

MEMORANDUM OF UNDERSTANDING BETWEEN THE
SECRETARIES OF STATE AND HOMELAND SECU-
RITY CONCERNING IMPLEMENTATION OF THE
HOMELAND SECURITY ACT

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRE-
TARIES OF STATE AND HOMELAND SECURITY CONCERNING IM-
PLEMENTATION OF SECTION 428 OF THE HOMELAND SECURITY
ACT OF 2002, PURSUANT TO PUB. L. 107-296, SEC. 428(e)(8)(A)



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To the Congress of the United States:

Consistent with section 428(e)(8)(A) of the Homeland Security Act of 2002 (Public Law 107-296) (the "Act"), I am pleased to report that the Secretary of State and the Secretary of Homeland Security have completed a Memorandum of Understanding concerning implementation of section 428 of the Act. The Memorandum of Understanding will allow the Departments of State and Homeland Security to work cooperatively to create and maintain an effective, efficient visa process that secures America's borders from external threats and ensures that our borders remain open to legitimate travel to the United States.

GEORGE W. BUSH.

THE WHITE HOUSE, *September 29, 2003.*

MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARIES OF STATE AND HOMELAND SECURITY CONCERNING IMPLEMENTATION OF SECTION 428 OF THE HOMELAND SECURITY ACT OF 2002

This Memorandum of Understanding (MOU) is the agreement between the Secretary of State and the Secretary of Homeland Security that shall govern the implementation of section 428 of the Homeland Security Act of 2002, P.L. 107-296 (hereafter the Act), by the Department of State (DOS) and the Department of Homeland Security (DHS).

1. INTENT OF THE PARTIES

a. The Secretary of State and the Secretary of Homeland Security will work cooperatively to create and maintain an effective, efficient visa process that secures America's borders from external threats and ensures that our borders remain open to legitimate travel to the United States. Such travel is important to our international, economic, and national values and interests.

b. Accordingly, the Secretary of Homeland Security will establish visa policy, review implementation of that policy, and provide additional direction as provided by this memorandum, while respecting the prerogatives of the Secretary of State to lead and manage the consular corps and its functions, to manage the visa process, and to execute the foreign policy of the United States. The Secretary of Homeland Security will rely upon the expertise of the Department of State with respect to foreign policy, and the Secretary of State will respect the expertise of the Department of Homeland Security concerning threats to American security.

2. VISA GUIDANCE

a. Definition. As used in this MOU, the term "visa guidance" refers to regulations, Foreign Affairs Manual provisions (including all interpretive and procedural notes) and ALDACs (DOS cables to all diplomatic and consular posts) implementing the provisions of the Immigration and Nationality Act (INA) or other immigration and nationality laws pertaining to visas.

b. Continuity of existing visa guidance. All existing DOS visa guidance shall remain effective unless and until superseded in accordance with this MOU.

c. Issuance of visa guidance. (1) DOS may propose and issue visa guidance subject to DHS consultation and final approval as discussed below. DHS will have authority to issue or approve (hereinafter "final responsibility over" visa guidance, except for those matters that are the specific responsibility of the Secretary of State as prescribed in section 428 (c)(2) and (d)(2) of the Act, in existing statutes related to foreign policy or management of the visa process, in future statutes, Presidential proclamations and executive orders, and in paragraphs 3 and 10 of this MOU. DHS will exercise

its final responsibility over visa guidance subject to consultation as discussed in paragraph 2d.

d. Notice and consultation.

(1) DHS and DOS will provide notice to the other when either determines that serious consideration should be given to development of new visa guidance. DHS will also provide notice to DOS when it begins drafting rules, policies or procedures affecting the visa process. Each will designate a point of contact for this purpose who may or may not be a liaison identified in paragraph 9a below.

(2) DHS and DOS will each offer the other the opportunity to consult regarding security, legal, operational, resource, or foreign policy or foreign relations issues associated with such guidance.

e. Publication of regulations. The Secretary of Homeland Security may elect to publish any and all visa regulations in 6 C.F.R. in an appropriate form. All visa regulations shall be published by the Secretary of State in 22 C.F.R. using State Department procedures for the issuance of visa regulations and shall become effective on the effective date specified in the Federal Register when published as interim final or final regulations. Each notice of rulemaking will indicate whether the rule is being approved by or being issued on behalf of DHS. DOS will expeditiously publish notices of rulemaking that are approved by or directed by DHS in accordance with paragraph 2c, and will expeditiously implement interim final or final regulations that are approved by or directed by DHS. Regulations prepared by DOS and requiring DHS approval will be expeditiously reviewed and approved by DHS. Wherever possible, the Secretaries will jointly issue regulations affecting the visa process.

3. AREAS OF PARTICULAR INTEREST

a. Classification, admissibility and documentation.

