

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 215, 235 and 252

[DHS-2007-0002]

RIN 1650-AA00

#### United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"); Authority to Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry

**AGENCY:** Border and Transportation Security Directorate, DHS.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Department of Homeland Security (DHS) has established the United States Visitor and Immigrant Status Technology Program (US-VISIT), an integrated, automated entry-exit system that records the arrival and departure of aliens; verifies aliens' identities; and authenticates aliens' travel documents through comparison of biometric identifiers. On January 5, 2004, DHS implemented the first phase of US-VISIT by publishing an interim rule in the **Federal Register** at 69 FR 468. The January 5, 2004 interim rule authorized DHS to require aliens seeking to be admitted to the United States pursuant to nonimmigrant visas to provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. This interim rule expands the US-VISIT program to the 50 most highly trafficked land border ports of entry in the United States. These 50 land borders will be integrated into the US-VISIT program following identification in Notices published in the **Federal Register**, with all 50 ports of entry to be identified no later than December 31, 2004.

This interim rule also further defines the population of aliens who are required to provide biometric identifiers and other identifying information under the US-VISIT program. First, DHS may require biometric data collection from nonimmigrant aliens who are visa exempt under the Visa Waiver Program (VWP). While this interim rule provides that DHS has the authority to require Mexican nationals who present a Border Crossing Card to provide biometric data upon arrival in, or departure from, the United States, the Secretaries of DHS and the Department of State (DOS) have jointly determined that BCC travelers who are not required to be issued a Form I-94 Arrival/Departure Record at

the time of admission are exempt from the US-VISIT biometric data collection requirements. Second, certain officials of the Taipei Economic and Cultural Representative Office are exempt from the US-VISIT biometric data collection requirements. Third, crewmembers applying for landing privileges may be required to provide biometric data under US-VISIT.

This interim rule also makes technical changes to US-VISIT as a result of comments received by DHS on the January 5, 2004 interim rule. Finally, DHS solicits public comment on all aspects of the operation of US-VISIT to date, as well as the expansion of US-VISIT pursuant to this interim rule.

**DATES:** *Effective date:* This interim rule is effective September 30, 2004.

*Comment date:* Written comments must be submitted on or before November 1, 2004.

**ADDRESSES:** Because DHS does not yet have electronic docketing capability, for the purposes of this rule, we are using the Environmental Protection Agency (EPA) Docket Management System for US-VISIT. You may submit comments identified by RIN 1615-AA00 to the Docket Management Facility at the EPA. To avoid duplication, please use only one of the following methods:

(1) Web site: <http://www.epa.gov/edocket>. Follow the instructions for submitting comments at that web site.

(2) Mail: Written comments may be submitted to Michael Hardin, Senior Policy Advisor, US-VISIT, Border and Transportation Security, Department of Homeland Security, 1616 North Fort Myer Drive, 18th Floor, Arlington, VA 22209.

(5) Federal eRulemaking portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Submitted comments may be inspected at 1616 North Ft. Myer Drive, Arlington, VA 22209, between 9 a.m. and 5 p.m., Monday through Friday except Federal holidays. Arrangements to inspect submitted comments should be made in advance by calling (202) 298-5200. You may also find this docket on the Internet at <http://www.epa.gov/edocket>. You may also access the Federal eRulemaking Portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION, CONTACT:** Michael Hardin, Senior Policy Advisor, US-VISIT, Border and Transportation Security, Department of Homeland Security, 1616 Fort Myer Drive, 18th Floor, Arlington, Virginia 22209, (202) 298-5200.

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#### I. Background

##### A. Statutory Authority for US-VISIT

DHS established US-VISIT in accordance with several statutory mandates that collectively require DHS to create an integrated, automated entry and exit system (entry-exit system) that records the arrival and departure of aliens; verifies the identities of aliens; and authenticates travel documents presented by such aliens through the comparison of biometric identifiers. Aliens subject to US-VISIT requirements may be required to provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States.

The statutory mandates which authorize DHS to establish US-VISIT include, but are not limited to, the following:

- Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106-215;
- Section 205 of the Visa Waiver Permanent Program Act of 2000 (VWPPA), Public Law 106-396;

- Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56; and

- Section 302 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act), Public Law 107–173.

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 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)<sup>1</sup> or Department of State (DOS) databases. 8 U.S.C. 1365a. Under DMIA, 8 U.S.C. 1356a(d), this integrated entry-exit system was required to be implemented at air and sea ports of entry in the United States no later than December 31, 2003, using available air and sea alien arrival and departure data as described in the statute. DMIA also requires 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 reports to Congress on the numbers of aliens who have overstayed their periods of admission, as well as reports on the implementation of the system. 8 U.S.C. 1365a(e). DMIA authorizes the Secretary of DHS, 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 during 2002, Congress, following the events of September 11, 2001, passed two additional laws affecting the development of the entry-exit system: the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56 (2001), 115 Stat. 353; and the Enhanced Border Security and Visa Entry Reform Act of 2002 (“Border Security Act”), Public Law 107–173 (2002), 116 Stat. 553. Section 403(c) of the USA PATRIOT Act, 8 U.S.C. 1379, requires DHS and DOS jointly to develop and certify a technology standard 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. The technology standard shall be developed through the National Institute of Standards and Technology (NIST), in consultation with the Secretary of the Treasury, other appropriate Federal law enforcement and intelligence agencies, and Congress. The standard shall include appropriate biometric identifier standards. The USA PATRIOT Act further directs DHS and DOS 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 and note.

The legislative requirements for biometric identifiers to be utilized in the context of the entry-exit system also were strengthened significantly under the Border Security Act. Section 302(a)(1) of the Border Security Act, 8 U.S.C. 1731, states that the entry-exit system must use the technology and biometric standards required to be certified by DHS and DOS under section 403(c) of the USA PATRIOT Act. Section 303(b)(1) of the Border Security Act further requires that the United States issue to aliens only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers. 8 U.S.C. 1732(b)(1). Further, DHS and DOS must jointly establish document authentication and biometric identifier standards for alien travel documents from among those recognized by domestic and international standards

organizations. However, unexpired travel documents that have been issued by the U.S. government that do not use biometrics are not invalidated. *Id.* Section 303(b)(2) of the Border Security Act requires the United States, by October 26, 2004, to install at all ports of entry, equipment and software that allow biometric comparison and authentication of all U.S. visas and machine-readable, tamper-resistant travel and entry documents issued to aliens, as well as passports that are issued by countries participating in the Visa Waiver Program (VWP). 8 U.S.C. 1732(b)(2). Congress recently extended this deadline for one year, until October 26, 2005, pursuant to Public Law 108–299.

In addition, any country that is designated by the United States to participate in the VWP must certify that such country has 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). Section 303(c) of the Border Security Act requires that 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 DHS and DOS also must 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.

