 Requirements for biometric identifiers from aliens on departure from the United States.

(a)(1) The Secretary of Homeland Security may establish pilot programs at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary or his delegate may require an alien admitted pursuant to a nonimmigrant visa who departs the United States from a designated air or sea port of entry to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States.

(2) The requirements of paragraph (a)(1) shall not apply to:

(i) Aliens younger than 14 or older than 79 on date of departure;

(ii) Aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas and maintaining such status at time of departure, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (a)(1);

(iii) Classes of aliens to whom the Secretary of Homeland Security and the Secretary of State jointly determine it shall not apply; or

(iv) An individual alien to whom the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines it shall not apply.

(b) An alien who is required to provide biometric identifiers at

departure pursuant to paragraph (a)(1) and who fails to comply with the departure requirements may be found in violation of the terms of his or her admission, parole, or other immigration status. In addition, failure of a covered alien to comply with the departure requirements could be a factor in support of a determination that the alien is ineligible to receive a future visa or other immigration status documentation, or to be admitted to the United States. In making this determination, the officer will consider the totality of the circumstances, including, but not limited to, all positive and negative factors related to the alien's ability to comply with the departure procedures.

(c) A covered alien who leaves the United States without complying with the departure requirements in this section may be found to have overstayed the period of his or her last admission where the available evidence clearly indicates that the alien did not depart the United States within the time period authorized at his or her last admission or extension of stay. A determination that the alien previously overstayed the terms of his admission may result in a finding of inadmissibility for accruing prior unlawful presence in the United States under section 212(a)(9) of the Immigration and Nationality Act or that the alien is otherwise ineligible for a visa or other authorization to reenter the United States, provided that all other requirements of section 212(a)(9) have been met. A determination that an alien who was admitted on the basis of a nonimmigrant visa has remained in the United States beyond his or her authorized period of stay may result in such visa being deemed void pursuant to section 222(g) of the Act (8 U.S.C. 1202(g)) where all other requirements of that section are also met.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 5. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

■ 6. Section 235.1(d)(1) and (f)(1) introductory text are revised to read as follows:

§ 235.1 Scope of examination.

* * * * *

(d) *Alien applicants for admission.* (1) Each alien seeking admission at a United States port-of-entry must present whatever documents are required and must establish to the satisfaction of the

inspecting officer that the alien is not subject to removal under the immigration laws, Executive Orders, or Presidential Proclamations, and is entitled, under all of the applicable provisions of the immigration laws and this chapter, to enter the United States.

(i) A person claiming to have been lawfully admitted for permanent residence must establish that fact to the satisfaction of the inspecting officer and must present proper documents in accordance with § 211.1 of this chapter.

(ii) The Secretary of Homeland Security or his delegate may require nonimmigrant aliens seeking admission pursuant to a nonimmigrant visa at an air or sea port of entry designated by a notice in the **Federal Register** to provide fingerprints, photograph(s) or other specified biometric identifiers during the inspection process. The failure of an applicant for admission to comply with any requirement to provide biometric identifiers may result in a determination that the alien is inadmissible under section 212(a)(7) of the Immigration and Nationality Act, or other relevant grounds in section 212 of the Act.

(iii) Aliens who are required under paragraph (d)(1)(ii) to provide biometric identifier(s) at inspection may also be subject to the departure requirements for biometrics contained in § 215.8 of this chapter, unless otherwise exempted.

(iv) The requirements of paragraph (d)(1)(ii) shall not apply to:

(A) Aliens younger than 14 or older than 79 on date of admission;

(B) Aliens admitted on A-1, A-2, C-3 (except for attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (d)(1)(ii);

(C) Classes of aliens to whom the Secretary of Homeland Security and the Secretary of State jointly determine it shall not apply; or

(D) An individual alien to whom the Secretary of Homeland Security, the Secretary of State, or the Director of

Central Intelligence determines it shall not apply.

* * * * *

(f) *Form I-94, Arrival-Departure Record.* (1) Unless otherwise exempted, each arriving nonimmigrant who is admitted to the United States will be issued a Form I-94 as evidence of the terms of admission. For land border admission, a Form I-94 will be issued only upon payment of a fee, and will be considered issued for multiple entries unless specifically annotated for a limited number of entries. A Form I-94 issued at other than a land border port-of-entry, unless issued for multiple entries, must be surrendered upon departure from the United States in accordance with the instructions on the form. Form I-94 is not required by:

* * * * *

Dated: December 30, 2003.

Tom Ridge,

Secretary of Homeland Security.

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