(1) Classification. The Secretary of Homeland Security will have final responsibility over visa guidance to consular officers concerning eligibility for classification for nonimmigrant and immigrant visas, except that:

(a) The two Secretaries will have joint responsibility over visa guidance concerning approval of cultural and training programs under INA section 101(a)(15)(Q)(ii) and eligibility for classification under INA section 101(a)(15)(S)(ii); and

(b) The Secretary of State will have final responsibility over visa guidance concerning eligibility for classification for nonimmigrant and immigrant visas under INA sections 101(a)(11), 101(a)(15)(A), 101(a)(15)(C) (determine who is eligible to pass in transit to and from the U.N. headquarters district), 101(a)(15)(E) (determine what is a qualifying treaty of commerce and navigation), 101(a)(15)(G), NATO and other defense or arms control agreements, 101(a)(15)(I) (determine whether qualifying reciprocity exists), 101(a)(15)(J) (designate qualifying exchange visitor programs), 101(a)(27)(D), and 101(a)(45)(establish, after consultation with appropriate agencies, amount of trade or capital that is "substantial" for purposes of INA section 101(a)(15)(E)).

(2) The Secretary of Homeland Security will have final responsibility over visa guidance concerning grounds of inadmissibility for visa applicants, except that:

(a) The two Secretaries will have joint responsibility over visa guidance concerning the exception to the material support provisions established in INA sections 212(a)(3)(B)(iv) and 212(a)(3)(F); and

(b) The Secretary of State will have final responsibility over visa guidance concerning the suspension or restrictions on entry pursuant to Presidential proclamations under INA section 212(f) and the grounds of inadmissibility for visa applicants specified in section 428 (c)(2) of the Act; INA section 212(a)(2)(G) (determine who is a foreign government official who was responsible for or directly carried out particularly severe violations of religious freedom); INA 212 section (a)(3)(B)(i)(determine whether an alien is an officer, official, representative or spokesman of the PLO); INA section 212(a)(3)(B)(vi)(II); INA section 212(a)(3)(E) (define participation in Nazi persecution and genocide); INA section 212(d)(8); section 2225 of the Foreign Affairs Reform and Restructuring Act of 1998 (found in Div. G, Title XXII of P.L. 105-277); and the exception to the retroactive application of section 411 of the USA PATRIOT Act (P.L. 107-56) established in section 411(c)(4) of that Act.

(3) DHS will have sole responsibility for determining when waivers of grounds of inadmissibility are granted, except that:

(a) The two Secretaries will have joint responsibility for waivers under INA section 212(d)(4)(B); and

(b) The two Secretaries will have joint responsibility, with the Secretary of Interior, for waivers under INA section 212(1).

(4) Consular officers or the Secretary of State may recommend waivers to DHS under such guidance as the Secretary of State may establish.

(5) The Secretary of Homeland Security will have final responsibility over visa guidance prescribing information, evidence, or other documentation collected to establish eligibility for a visa, admissibility to the United States, and to classify an alien as an immigrant or nonimmigrant, provided, however, that DHS will not require foreign-source documents from any country without establishing the reliability and availability of such documents in close consultation with the Secretary of State. DHS will otherwise consult with DOS concerning the reliability and availability of documentation and DOS will identify resource implications for collecting, maintaining, and evaluating additional or different documentary requirements. The Secretary of Homeland Security will prescribe only documentary requirements that the Secretary determines are germane to visa adjudication or core homeland security interests.

b. Place of visa application. The Secretary of Homeland Security will have final responsibility over visa guidance prescribing the circumstances in which aliens applying for an immigrant or nonimmigrant visa, other than aliens applying for visas for diplomatic or official purposes, may make application at a place other than a consular post having jurisdiction over the alien's country of origin or principal, actual dwelling place, provided that the Secretary of State shall have final responsibility for specifying, in consultation with the Secretary of Homeland Security, the place or places of visa application for nationals of a country in which there is no visa processing post.

c. Discontinuing granting visas to nationals of country not accepting aliens. The Secretary of Homeland Security will have authority to notify the Secretary of State pursuant to INA section 243(d) when a foreign government denies or delays accepting an alien who is a citizen, subject, national, or resident of that country. When so notified, the Secretary of State shall order consular officers to discontinue granting nonimmigrant and/or immigrant visas, as the Secretary of State deems appropriate.

d. Personal appearance. The Secretary of Homeland Security will have final responsibility over visa guidance prescribing when a consular officer may waive a visa applicant's personal appearance, except that the Secretary of State will have final responsibility over guidance applicable to aliens applying for visas for diplomatic and official purposes.