DHS’s broad authority to inspect aliens under sections 235 and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1225, further supports the requirements under US-VISIT that foreign nationals provide biometric identifiers and other relevant identifying information upon admission to, or departure from, the United States. Pursuant to section 215(a) of the INA

<sup>1</sup> Effective March 1, 2003, pursuant to the Homeland Security Act of 2002, the responsibility for maintenance of such files, along with other functions, was transferred from DOJ to DHS. For purpose of consistency throughout this interim rule, any reference to authorities or functions originally vested in the Attorney General or DOJ that were transferred to DHS or the Secretary of DHS will now be referred to as functions or authorities of DHS or the Secretary of DHS.

and Executive Order No. 13323 (69 **Federal Register** 241), the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to issue this interim rule which requires certain aliens to provide requested biographic identifiers and other relevant identifying information as they depart the United States. Section 101(a)(6) of the INA, 8 U.S.C. 1101(a)(6), requires that regulations promulgated by DHS to prescribe the conditions for use of "border crossing identification cards" must provide that "an alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the BCC matches the appropriate biometric characteristic of the alien." In addition, under section 214 of the INA (8 U.S.C. 1184), DHS may make compliance with US-VISIT departure procedures a condition of admission and maintenance of status for nonimmigrant aliens while in the United States.

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, the requirements relating to alien crewmen located at section 251 *et seq.*, and authority for alternative inspection services in sections 286(q) and 235 of the INA and section 404 of the Border Security Act.

These statutory mandates, among other laws, collectively authorize DHS to promulgate regulations, including this interim rule, as necessary to implement US-VISIT.

#### *B. Recommendations of the 9/11 Commission*

The National Commission on Terrorist Attacks upon the United States (the Commission) was established by Congress and the President on November 22, 2002 (Public Law 107-306) to investigate the events leading up to the terrorist attacks on the United States on September 11, 2001. On July 22, 2004, the Commission published its final report, "The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States" (the Report). In its Report, the Commission recognizes the importance of screening aliens traveling to and from the United States. In addition, the Commission recommended that "[t]argeting travel is at least as powerful a weapon against terrorists as targeting their money. The

United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility." The Report calls for the implementation of a biometric screening system and specifically refers to the implementation of US-VISIT among the Commission's many recommendations for strengthening the ability of the United States to detect and deter terrorist attacks on the United States. The Report also emphasizes the need to make US-VISIT fully operational as soon as possible and that the present timetable "may be too slow, given the possible security dangers."

This interim rule, which expands US-VISIT to the 50 most highly trafficked land borders and includes aliens traveling without visas under the VWP, will assist in meeting the goals and recommendations of the Commission.

## **II. Implementation of the First Phase of US-VISIT**

### *A. Air and Sea Ports of Entry*

On January 5, 2004, DHS published an interim rule in the **Federal Register** establishing US-VISIT at air and sea ports of entry designated by notice in the **Federal Register** at 69 FR 468. Also on January 5, 2004, DHS published a notice in the **Federal Register** at 69 FR 482, designating 115 airports and 14 sea ports for the collection of biometric data from certain aliens upon arrival to the United States under the US-VISIT program. Since January 5, 2004, aliens applying for admission pursuant to a nonimmigrant visa at designated air and seaports have been required to submit fingerprints and photographs.

Since its implementation at air and seaports in January 2004, US-VISIT has proven that the use of biometrics to check identity and background is a highly effective national security and law enforcement tool. US-VISIT has already prevented 196 criminal aliens from entering the United States. Further, US-VISIT has already identified 790 aliens using biometric "lookout" lists—established lists of aliens suspected of being terrorists, or having committed past criminal acts or immigration violations.

### *B. Exit Pilot Programs*

The January 5, 2004 interim rule also authorized the Secretary of DHS to establish pilot programs at up to fifteen air or sea ports of entry, to be identified by notice in the **Federal Register**, through which DHS may require certain aliens who depart from a designated air or sea port of entry to provide specified

biometric identifiers and other evidence at the time of departure. 8 CFR 215.8. On January 5, 2004, DHS published a notice in the **Federal Register** at 69 FR 482 identifying the implementation of exit pilot programs at Baltimore-Washington International Airport (BWI) and the Miami Seaport. DHS has recently implemented exit pilot programs at an additional 13 ports of departure, as identified by notice in the **Federal Register** on August 3, 2004 at 69 FR 46556.

Under the exit pilot programs at BWI and Miami, aliens departing from any of the designated departure air and sea ports are required to submit fingerprints and electronically scan their nonimmigrant visas or passports at self-serve "kiosks" which are located in the air and sea port terminals. DHS personnel are available to assist aliens with the data collection procedure as needed. To date, the process has been implemented smoothly with no significant delays for travelers.

Since early August of 2004, DHS, through the extended exit pilot program, has been testing different methods to collect the required information from aliens as they depart the United States through the designated ports of entry. DHS currently is exploring several different methods and processes for collection of information, including an "enhanced" version of the existing self-serve kiosks already in place. The enhanced version provides the alien a receipt with biometric identifiers for the alien to present to a DHS representative prior to boarding a flight or ship. Also, DHS is testing hand-held scanners, which can be taken from person to person by a DHS representative to collect biometric information, and a combination of the two systems. US-VISIT rejected several other options, including the use of Transportation Security Administration (TSA) screeners or airline personnel assisting in data collection, as unfeasible due to the potential of overwhelming the ability of these organizations to perform their already existing functions.

The exit pilot program will enable DHS to conduct a cost-benefit analysis of the different processes and determine which process allows for the most accurate and efficient collection of information from aliens departing from the United States. After careful analysis and consideration of the deployed alternatives, DHS will then evaluate which solution or solutions will be selected for additional deployment at air and sea ports.

The evaluation of the best method for collecting exit data collection will occur from August through November 2004.

The pilot programs will be evaluated based on: (1) The cost of each option, including the impact on staffing and necessary personnel; (2) how well the alternative supports all necessary aliens being processed and requisite law enforcement functions; and (3) how conducive the alternative is for tourist and commercial travel. The extended pilot program began in August 2004, where the additional methods of data collection have occurred in Chicago O'Hare airport, Baltimore/Washington International Airport, and Miami seaport. In early September 2004, US-VISIT exit pilot program will expand to additional ports of entry where additional evaluations may be made. DHS will take a flexible approach to the evaluation of the different methods of data collection, and may select one of the methods currently evaluated or a slightly modified version, depending on information gained from the pilot program. In addition, DHS may not select the same method at every port, recognizing that physical space limitations and passenger procedures are different at different ports. DHS invites comments on the existing methods being piloted, the ones previously rejected, or on any other potential technologies or methods of collecting US-VISIT exit data.