e. Visa validity periods and multiple entry visas. The Secretary of State will continue to prescribe periods of validity for a category of nonimmigrant visas based on reciprocity but will consult with the Secretary of Homeland Security before increasing any period of validity or establishing a period of validity in the first instance. Once a validity period is established by the Secretary of State, the Secretary of Homeland Security, in consultation with the Secretary of State, may prescribe a shorter period of validity or place other restrictions upon the validity period for an individual applicant or class of applicants within a category, based on security interests.

f. Visa waiver program. In accordance with INA section 217, the Secretary of Homeland Security, in consultation with the Secretary of State, will designate countries that may participate in the visa waiver program, and the two Secretaries will carry out their other responsibilities as specified in that section.

g. Notices of visa denials. The Secretary of Homeland Security will have final responsibility over visa guidance pursuant to INA section 212(b) prescribing when and under what conditions a consular officer may waive notice of denial of a visa, but the Secretary of State will have final responsibility over guidance applicable to diplomats or other official government representatives, and may provide for notice in cases in which advising the applicant of the ground of denial would advance the foreign policy of the United States.

h. Persons from state sponsors of terrorism.

(1) A country is a "state sponsor of terrorism" for purposes of section 306 of the Enhanced Border Security and Visa Entry Reform Act of 2002, P.L. 107-173 (8 U.S.C. 1735) if the Secretary of State determines, under any of the laws specified in section 306(b)(2), that the country's government has repeatedly provided support for acts of international terrorism.

(2) After the Secretary of State has designated a country as a state sponsor of terrorism, DOS and DHS will jointly, in consultation with other appropriate agencies, develop standards and procedures for administering section 306 with respect to nationals of that country, keeping in mind the Secretary of State's expertise with respect to foreign policy and the management of the visa process and the Secretary of Homeland Security's expertise concerning threats to homeland security. The standards and procedures for nationals of each country designated as a state sponsor of terrorism

will be specifically tailored to the nationals of each country, taking into account the reasons why the Secretary of State designated the government of the country as a state sponsor of terrorism and the relevance of those reasons to the individual nationals of that country. The standards and procedures will not preclude a national of the country from applying for a visa and providing information to show that the applicant does not pose a threat to the safety or national security of the United States. The Secretary of Homeland Security will have the final responsibility over the standards and procedures for administering section 306. Should DOS object to a standard or procedure and articulate specific U.S. foreign policy objectives or interests that will be compromised relevant to the country or nationals concerned, however, the matter will be referred to the Secretaries of both departments to consult and reach agreement.

(3) Any determination by the Secretary of State or designee that an alien from a country that is a state sponsor of terrorism does not pose a threat to the safety or national security of the United States will be made in accordance with the standards and procedures for nationals of that country and in consultation with the Secretary of Homeland Security or designee (unless otherwise provided for in procedures), and shall be without prejudice to the Secretary of Homeland Security's authority to refuse or revoke a visa in accordance with law.

4. ADVISORY OPINIONS

a. Continuation of DOS advisory opinion guidance and DHS review. The Secretary of State will continue to prescribe guidance concerning advisory opinions that may be sought by consular officers, but will consult with the Secretary of Homeland Security concerning changes in that guidance. Except with respect to security advisory opinions (SAOs) relating to matters to which paragraph 3a(2)(b) of this MOU refers, the Secretary of Homeland Security must concur in changes in policies and procedures involving SAOs, including when an SAO is requested and when an SAO may be transmitted to a consular officer, and may direct changes in SAO policies and procedures when it serves the interest of homeland security.

b. Continuation of DOS issuance of advisory opinions and DHS review. DOS will continue to provide advisory opinions, including SAOs, after appropriate interagency coordination. DHS will be copied on all security advisory opinion requests. DHS will be copied on all outgoing advisory opinions whether or not relating to security. Cases in which a third agency to which such an SAO request is referred believes that denial of a visa is appropriate and DOS believes the information is legally insufficient will be referred to the Secretary of Homeland Security to decide whether the facts support denial of the visa in accordance with law. DOS advisory opinions are without prejudice to the authority of the Secretary of Homeland Security to refuse or revoke a visa. DHS will have access on site at the Visa Office or remotely, as may be appropriate, to any advisory opinion and may seek consultation concerning any opinion that may affect homeland security.

c. Involvement of Overseas DHS employees in advisory opinions. A DHS employee assigned to an overseas post who performs section 428 functions will have access to all advisory opinion requests transmitted by the post of assignment to DOS, unless the Chief of Mission or Deputy Chief of Mission determines that the sensitivity of the matter requires that access be limited in the case of a particular advisory opinion request under a ground of inadmissibility specified in paragraph 3a(2)(b) of this MOU. If the COM or DCM limits the access of a DHS employee assigned to an overseas post who performs section 428 functions to an advisory opinion request, the COM or DCM will advise DOS, which will advise DHS headquarters of the request as appropriate. A DHS employee who performs section 428 functions may recommend that the post submit security advisory opinion requests.