The pilot program is currently for air and sea ports of entry; at this time, no departure requirements are in place at land border ports of entry.

### *C. Classes of Aliens Exempted From Biometrics Requirements of US-VISIT Pursuant to the January 5, 2004 Interim Rule*

The January 5, 2004 interim rule exempts certain classes of aliens from US-VISIT requirements. The exempted classes are: (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, and 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. 8 CFR 215.8(a)(2).

### **III. Implementation of the Second Phase of US-VISIT**

This interim rule amends DHS regulations to implement the second phase of US-VISIT by expanding the program to the 50 most highly trafficked land border ports of entry in the United States as directed under 8 U.S.C. 1365a(d)(2). This interim rule also expands the population of nonimmigrant aliens who may be subject to US-VISIT biometric data collection. Finally, this interim rule further defines the aliens who are exempt from US-VISIT biometric data collection requirements.

#### *A. The 50 Most Highly Trafficked Land Border Ports*

This interim rule authorizes the Secretary or his delegate to extend the US-VISIT biometric data collection requirements to land border ports of entry designated by notice in the **Federal Register**. Biometric data collection at time of entry will be implemented at the 50 most highly trafficked land border ports of entry by December 31, 2004. Biometric data collection at time of departure will be implemented at land border ports, through a limited number of pilot programs at locations designated by notice in the **Federal Register**. The classes of aliens required to provide biometrics are the same regardless of whether the application for admission takes place at an air, sea or land port of entry.

DHS expects to comply with the December 31, 2004 DMIA deadline for implementing the integrated entry exit system at the 50 most highly trafficked land border ports of entry. This compliance will include integration of all available arrival and departure data on aliens that currently exist in the electronic systems of DHS and DOS. This includes information from Advance Passenger Information System (APIS) and the Arrival/Departure Information System, (ADIS), as well as other systems related to air and sea inspections as well as law enforcement purposes. APIS and ADIS include information captured from passenger manifest data received from carriers and information on visa applicants and recipients received through the DataShare program with DOS.

At this time, DHS has not designated any land border ports of entry where biometric data collection is required. DHS will implement the biometric data requirements, taken at the time of alien arrival, at the 50 most highly trafficked land ports of entry within the next few months. Those land border ports will be

identified through notice(s) in the **Federal Register**. Staggering the implementation of US-VISIT, starting with a few initial locations, will enable DHS to test the system and identify areas where the process for collection of biometric information may be improved. Subsequent to implementation of biometric data collection at time of entry at the 50 busiest ports, DHS will implement biometric data collection at time of departure through a limited number of pilot programs at locations designated by notice in the **Federal Register**.

This interim rule is expected to have minimal effect on the overall inspection process or inspection times for travelers at land border ports of entry. DHS, through Bureau of Customs and Border Protection (CBP) personnel, have carefully monitored the impact of US-VISIT biometric data collection on the inspection of air and sea applicants for admission, and has determined that this process takes, on average, approximately 15 additional seconds during the inspection. Similar results are expected at land border ports of entry, given the population to whom this process will apply and how it will be conducted. However, DHS, through CBP, will continue to carefully monitor the effect of US-VISIT on overall inspection times at all locations at which US-VISIT has been deployed, and will make operational adjustments as necessary.

Similarly, this interim rule is expected to have little effect on trans-border commerce. Minimal additional time or effort will be spent in the US-VISIT process and no delays or interruptions of shipments are expected as a result of this rule.

DMIA requires that DHS implement US-VISIT at the 50 most highly trafficked land border ports of entry in the United States no later than December 31, 2004. This interim rule authorizes the Secretary of DHS to extend the US-VISIT biometric data collection requirements to the 50 most highly trafficked land border ports of entry and to identify the specific land border ports separately by notice in the **Federal Register**.

This interim rule makes no changes to current regulations that control the issuance and use of the Form I-94. All current valid Forms I-94 remain in effect. DHS will verify an alien's identity using biometrics at the time of issuance of a Form I-94, or at any time DHS determines such verification is necessary. The goal of the US-VISIT program, once fully implemented, is to verify an alien's identity using biometric identifiers upon each entry and

departure through any air, land, or sea port of entry.

The fee required under 8 CFR 103.7(b)(1) and 8 CFR 235.1(f) for the issuance of a Form I-94 at a land border port of entry will still be required. This interim rule does not change any of the fee requirements. As previously stated, this interim rule merely adds designated land border ports-of-entry as a location for the collection of biometrics upon the entry of aliens required by regulation to provide them. Multiple-entry Forms I-94 will still be issued as before, with no change in the fees.

#### *B. Inclusion of Visa Waiver Program Participants*

Pursuant to section 217 of the INA, the Secretary of DHS, in consultation with the Secretary of State, may designate certain countries as VWP program countries if certain requirements are met. Those requirements include, without limitation, (i) the rate of nonimmigrant visa refusal for nationals of the country, (ii) whether the government certifies that it has a program to issue machine readable, tamper-resistant passports that comply with ICAO standards, (iii) whether the country's designation would negatively affect U.S. law enforcement and security interests, and (iv) whether the government certifies that it reports to the United States on a timely basis the theft of blank passports. The statute also sets forth requirements for continued eligibility and, where appropriate, emergency termination of program countries. Nationals of VWP countries, who are otherwise admissible, may travel to the United States and be admitted in the B-1/B-2 categories without a visa for up to ninety days.

Travelers seeking entry to the United States through the VWP comprise nearly 50% of the total number of nonimmigrant aliens who apply for admission each year by air or sea. Individual travelers are limited by statute in both purpose and duration of visit, as well as other benefits potentially available to travelers holding visas. VWP applicants must also waive any right to appeal the admissibility determination or to contest, other than on the basis of an application for asylum, any action for removal of the alien.

DHS has determined that enrolling VWP aliens in the US-VISIT program will improve public safety, national security, and the integrity of the immigration process. As with any traveler to the United States, it is important to verify the true identity of the alien and to ensure that the alien is

admissible. Enrolling VWP travelers in US-VISIT reduces the risk that the VWP traveler's identity could be used by other individuals to enter the United States. By linking the alien's biometric information with the alien's travel documents, DHS reduces the likelihood that another alien could later assume the identity of an enrolled individual to gain admission to the United States. Since US-VISIT was initiated on January 5, 2004, the program has been very successful in identifying aliens whom the officer would not have known were inadmissible. Through June 2004, US-VISIT has prevented the admission of more than 196 persons traveling under non-immigrant visas that were inadmissible, including known or suspected criminals. Adding the VWP population to US-VISIT should result in additionally success in preventing criminal aliens from being admitted.