5. NOTIFICATION AND COORDINATION OF REFUSALS AND REVOCATION

a. If the Secretary of Homeland Security decides to exercise the authority of the Secretary of Homeland Security to refuse a visa in accordance with law, or to revoke a visa, the Secretary of Homeland Security shall request the Secretary of State to instruct the relevant consular officer to refuse or revoke the visa and specify the grounds and factual basis for refusal or revocation. The refusing consular officer shall note in the Consolidated Consular Database entry that the refusal or revocation has been directed by DHS. Notwithstanding paragraph 17, the Secretary of Homeland Security's authority to direct refusal or revocation of a visa may be delegated only to DHS headquarters staff.

b. If the Secretary of State directs a consular officer to refuse a visa on the grounds that refusal is deemed to be necessary or advisable in the security or foreign policy interests of the United States, DOS shall notify DHS of the exercise of such authority by including DHS on the distribution of the instruction cable and making a notation in the Consolidated Consular Database entry, and/or by any agreed upon means of communication.

c. If the Secretary of State decides to revoke a visa pursuant to his authority under Section 221(i) of the INA, DOS will notify DHS of the exercise of such authority by including DHS on the distribution of any cable reporting the visa revocation decision, by making an entry in the Consolidated Consular Database, by forwarding to DHS a copy of the certificate of revocation, and/or by any agreed upon means of communication.

6. ASSIGNMENT OF DHS PERSONNEL TO DIPLOMATIC POSTS AND THEIR FUNCTIONS

a. Selection of posts to which DHS personnel will be assigned and assignment of DHS personnel. DHS shall identify the diplomatic and consular posts where it considers the assignment of DHS personnel to be necessary to perform section 428(e) functions, including posts where it wishes to have existing DHS personnel perform section 428(e) functions. DHS will establish criteria by which posts will be selected and will consult with DOS concerning the selection of posts. DOS may recommend posts to which assignment of DHS personnel to perform section 428(e) functions would be beneficial. DHS may assign employees pursuant to section 428(e) to

perform functions of regional or worldwide scope or functions related to a particular post to which they may be assigned. Each position and assignment shall be justified and described in accordance with National Security Decision Directive 38, and communicated to the Secretary of State and relevant chief(s) of mission. DHS will consult with DOS and relevant chief(s) of mission before assigning section 428(e) functions to DHS employees already assigned to diplomatic posts to perform other functions. Assignment of DHS personnel will be made consistent with resource availability.

b. Qualifications for overseas DHS personnel.

(1) Any DHS employee selected for assignment overseas after the effective date of this MOU to perform section 428(e) functions should have:

- (a) broad knowledge of immigration law, including visa law,
- (b) experience or training in counter-terrorism,
- (c) experience or training in interviewing individuals during investigations, including fraud, or in similar contexts, and
- (d) experience or training in identifying tampered documents.

(2) DHS will exercise best efforts to provide training for personnel who are assigned to perform section 428(e) functions who are selected for such assignments prior to the effective date of this MOU or who are already assigned overseas to perform other functions.

(3) DHS training and assignment policies will emphasize identification of persons with the following skills, experience or knowledge, or developing them before or during assignment:

- (a) the ability to speak the host country language, and
- (b) experience in or knowledge of the host country, and extensive understanding of terrorism or other homeland security concerns in the host country.

(4) Prior to being assigned to an overseas post, a DHS employee must obtain a minimum security clearance of Top Secret.

(5) The assignment of DHS employees to a particular post to perform section 428(e) functions, the scope of their functions, and who and how many DHS employees are assigned will be determined in accordance with the authority of the relevant chief(s) of mission and the Secretary of State. The Assistant Secretary of State for Consular Affairs will use best efforts to facilitate and assist the assignment of qualified DHS employees and the Assistant Secretary of State for Administration will assign a high priority to the expeditious provision of administrative arrangements to accomplish these assignments.

c. Temporary duty of DHS personnel.

(1) DHS may also send DHS employees to overseas posts in temporary duty status to perform functions under section 428(e) from time to time.

(2) Whether a DHS employee may go to an overseas post on temporary duty status is subject to the authority of the relevant chief(s) of mission and country clearance procedures.

d. Support of DHS employees.

(1) In addition to participating in basic mandatory shared administrative costs overseas, DHS may at its option enter into reimbursable support agreements under the International Cooperative Ad-

ministrative Support Services (ICASS) established under sections 13 and 23 of the Department of State's Basic Authorities Act (22 U.S.C. §§ 2687 and 2695), which provides administrative services to agencies performing functions overseas. DHS may participate in the ICASS system on the same basis as other participating agencies. DHS may utilize the ICASS system where appropriate to procure such equipment, facilities and supplies as are normally purchased by individual agencies, at its costs.

(2) DHS will be provided with necessary office space and Embassy housing as available on the same basis as other agencies represented in the relevant mission overseas. To the maximum extent practicable, DHS employees performing visa duties shall be collocated with consular officers. DHS employees who are properly cleared will have access to secure equipment and facilities, and be provided work space in such controlled access areas, that may be available at particular posts and that is necessary for the performance of their section 428(e) duties.

(3) DOS will take such steps as may be appropriate and necessary so that DHS employees performing visa duties pursuant to section 428 receive from the host country legal privileges and immunities appropriate to their functions and the post to which they are assigned.

e. DHS overseas functions. DHS employees assigned to overseas posts who perform section 428(e) functions will:

(1) Provide expert advice to consular officers regarding specific security threats relating to the adjudication of individual visa applications or classes of applications. This may include but is not limited to:

(a) Gathering and reviewing intelligence reports and coordinating with other agencies at post to consolidate up-to-date information with respect to terrorist groups or other entities or individuals in the host country who pose a threat to homeland security and their connections with individuals and groups in other countries and making this information available to consular officers in a timely and useful manner.

(b) Briefing consular officers and providing training sessions to consular officers, as appropriate, concerning terrorist groups or other entities that pose a threat to homeland security and questions and interview techniques useful in detecting persons who may be a threat or whose applications may be fraudulent.

(c) Consulting with consular officers on particular visa applicants who raise homeland security concerns.

(2) Review any such applications, either on the initiative of the DHS employee in accordance with procedures prescribed by DHS under paragraph 6(f)(1) below, or upon request by a consular officer or other person charged with adjudicating such applications. This may include but is not limited to providing input to or recommending security advisory opinion requests based on their expertise.

(3) Conduct investigations with respect to consular matters under the jurisdiction of the Secretary of Homeland Security, in accordance with paragraph 6g of this MOU.

f. Performance of DHS overseas functions.

(1) DHS, in consultation with DOS, will develop policies and procedures by which DHS employees assigned to posts abroad who perform section 428(e) functions will perform the functions listed in paragraph 6e of this MOU. DHS may conduct the functions listed in paragraph 6e of this MOU with regard to some or all non-immigrant visas and, at its option, some or all immigrant visas. DHS, in consultation with DOS, will develop standards by which it may direct DHS employees at post to review classes or quantities of visa applications based upon worldwide threat assessments, or by which DHS employees at post may initiate, in consultation with the Deputy Chief of Mission or senior consular officer, review of classes or quantities of visa applications based on local threat assessments. In accordance with section 428(i), DHS employees assigned to Saudi Arabia to perform section 428 functions shall review all nonimmigrant and immigrant visa applications.

(2) A DHS employee assigned to an overseas post and performing section 428(e) functions may recommend to the chief of the consular section or the most senior supervisory consular officer present that a visa be refused or revoked. If the chief of section or supervisory consular officer does not agree that the visa should be refused or revoked, the post will initiate a request for a security or other advisory opinion and the DHS employee will be consulted in its preparation. No visa will be issued in the interim. No advisory opinion will be issued thereafter without the full consultation of DOS and DHS. Nothing in this subparagraph prejudices the authority of the Secretary of Homeland Security to direct refusal of the visa at any time in accordance with the procedures specified in paragraph 5 of this MOU.

(3) DHS employees assigned to overseas posts and performing section 428(e) functions may communicate directly with consular officers and other DOS employees assigned to overseas posts and other DHS officials in carrying out their functions, provided that their interactions are consistent with the authority of the senior consular official at post over the consulate or consular section. DHS employees will not serve under the supervision of consular personnel, and DHS employees will not supervise consular personnel, or otherwise give binding instructions or directions to consular officers.

(4) DHS employees assigned to overseas posts and performing section 428(e) functions are subject to the authority of the chief of mission and the Secretary of State in the same manner as all other executive branch employees serving abroad. They must also comply with the Interagency Security Policy Board's security guidelines.

g. Investigations by DOS and DHS.

(1) DHS employees assigned to overseas posts and performing section 428(e) functions may in accordance with policies and procedures established by DHS under paragraph 6f(1), recommend investigations, participate in investigations conducted by consular officers (with their consent), or conduct investigations involving visa matters, such as the eligibility of any visa applicant. Consular officers will, in any event, make available their investigative reports or conclusions. However, such DHS employees shall not conduct law enforcement investigations or activities, investigations concerning matters that are within the jurisdiction of the Bureau of

Diplomatic Security or the Inspector General of the Department of State, or take action in relation to allegations of misconduct by an employee of the United States Government, other than to report such allegations. This does not affect DHS investigative functions performed under other authorities. DHS employees performing investigative functions under section 428(e) authority will consult and cooperate with consular officers and Regional Security Officers with respect to any investigative activity. DHS employees performing investigative functions under other authority will ensure appropriate coordination with other law enforcement elements. DHS employees will ensure that the COM or the COM's designated representative is fully and continually informed regarding such activity.