Although the Secretary of DHS may have determined that the rate of visa refusal for nationals of VWP countries is low and that the country's participation in the VWP program is consistent with U.S. law enforcement and security programs, the importance of identification verification and other security concerns require that VWP travelers be enrolled in US-VISIT.

Further, there is evidence that VWP passports are attractive to individuals seeking to avoid the security and immigration screening provided by the visa issuance process. Security concerns outside of identity fraud also have led DHS to the conclusion that enrolling VWP travelers in US-VISIT is warranted.

#### *C. Additional Classes of Aliens Affected by Changes to the January 5, 2004 Interim Final Rule*

##### 1. TECRO Aliens

In establishing diplomatic relations with the People's Republic of China (PRC) in 1979, the U.S. Government recognized the PRC as the sole legal government of China. Both sides agreed that, within this context, the people of the United States would maintain cultural, commercial, and other unofficial relations with the people in Taiwan.

The Taiwan Relations Act (TRA) (Pub. L. 96-8) provides the legal framework for the conduct of these unofficial relations. This law provides that the Taipei Economic and Cultural Representative Office (TECRO), a private organization, is responsible for the unofficial relations between the people of the United States and the people in Taiwan. In keeping with this

special status, Taiwan representatives of the TECRO, and their dependents, are added as an additional class of aliens exempt from the collection of biometric information under US-VISIT at this time. This interim rule now exempts certain officials of TECRO from US-VISIT, through amendments to 8 CFR 252.8(a)(2)(ii) and 235(d)(iv)(B).

##### 2. Alien Crewmembers

Pursuant to section 101(a)(15)(D) of the INA, an alien may be admitted into the United States temporarily to work as a crewmember. Current DHS regulations at 8 CFR 252.1(b) provide that crewmembers are examined under the provisions of 8 CFR parts 235 and 240. This interim rule clarifies that every alien crewman applying for landing privileges in the United States is subject to the collection of biometric information pursuant to 8 CFR 235.1(d)(1)(ii) and (iii).

##### 3. Mexican Nationals Who Present a Form DSP-150, B-1/B-2 Visa and Border Crossing Card (BCC)

Mexican nationals who travel to and from the United States may apply for a Form DSP-150, B-1/B-2 Visa and Border Crossing Card (BCC). Pursuant to 8 CFR 212.1(c)(1)(i), a visa and passport are not required of a Mexican national who is in possession of a BCC containing a machine-readable biometric identifier and who is applying for admission as a temporary visitor for business or pleasure from a contiguous territory. If the BCC traveler is applying for admission from other than a contiguous territory, he or she must present a valid passport. See 8 CFR 212.1(c)(2).

Prior to issuing a BCC to a Mexican national, DOS obtains fingerprints and a photograph from the individual and conducts a background check on the individual using biographic and biometric identifying information. Once the individual is approved, the fingerprints and photograph of the Mexican national are then embedded into the BCC. Upon admission to the United States, a CBP officer inspects the holder of a BCC to determine that he or she is the rightful bearer of the document.

Whether a BCC traveler is issued a Form I-94 Arrival/Departure Record at time of admission depends on how long the Mexican national will remain in the United States and where the Mexican national will travel while in the United States. Pursuant to 8 CFR 235.1(f)(1)(iii), if the Mexican national's admission will not exceed 30 days and the visit will be within 25 miles of the border, it is not required that the alien be issued a Form

I-94 Arrival/Departure Record. The distance restriction is increased to 75 miles if the Mexican national is admitted at a port of entry in the state of Arizona. See 8 CFR 235.1(f)(1)(v).

Pursuant to this interim rule, the Secretary of DHS or his delegate may require Mexican nationals who present a BCC at time of admission at a designated air, sea or land port of entry to provide fingerprints, photographs, or other biometric identifiers at time of entry into or departure from the United States. However, under 8 CFR parts 215.8(a)(2)(iii) and 235.1(d)(1)(iv)(C), the Secretaries of DHS and State may jointly exempt classes of aliens from the US-VISIT biometric data requirements. This interim rule constitutes notice that the Secretaries of DHS and State have jointly determined that the US-VISIT departure requirements in 8 CFR part 215.8(a)(1), and inspection requirements in 8 CFR 235.1(d)(ii), shall apply only to Mexican nationals for whom a Form I-94 is issued under 8 CFR 235.1(f)(1)(iii) or (v). This means that Mexican nationals who present a BCC at time of admission, who will stay within 25 miles of the border (75 miles if admitted at a port of entry in Arizona) and whose stay will be shorter than 30 days, are not subject to the US-VISIT biometric data collection requirements. The Secretaries of DHS and State have determined that this class of aliens should be exempt because the biometric data (fingerprints and photographs) of BCC travelers have already been captured by DOS at time of the BCC issuance, and the biometric photograph of the traveler on the BCC is compared to the facial appearance of the traveler upon admission. This exemption is temporary. DHS expects that the exemption will be phased out as US-VISIT capabilities and technologies improve.

Mexican nationals who present a BCC and who will travel beyond the geographic restrictions or remain in the United States for longer than 30 days are currently issued a Form I-94, Arrival/Departure Record and will now be subject to US-VISIT biometric requirements if they apply for admission at a designated air, sea, or land port of entry. If a BCC traveler is issued a multiple-entry Form I-94, Arrival/Departure Record, the traveler will be subject to US-VISIT biometric data requirements the next time the traveler is issued a Form I-94, Arrival/Departure Record.

#### IV. Comments and Changes to the January 5, 2004 Interim Rule

##### A. Summary of Comments

DHS received 21 comments on the January 5, 2004 interim rule. The commenters included representatives of the travel industry, including airports, airlines, and travel or transport associations. Other commenters included a national business association, a privacy organization, attorneys and an attorney association, two universities, an educational association, a personnel association, a trucking association, a manufacturer of smart cards, and a foreign government.

The following is discussion of the comments received and the Department's response.

##### 1. Comments Regarding Implementation of US-VISIT

DHS received several comments from the public praising the implementation of US-VISIT, both in terms of its value in improving the security of the United States and its minimal effect upon travel times and the public. Many of the comments specifically praised the program as having almost no impact on travel to and from the United States. As one commenter said: "The program has been implemented successfully at 115 airports and 14 seaports for entry. To date, [we] have received no reports of significant delays. In fact, the collection of the biometric data and the security checks seem to have been integrated almost seamlessly into the inspection process." A second commenter said "We commend US-VISIT and CBP on the generally smooth implementation of the US-VISIT program at 115 airports."

##### 2. "Good Cause" Exception to Initial Notice and Comment of the January 5, 2004 Rule

Several commenters expressed their concerns that DHS implemented US-VISIT at air and sea ports of entry by an interim rule without providing prior public notice or the opportunity to comment. As discussed in the January 5, 2004 interim rule, DHS implemented the initial phase of the US-VISIT program through an interim rule, with a request for public comment after the effective date, for two reasons: (1) The delay of the implementation of US-VISIT at air and sea ports to allow public comment would have compromised national security and thus been contrary to the public interest under the Administrative Procedure Act, 5 U.S.C. 553(b) and (d)(3), and (2) such delay would not have allowed the newly-formed Department to meet the

statutory deadlines for implementation of the exit-entry system under DMIA.

One commenter also stated that, because the January 5, 2004 interim rule was not published as a notice of proposed rulemaking, DHS should provide a sunset provision in the final rule. DHS cannot implement this request. US-VISIT was established by several statutory mandates. These statutes do not contain sunset provisions. Therefore, allowing US-VISIT to expire through a sunset provision implemented in a DHS regulation would be contrary to existing law and the intent of Congress in requiring the establishment and implementation of US-VISIT.

##### 3. Data Management Information Act (DMIA) and Task Force

One commenter objected to a statement in the **SUPPLEMENTARY INFORMATION** recommending that travelers maintain evidence of departure. The commenter stated that this recommendation violates the DMIA restriction on additional documentary requirements. The statement was made in recognition that some travelers may be concerned about evidence of a prior departure when they seek to re-enter. The statement is merely a recommendation made in the **SUPPLEMENTARY INFORMATION** and imposes no new documentary requirement on the traveler.

One commenter stated that US-VISIT should use the recommendations of the DMIA Task Force in implementing US-VISIT at land borders. The DMIA Data Management Improvement Task Force was a public/private group created by the provisions of DMIA and chartered by the Attorney General in 2002 to evaluate how the Attorney General could carry out the provisions of DMIA and improve the flow of traffic at airports, seaports, and land border ports of entry through: (1) Enhancing systems for data collection and data sharing, and (2) increasing cooperation between the public and private sectors, increasing cooperation among Federal agencies and among federal and state agencies, and modifying information technology systems. The Task Force members included the Departments of Homeland Security, Commerce, State, and Transportation, as well as several private sector organizations with knowledge of trans-border commerce.

The Task Force delivered two separate reports to Congress in 2002 and 2003 which made a series of recommendations, including one specifically aimed at the US-VISIT program, which was adopted. As recommended by the Task Force, the

deployment to land border ports will begin with pilots that will then be evaluated before additional deployments are made. As provided elsewhere in this rule, US-VISIT will be implemented at land borders in accordance with the requirements of DMIA statute and the DMIA taskforce recommendations have been reviewed accordingly. All of the Task Force reports are public and may be accessed electronically at <http://www.immigration.gov>.

One commenter stated that the DMIA Task Force should not have been disbanded. Under section 3(i) of DMIA, Congress provided authority for the termination of the Task Force to the Attorney General, now the Secretary of DHS. Through delegation to the chair of the Task Force, the Under Secretary for Border and Transportation Security, on January 27, 2004, the DHS Secretary terminated the Task Force as it had completed its mission and met the statutory requirements of DMIA. However, DHS also believes that the comment procedures of this interim rule and the January 5, 2004 interim rule allow the public to participate and have significant input into the continued development of US-VISIT.

#### 4. Monitoring and Evaluation of US-VISIT

One commenter stated that US-VISIT should implement a process to evaluate and monitor how the program is working. Another commenter stated that such an evaluation should be made within 6 months of implementation of the program.

On January 5, 2004, DHS implemented a strict reporting procedure to monitor the passenger arrival process at all US-VISIT designated locations and has evaluated the impact of US-VISIT biometric enrollment. DHS monitors all locations on a daily basis and makes the appropriate adjustments to field operations to minimize any adverse impacts. Analyses of data indicate that deployment of US-VISIT has had minimal impact on the passenger arrival and departure process. The data indicates that the entire process consumes no more than 15 seconds per affected passenger, on average, above the time already currently required in the inspections process. Overall, there was no significant impact upon the overall clearance times. DHS continues to monitor US-VISIT at all locations on a weekly basis to ensure that the facilitative aspects of its mission continue unimpeded, making modifications where necessary.

#### 5. Privacy Issues

One commenter representing a privacy organization raised several concerns. The commenter stated that US-VISIT should address how long information will be retained and that the program should develop guidelines for deleting records and expunging information when no longer relevant, to avoid "mission creep" (meaning using information for purposes beyond those defined by statute). The commenter also stated that the program should expunge data when the individual becomes a lawful permanent resident.

US-VISIT is currently using technology systems that have been employed by the former Immigration and Naturalization Service (now DHS) components for years. The existing legacy systems were created at different times and for different purposes, and the data within them are retained and disposed of based on those needs. Data usage and retention schedules are published for each of these systems. As US-VISIT matures and decisions are made regarding whether the existing systems will be integrated, modernized, and/or retired, the data retention periods for US-VISIT data will be reviewed and adjusted to reflect the redefined needs of DHS. DHS recognizes the importance of privacy rights and will further define the purpose of US-VISIT and the limitations on data collection, maintenance, and use through updates to the Privacy Impact Assessment.

The Privacy Impact Assessment (PIA) for US-VISIT lists the principal users of the data within DHS and notes that the information may also be shared with other law enforcement agencies at the federal, state, local, foreign, or tribal level, who, in accordance with their responsibilities, are lawfully engaged in collecting law enforcement intelligence information and/or investigating, prosecuting, enforcing, or implementing civil and/or criminal laws, related rules, regulations, or orders. This PIA is published on the DHS Web site at <http://www.dhs.gov/us-visit>.

Several commenters stated that US-VISIT must make it a priority to protect privacy and should declare specifically who has access to US-VISIT data. One of US-VISIT's primary goals is to safeguard the personal information that is being collected in a way that is responsible and respectful of privacy concerns. DHS is achieving this goal by implementing a comprehensive privacy program to ensure that personal information is protected from misuse and improper disclosure, and destroyed when no longer needed for its stated

purpose. The Privacy Officer for US-VISIT provides oversight to ensure that collected data is being handled in accordance with all applicable Federal laws, regulations and Departmental policy regarding privacy and data integrity.

While it is not possible for US-VISIT to list the names of the specific entities that may be given access to the data in the future, it should be noted that access is only provided on an official basis and in accordance with the system of notices required for records within the existing systems on which US-VISIT is based.

Several commenters stated that US-VISIT should establish procedures for correcting any errors and should address how long it will take to make any corrections. US-VISIT utilizes a three-step redress process for individuals to have their records reviewed and amended or corrected based on accuracy, relevancy, timeliness, or completeness. This process includes confirming that mismatches and other errors are not retained as part of an alien's record. The first opportunity for data correction occurs at the port of entry where the CBP Officer has the ability to correct manually most biographic-related errors such as name, date of birth, flight information and document errors. A Data Integrity Team sends biometric-related errors to US-VISIT for resolution. All of this process occurs without any action required by the individual.