(2) If the DOS becomes aware of an allegation of visa fraud or other misconduct in relation to the issuance of visas, any allegation of misconduct by such DHS employees, contractors or grantees or by DOS consular employees in relation to the visa function, any other matter in relation to the visa function that creates a potential security vulnerability, or any allegation of fraud, waste or abuse of DHS funds or involving DHS programs or operations, the DOS shall promptly notify the DHS IG of such allegation. If the DHS becomes aware of an allegation of visa fraud or other misconduct in relation to the issuance of visas, any allegation of misconduct by such DHS employees in relation to the visa function or by DOS employees, contractors or grantees, any other matter that affects the security of the mission or that creates a potential security vulnerability, or any allegation of fraud waste or abuse of DOS funds or involving DOS programs, the DHS shall promptly notify the DOS and, unless determined to be inappropriate, the COM.

(3) When allegations concern matters over which the DHS IG and the DOS both have investigative jurisdiction, they shall consult regarding how best to pursue the investigation. Unless otherwise decided in a given case, DOS shall investigate allegations concerning DOS employees, contractors, grantees and funds and DHS IG shall investigate allegations concerning DHS employees, contractors or grantees. DHS IG and DOS may, as agreed, also develop more detailed guidelines and procedures with respect to the conduct of such investigations.

(4) Any DHS investigation conducted abroad must be conducted in compliance with local law (unless it is an activity routinely authorized by senior host country officials and ground rules established by the host country), unless otherwise authorized by the Secretary of Homeland Security, or his designee, and by the Secretary of State, or his designee, and the Chief of Mission.

h. Participation in Lookout Committees. DHS employees assigned to overseas posts and performing section 428(e) functions shall participate in the terrorist lookout committee established under Section 304 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (8 U.S.C. § 1733), and other relevant groups.

7. PERFORMANCE STANDARDS AND EVALUATIONS FOR CONSULAR OFFICERS AND FOR DHS EMPLOYEES ASSIGNED ABROAD TO PERFORM SECTION 428 FUNCTIONS

a. Performance standards for consular officers. The Secretary of Homeland Security may develop performance standards for evaluating the performance of consular officers with respect to the processing and adjudication of applications for visas. If the Secretary of Homeland Security wishes to develop such performance standards, the Secretary will consult with the Secretary of State in their development. The Secretary of State will also consult with the Secretary of Homeland Security in developing or revising other performance standards relating to the issuance of visas by consular officers. Once any such standards are developed, the Secretary of State will take the necessary measures to incorporate the standards into the DOS evaluation process in a manner consistent with the Foreign Service Act of 1980 and applicable labor-management consultation or negotiation requirements.

b. DHS input to consular officer evaluations. DHS employees assigned abroad and performing section 428(e) functions may, as deemed appropriate by the Secretary of Homeland Security, provide the rating and/or reviewing officer with input relevant to the evaluation of a consular officer in light of any performance standards developed by the Secretary of Homeland Security pursuant to this paragraph. The rating or review officer will take such input into consideration in preparing the annual employee evaluation report.

c. Performance standards for DHS employees. The Secretary of Homeland Security will develop performance standards for DHS employees who are assigned to posts abroad pursuant to section 428, and will consult with the Secretary of State concerning them prior to issuance.

d. DOS input to DHS employee evaluations. The chief of mission or deputy chief of mission may provide the rating and/or reviewing officer of a DHS employee assigned abroad pursuant to section 428(e) with input relevant to evaluation of the employee. The rating or reviewing officer will take such input into consideration in preparing the annual employee evaluation report. The senior DHS employee at post shall be subject to evaluation by the COM and/or DCM in the same manner as other agency senior representatives.

8. TRAINING

a. Availability of DOS training to DHS employees and families.

(1) At the request of DHS, DOS shall, on a reimbursable and space-available basis, make available to DHS employees identified for assignment to overseas posts to perform functions under section 428(e) training relevant to such functions, including training in foreign languages, interview techniques, fraud techniques, conditions in the country of assignment and other appropriate areas of study, and shall give priority to these employees after DOS employees, and ahead of other personnel of other agencies. DHS employees may train with consular officers and undergo the same consular function training on a reimbursable and space-available basis.

(2) DOS shall afford the families of DHS employees assigned to overseas posts access to language and culture training on the same basis as the families of employees of other agencies, i.e., on a reimbursable, space-available basis.