If the individual still has questions about the travel record, he or she can send a written request by mail or telefax to the US-VISIT Privacy Officer, Steve Yonkers, at the following address: US-VISIT, Border and Transportation Security, Department of Homeland Security, Washington, DC 20528. Phone (202) 927-5200. Fax (202) 298-5201. The Privacy Officer will review the travel record, amend or correct it as necessary, and send a response to the traveler describing the action taken, within 20 business days of receipt. If the individual is not satisfied with the action taken, he or she can appeal to the Department Chief Privacy Officer, who will review the appeal, conduct an investigation, and make a final decision on the action to be taken. This redress policy is published on the DHS Web site at <http://www.dhs.gov/us-visit>. The US-VISIT Privacy Officer can also be contacted by e-mail at [usvisitprivacy@dhs.gov](mailto:usvisitprivacy@dhs.gov).

One commenter stated that US-VISIT should provide a receipt that the visitor had a "false positive" to protect the visitor in future travel. When visitors are processed through US-VISIT, the

fingerprints collected are checked against a biometric watch list for a possible match. If DHS determines that the match was a "false positive," no negative information is associated with the traveler history. This "false positive" will not affect future entries into the United States. That an individual may be a repeat "false positive" is possible, but not likely because the system automatically collects the highest quality fingerprints available with each new entry, reducing the possibility of a future erroneous match.

#### 6. Databases

Several commenters made statements about the US-VISIT database. One commenter stated that the Advance Passenger Information System (APIS) regulation, as proposed, requires more information than is presently provided to US-VISIT by the carriers. One commenter stated that the regulation should clarify whether US-VISIT is receiving the information described in the supplementary information section of the January 5, 2004, interim rule. Another commenter recommended that US-VISIT create an intelligence liaison office to consolidate the watch list databases to ensure accuracy. US-VISIT has the capability to receive and collect any information required by 8 CFR 231, although as the commenter noted, not all of the data elements enumerated in the January 5, 2004 interim rule supplemental information are currently being provided by the transportation carriers.

One commenter stated that databases need to be fully integrated and that the database systems from the three immigration-related bureaus should be integrated. Two commenters stated that multiple agencies should not be asking for the same or redundant travel information. One commenter stated a concern that as US-VISIT is expanded to other groups, the capacity of the database may not be adequate and that time necessary for database and watch list searches will delay the US-VISIT process.

Under US-VISIT, information systems associated with border inspections and security are being linked. Biometric and other information will be available to appropriate staff in CBP, the Bureau of Immigration and Customs Enforcement (ICE), the Bureau of Citizenship and Immigration Services (CIS), DOS consular officers, and other staff involved with the adjudication of visa applications at overseas posts, other DHS officers, appropriate officers of the United States intelligence and law enforcement community, and DOS

personnel and attorneys when needed for the performance of their duties.

Over time, US-VISIT will continue to integrate appropriate additional databases and ensure interoperability with other databases as appropriate. US-VISIT maintains a long-term vision that, working in conjunction with a prime integrator, will address these concerns, including redundant information requests. In addition, US-VISIT works closely with the National Institute of Standards and Technology (NIST), and DOS to ensure that the US-VISIT database has and maintains the ready performance and quality to hold and manage increasing data.

One commenter stated that frequent traveler programs should be utilized by US-VISIT. DHS currently utilizes several frequent traveler programs. As one example, DHS uses the INSPASS program at air ports of entry to facilitate frequent air travelers. DHS does not currently utilize a frequent-traveler program as part of US-VISIT, though classes of aliens who benefit from other programs (e.g. INSPASS) are currently exempt from US-VISIT. DHS will determine whether such programs will be used, and how they will be integrated with US-VISIT, as US-VISIT is expanded.

One commenter stated that more time is needed to develop the necessary infrastructure and technological capabilities and recommended that US-VISIT use small-scale operations before going nationwide. That commenter stated that NSEERS (discussed in section N, below) and SEVIS (the Student and Exchange Visitor Information System, designed to track aliens in the F, J, and M visa classifications who are attending an educational program in the United States) programs have included data entry errors, system malfunctions, and leakages of data. US-VISIT is based on existing, functional systems. The successful nationwide implementation of US-VISIT, as required by statute, demonstrates that small-scale operations were not necessary. Where DHS is still developing technologies (e.g. exit capabilities), DHS is piloting different methodologies in certain areas before nationwide expansion (*see Federal Register* notices at 69 FR 482 (January 5, 2004) and 69 FR 46556 (August 3, 2004)).

One commenter stated that SEVIS is flawed and indicated that US-VISIT should not use SEVIS to determine status or background. SEVIS has been very responsive to meeting stakeholder and users requirements and continues to make enhancements. US-VISIT receives information from many systems; no

single system is relied upon for final determinations.

One commenter stated that the interim rule does not include a list of all the law enforcement databases that will be used. DHS specifically did not include a detailed list of these databases because of their sensitive nature relating to law enforcement and intelligence.

One commenter stated that IDENT (DHS' automated fingerprint identification tool) checks at consular offices and by US-VISIT should get priority over other requests for IDENT checks. US-VISIT and consular office IDENT checks are prioritized to meet the required response time for each type of check. Another commenter stated that DHS should create a separate US-VISIT biometric database instead of using IDENT, because "[by] lumping US-VISIT enrollees in with criminals, we are sending the message that aliens are criminals." DHS is not sending such a message, instead, DHS is using its available existing resources to ensure criminals are quickly identified and, if appropriate, denied entry to the United States.

#### 7. Right to Counsel

One commenter stated that arriving aliens should have the right to counsel, stating that the US-VISIT program increases the chance for erroneous admission decisions and reinforces the need for the availability of an alien's counsel at a port of entry.

This recommendation will not be adopted at this time. The current DHS regulation at 8 CFR 292.5(b) reads, in part, "\* \* \* nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody." DHS does not believe that the introduction of US-VISIT requires a change to the existing regulation because US-VISIT does not significantly alter the inspection or admission process for aliens.

#### 8. Inspecting Officers

Two commenters stated that individuals accessing US-VISIT information must be trained to interpret data correctly. Another commenter stated that DHS should establish an immigration expertise officer or specialist officer at the ports-of-entry, and suggested that the specialists should be coordinated by the Offices of Chief Counsel for BCIS and the Principal Legal Advisor for ICE. The commenter stated that these steps

would help to ensure the accuracy and consistency of immigration decisions.