(3) All DHS employees assigned to overseas posts must attend the DOS Security Overseas Seminar, or such training as may be required in the future of persons assigned overseas, on a reimbursable, space-available basis. Eligible family members of DHS personnel are also encouraged to attend the Security Overseas Seminar, on a reimbursable, space-available basis. In addition, DHS employees assigned to overseas posts are strongly encouraged to attend the Introduction to Working at an Embassy seminar prior to departure, on a reimbursable, space-available basis.

b. DHS training development.

(1) DHS may develop other training, as appropriate, to enable DHS employees to carry out their functions. Such training will be made available to consular officers on a reimbursable basis and equal basis with DHS employees.

(2) DOS will consult with DHS, as appropriate, to ensure that DOS consular officer training incorporates homeland security concerns, and DHS may propose changes in DOS curricula to better prepare consular officers to perform their functions in connection with the granting or refusal of visas. DHS may also develop programs of homeland security training for consular officers in addition to other DOS training programs. Such programs may be conducted by or under the auspices of DHS and facilitated by DOS, or DOS may conduct such programs under the guidance of DHS, as DHS and DOS may agree. DHS shall bear the costs of developing and delivering such training and cooperate with DOS to schedule such training in conjunction with other DOS training DOS personnel are required to take or give under DOS auspices. DOS will use best efforts to make available DOS facilities for such training that may include Foreign Service Institute space, subject to DOS resources and other commitments. DOS shall otherwise bear the costs of travel and per diem of its personnel who participate in training either as instructors or students for the purpose of improving the skills or knowledge of consular officers. DOS shall determine in consultation with DHS the appropriate timing for participation in such training, either as instructors or students, based on staffing requirements of the DOS employee's post of assignment, so as not to impede the ability of the post to carry out essential functions assigned to the employee. DOS will ensure attendance of DOS personnel in a manner consistent with effective and efficient training management and to ensure training is received in a timely fashion.

(3) DHS employees assigned overseas to perform section 428 functions may develop local training programs in whose development post consular personnel will cooperate. The chief of the consular section or the most senior supervisory consular officer present will facilitate the attendance of consular personnel at such training, provided that the nature and timing of such training shall not impede the ability of the post to carry out essential consular functions.

c. Joint training development. DHS and DOS agree to cooperate in the joint development of training that will be useful to the employees of both agencies, that may be conducted at DOS facilities, or in other institutions.

d. Resource availability. Training activities under this paragraph are subject to resource availability.

9. INTERAGENCY COOPERATION

a. Establishment of liaisons. The Secretary of Homeland Security, or designee, and the Secretary of State, or designee, may designate persons to serve as liaisons between the headquarters of both departments, who may or may not be stationed in the other's headquarters. Any DHS liaison assigned to work in the Visa Office will have access to any advisory opinion that may be issued.

b. Management reports. DHS will have access to standard workload reports generated by the automated visa systems of the Bureau for Consular Affairs. DHS will also have access to such systems to determine the status of specific visa cases and accompanying notes. The Bureau will respond to requests from DHS for periodic reports on how DHS or other visa policies are being implemented and will cooperate with DHS in generating special queries when necessary and practicable.

c. On-Site Monitoring of field operations. DHS employees may participate in Consular Management Assistance Teams and travel with regional consular officers as may be practicable. DHS shall bear the cost of travel of its employees.

d. Cooperation in interagency and international matters. DOS and DHS agree to cooperate and coordinate as appropriate in interagency and international matters that may affect the function of consular officers in connection with the granting or refusal of visas.

10. SYSTEMS AND RECORDS

a. Maintenance of DOS systems; DHS systems authority. The Secretary of State has the authority to create, maintain and operate all information systems used by consular officer and other DOS employees in visa adjudication and issuance processes. These systems are DOS systems.

b. Maintenance of visa applications and visa issuance records. DOS has the authority to create and maintain all records pertaining to the issuance or refusal of visas or permits to enter the United States. DOS is the originating agency and retains custody and control over such records for purposes of the requirements of the Federal Records Act, the Freedom of Information Act, the Privacy Act, Executive Order 12958 and section 222(f) of the Immigration and Nationality Act, as well as for purposes of all document production and information requests. To the extent that the DHS obtains copies of such records in connection with its duties, DHS shall refer questions concerning the above requirements to DOS, in accordance with normal third agency referral procedures. DHS shall be responsible for such records as it may create and maintain and that are not made a part of DOS records.

c. Systems compatibility and biometric requirements.