US-VISIT has an aggressive deployment schedule which involves training, new technology, and new primary inspection procedures. Concurrent to the US-VISIT deployment, DHS initiated a cross-training program for all officers who perform the inspection function. A training curriculum was developed specific to US-VISIT which focused on using the new US-VISIT technology, as well as the additional systems used by the inspecting officers to process travelers, along with operational procedures. Instruction was completed prior to the launch of US-VISIT and will continue and expand as US-VISIT expands. DHS is confident, therefore, that the training provided will allow each CBP officer to have and maintain proficiency in current immigration law and procedure.

#### 9. Secondary Inspections

One commenter stated that US-VISIT should provide safeguards for secondary inspections, such as limiting the use of handcuffs and providing water. The existing procedures, which apply to secondary inspection, are designed to ensure the safety of the traveling public and our officers while ensuring that detained persons receive proper treatment. DHS does not believe that the introduction of biometric data collection as part of the inspection process necessitates a change to existing regulations and procedures governing secondary inspection and detention of certain aliens.

Another commenter stated that US-VISIT should have procedures to expedite aliens referred to secondary inspection by US-VISIT. DHS has promulgated new standard operating procedures for CBP officers responsible for addressing applicants referred to secondary inspection due to US-VISIT. The goal is to inspect and facilitate legitimate travelers as quickly as possible within current rules and regulations.

#### 10. Resources and Staffing

Several commenters addressed the need to provide adequate staffing and equipment to avoid long lines, the need to continue to meet the 45-minute clearance requirement, and the need to have mitigation strategies to avoid delay. The Department shares the public's concerns that US-VISIT not become an impediment to legitimate travel and trade. Ensuring that an impediment does not occur is one of US-VISIT's primary goals. Accordingly, it is a DHS priority to provide optimal

staffing and to minimize process wait times. DHS has procedures already in place for adequate staffing during peak processing times. Analyses of data indicate that there has been no significant increase in passenger wait times attributed to US-VISIT and that the US-VISIT process has been, for the most part, absorbed into the normal standard operating procedure. CBP will continually monitor inspection processing to reduce or avoid delays. Additional technical staff are being hired and assigned to key US-VISIT ports-of-entry to monitor the equipment to ensure that it remains in working order. All equipment and system issues are monitored closely and a central help desk is available to resolve any problems. If necessary, additional equipment is available to be deployed on short notice.

One commenter stated that employee vacancies should be filled so that adequate staffing is maintained. Employee vacancies continue to be filled through an ongoing Human Resources program. In addition, in Spring 2004, legacy Customs and Immigration Inspectors were converted to CBP Officer positions and cross-trained. As a result of this cross-training, port directors now have additional resources to maximize the staffing capabilities and flexibility at ports of entry. These resources will be used to ensure that all ports of entry are adequately staffed.

One commenter stated that the program should establish exclusive lines for travelers not subject to US-VISIT and should recalculate transfer times to account for US-VISIT. Queue management has been a long-established CBP practice. Because there has been no significant passenger processing delay, no changes to the inspection and transfer lines are required at this time.

#### 11. Use of Form I-94, Arrival/Departure Record

Several commenters stated their views on the use of the Form I-94, Arrival/Departure Record. One commenter stated that the Form I-94 should be modified to include an electronic bar code to provide an entry/departure record, and that the Form I-94 should be usable for reentry to ease consular burden. Another commenter stated that the Form I-94 should interface with the computer systems. One commenter stated that the privacy of the Form I-94 should be preserved. Three commenters stated that the Form I-94 should be discontinued, with one of those commenters stating that US-VISIT should rely on APIS (Advance Passenger Information System)

information rather than using Form I-94, and another commenter stating that the Form I-94 data was duplicative of the APIS information.

DHS is reviewing the continued use of the paper Form I-94, and is considering many of the enhancements suggested by the commenters. In addition, in conjunction with a passport, the Form I-94 currently serves an important purpose: Evidence of lawful entry and status after admission to the United States, especially in instances where access to online systems cannot be achieved. The current Form I-94 will continue to be utilized until alternatives and automated systems are developed to collect and provide the same information and have passed quality control and field-testing.

#### 12. Eligibility for Re-entry

Several commenters addressed re-entry and the impact of the exit component on eligibility for re-entry. One commenter stated that US-VISIT should not rely on US-VISIT exit information as the basis for any adverse actions until the system is fully applied. Another commenter stated that US-VISIT should provide outreach to the public on the consequences of overstay and re-entry.

US-VISIT has taken many steps to inform the public of their responsibility to report their exit when departing from a designated port of departure. Until US-VISIT is fully implemented, DHS and DOS will review all evidence surrounding an alien's prior travel to, and departure from, the United States to determine whether the alien complied with the terms of his or her admission. Information from US-VISIT, including departure information, will be one factor relied upon by consular officers and inspectors when determining whether the alien complied with the terms of his or her admission.

In an effort to fully inform the public of the benefits and responsibilities associated with the US-VISIT program, the US-VISIT Outreach Campaign was established. The campaign includes a comprehensive package of materials and media and stakeholder outreach to heighten awareness about US-VISIT and its role in enhancing the security of U.S. citizens and visitors while facilitating legitimate travel and trade.

The US-VISIT program produces videos, pamphlets and exit cards that are made available to the public and that explain the responsibility of a visitor to 'check out' before departing the United States. The video can be seen in-flight on airlines and on-board at cruise lines at appropriate points. The pamphlets are available at U.S.

consulates and on-line at [www.dhs.gov/us-visit](http://www.dhs.gov/us-visit). Each of these cards clearly states: "Visitors with visas who depart from a port where the departure confirmation system is in place must comply. The exit confirmation will be added to the visitor's travel records to demonstrate compliance and record the individual's status for future visits to the United States."

One commenter stated that US-VISIT should simplify procedures for aliens making subsequent trips. DHS is not altering the process for frequent travelers at this time. Part of US-VISIT's purpose is to identify aliens through biometric identifiers at the time of each admission and departure. The collection of biometrics is therefore required upon each visitor's entry and exit. DHS believes, however, that the steps required are simple enough such that the program will facilitate legitimate travel through an accurate determination of a traveler's immigration status or admissibility.

One commenter stated that the rule should clarify that aliens seeking reentry may receive a section 212(d)(3) of the Act waiver for failing to comply with departure requirements because of emergent circumstances. The January 5, 2004 interim rule states that an alien who does not comply with the departure requirements may be inadmissible under section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9). The commenter is correct that, for nonimmigrants, violations of 212(a)(9)(B) inadmissibility grounds may be waived under section 212(d)(3) of the Act, 8 U.S.C. 1182(d)(3). That interim rule did not alter an alien's eligibility to apply for a waiver under section 212(d)(3) of the Act. DHS has determined that it is not necessary to clarify the waiver authority in the codified text of the regulation.