(1) The Secretary of Homeland Security and the Secretary of State recognize that each has statutory authorities related to the

maintenance of electronic databases and use of biometrics for border security purposes and that they must exercise these joint and separate authorities in full coordination to ensure interoperability and effectiveness. Each agrees to coordinate closely with the other and to work together toward the maximum possible compatibility of the DHS and DOS information technology systems and data related to the issuance of visas to and the entry to and exit from the U.S. of aliens.

(2) In particular, each Secretary agrees to keep the other fully informed in a timely fashion about decisions and actions that his Department is contemplating with respect to such database systems related to the issuance of visas to, and the entry to and exit from the U.S. of, aliens, including the use of biometrics, legal interpretations and policy implementation decisions and datasharing (the sharing of information electronically). Toward this end, each Secretary will designate an employee of his Department to serve as a liaison on such systems development, interoperability and datasharing with the other Department. These systems liaison persons shall keep each other fully informed of applicable systems initiatives being taken within each home agency and will serve as the point of contact for reception and transmission of such information between the two Departments.

d. Coordination with DHS concerning systems. DOS will consult with DHS concerning what visa data will be contained and maintained within DOS systems. DOS will give serious consideration to implementing DHS recommendations concerning collection and maintenance of visa data, as well as DHS recommendations concerning management controls in automated systems that audit or support visa adjudication, consistent with resource availability. DHS and DOS will increase and expand data share between agencies. DHS will be consulted and, where possible, participate in modification of existing systems and development of new systems that remain under DOS control.

e. Access of DHS personnel to DOS systems and records. DOS will provide appropriate DHS personnel with access to DOS information systems used in visa adjudication and visa issuance processes as well as to DOS records pertaining to the issuance or refusal of visas or permits to enter the United States, as necessary and appropriate for implementation of DHS functions under section 428. In the case of classified information, such access will require both an appropriate security clearance and a need to know the information. DHS personnel who are provided such access will abide by applicable restrictions on the use of such systems and records and the disclosure of the information contained therein. In particular, such DHS employees will not disclose the information in such systems or records to anyone not authorized to receive it. DHS will make available to consular officials and other DOS officials involved in the visa issuance process all data maintained by DHS that is pertinent to the security and integrity of the visa issuance process, but DOS will respect restrictions on dissemination of sensitive law enforcement information.

11. RESOURCES

DHS and DOS shall bear their own costs in the performance of responsibilities under section 428 except as otherwise provided in this MOU, or other written agreement. Activities included in this MOU are subject to resource availability.

12. LITIGATION

The Legal Adviser to the Secretary of State and the General Counsel for DHS shall cooperate as appropriate in support of litigation conducted by the Department of Justice for or against the United States on account of actions taken or not taken by consular officers related to the issuance or refusal of visas or by DHS personnel performing functions under section 428.

13. STUDIES AND REPORTS

a. DOS will assist DHS as appropriate in the preparation of the study of the role of foreign nationals in the granting or refusal of visas and other documents authorizing applications for entry of aliens into the United States that is required by section 428(g)(1) and in the report containing the findings of the study conducted under section 428(g)(1) that is required by section 428(g)(2). DHS and DOS will jointly draft and submit to Congress, as required by section 428(e)(7), the report on the implementation of section 428 and any legislative proposals necessary to further the objectives of section 428.

b. In any case in which the Secretary of Homeland Security directs refusal of a visa on the basis of INA section 212(a)(3)(B), DHS will provide DOS with sufficient information (including the factual basis for the refusal) for the Secretary of State to fulfill his reporting requirements under section 51 of the State Department Basic Authorities Act (22 U.S.C. § 2723).

14. DISPUTE RESOLUTION

Disagreements concerning the interpretation or implementation of this MOU will be resolved at the lowest level possible. Failing that, matters will be referred successively to higher authorities.

15. MODIFICATION AND TERMINATION

This MOU may be modified or terminated upon the mutual agreement of the parties in writing. The parties shall review this MOU not later than 24 months after it becomes effective. Any amendments to it shall be by mutual agreement.

16. EFFECTIVE DATE

This MOU becomes effective on the date on which the President publishes notice in the Federal Register that he has submitted a report to Congress setting forth the MOU.

17. DELEGATIONS OF AUTHORITY

a. Except for paragraph 5, references in this MOU to the Secretary of Homeland Security or the Secretary of State or specific subordinate officers or components thereof shall not be construed

to limit the authority of the Secretaries of Homeland Security or State to direct and control the activities of their departments and delegate or re-delegate authority as may be appropriate.

b. The Secretary of Homeland Security and the Secretary of State shall keep each other informed on a timely basis of the persons to whom they have delegated their authority under this MOU.

c. Each Secretary hereby delegates to the other such authority as may be necessary to implement the provisions of this MOU.

18. ENFORCEABILITY

Nothing in this MOU is intended, or should be construed, to create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, or any of its agencies, officers, or employees.