### 13. Biometrics

Several commenters addressed the use of biometrics. One commenter stated the need to define better the rule's narrative statement about possible use of "other biometric identifiers." The International Civil Aviation Organization (ICAO) has stated that facial images are the mandatory biometric required for use in biometric passport applications. The ICAO standard indicates that nations may use fingerprints and iris scans in addition to facial images. US-VISIT currently collects fingerprints and facial images for use in its identity verification process, utilizing the fingerprints for the primary automated verification component. As technology evolves and international standards are refined, US-

VISIT will evaluate its use of biometric information. DHS's goal is to collect enough biometric information to ensure accuracy, while minimizing the burden and intrusion upon the privacy of travelers.

Another commenter stated biometrics in foreign documents should be interoperable with US-VISIT. US-VISIT anticipates the foreign nations will utilize the guidelines established by the ICAO and International Standards Organization for biometric data. Biometric data stored in these formats are interoperable. As nations begin to employ this standard, DHS will ensure that its systems are interoperable with international biometric standards.

One commenter stated that some persons object to fingerprint collection as intrusive. The collection of fingerprints is an integral part of national security efforts. DHS recognizes that some persons could find it intrusive to provide fingerprints, but the unique ability to compare fingerprints against a biometric watch list of known terrorists, criminal offenders, and immigration violators is essential to national security. Through continued outreach and education, DHS is confident that any perceived stigma associated with providing biometric information will be minimized.

One commenter asked whether there is any possibility other biometrics would be collected. Currently, only fingerprints and facial images are envisioned as part of US-VISIT. One commenter asked for an explanation of the accommodations that will be made for visitors who cannot provide biometrics. DHS has implemented procedures for handling persons who cannot provide adequate fingerprint images from a specific finger, utilizing a specified order of taking the fingerprints. If a traveler is unable to provide any adequate fingerprints (e.g. due to a physical disability), DHS may rely upon other biometric identifiers, including comparison with the facial image.

One commenter recommends that US-VISIT use "smart cards." The ICAO-compliant biometric passport, which VWP countries are required to implement over the next few years, is essentially a smart card. US-VISIT intends to use this document as part of the inspection process to verify identity for persons traveling under VWP. For visa holders, the visa will not contain a chip, but instead serves as a "pointer" to information already residing in a central database. There is no need for the additional expense and process involved in producing an e-visa.

One commenter recommended the continued use of two-finger fingerprints and for DHS to not require ten fingerprints. DHS currently utilizes a two-finger scan to verify whether the alien applying for admission is the same individual to whom the DOS issued the nonimmigrant visa. DHS also utilizes a two-finger scan to determine whether the alien is identified in any watch lists or lookout databases. As the US-VISIT database grows, DHS and other federal agencies will assess the need to expand to a greater number of fingerprints in order to maintain its ability to identify criminal and other inadmissible aliens, while minimizing the number of multiple hits or false hits.

### 14. Crewmembers

Three commenters stated that foreign crewmembers should not be included in US-VISIT. One commenter stated that crewmembers already go through a series of background checks as part of their jobs and that requiring crewmembers to comply with US-VISIT, because of the time involved to comply, would place foreign carriers at an unfair disadvantage with carriers whose crew were primarily or exclusively U.S. citizens. Alien crewmembers are examined pursuant to the provisions of 8 CFR 252.1(b), which provides that alien crewmen are examined in accordance with the provisions of 8 CFR parts 235 and 240. The classes of aliens exempt from US-VISIT, excluding those that are age dependent, are for the diplomatic corps and for foreign nationals traveling to the United States on official business as representatives of NATO. These exemptions are based on longstanding protocols, reciprocal agreements and treaties. DHS sees no valid reason to exempt crew visa holders from the US-VISIT process. While it may be true that some airline crews go through a series of criminal background checks in order to maintain employment, this process is not equivalent to what the US-VISIT program provides. For example, US-VISIT enhances DHS' ability to ensure that the person providing the biometric is the same person who received the visa. With regard to increasing the time spent by crewmembers complying with US-VISIT, given the short time frames for inspection, DHS has seen no evidence that this process would place the foreign carriers at a competitive disadvantage. To clarify that alien crewmen are subject to US-VISIT, DHS has amended 8 CFR 252.1(c).

### 15. NSEERS Registration

One commenter stated that the rule needs clarity on whether National

Security Entry-Exit Registration System (NSEERS)<sup>2</sup> aliens are also subject to the US-VISIT requirements. At present, because biometric and biographic information is collected from NSEERS registrants at time of admission, they are not currently required to provide additional biometric data pursuant under the US-VISIT program. The arrival and departure information of NSEERS registrants will be integrated into the entry-exit system.

#### 16. Additional Coverage of Classes of Aliens under US-VISIT

Several commenters expressed concern as to what other classes of travelers may be subject to the provisions of the January 5, 2004 interim rule and whether biometric collection will be required at all ports-of-entry. The statutory authority granted to the Secretary is to implement an automated entry-exit system that integrates electronic arrival and departure information for all aliens and that the system be deployed to all ports of entry by specific legislated dates. This interim rule is limited to the ports of entry that will be identified by notice in the **Federal Register**. The need for full deployment to all border crossings is requisite for a fully successful entry/exit system, therefore it should be expected that biometric collection and verification capabilities will be expanded to all ports of entry.

One commenter expressed concern that, as additional categories of alien visitors or additional biometrics are required, US-VISIT will not be able to meet clearance times. As stated previously, facilitating legitimate travelers is a primary DHS goal. DHS will continue to monitor the process to reduce or eliminate processing delays as US-VISIT expands to include additional categories of alien visitors (including the current expansion of US-VISIT to include VWP travelers) and additional ports of entry. While a statutorily mandated clearance time no longer exists, DHS takes very seriously its goal to facilitate the legitimate traveler, and as previously explained, DHS has taken extensive steps to ensure minimal impact due to this important security initiative. DHS further asserts that, once fully functional, US-VISIT may actually serve to expedite the processing of travelers by providing timely information demonstrating prior compliance with terms of admission.

<sup>2</sup> 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.

Another commenter states that the Mexican "laser visa" (also known as Border Crossing Card, or DSP-150) holders should be exempt from US-VISIT. This interim rule addresses this issue in full in Part III of this Supplemental section.

#### 17. Outreach, Consultation, and Public Information

Several commenters stated that US-VISIT should include extensive outreach to the public, including information on the consequences of overstay and re-entry, the exit requirements, and advising travelers abroad of US-VISIT before they commence travel.

As stated earlier in the section concerning re-entry, US-VISIT has launched an extensive outreach campaign, designed to inform and educate domestic and international audiences about US-VISIT. This campaign includes comprehensive materials and media and stakeholder outreach to heighten awareness about US-VISIT and its role in enhancing the security of U.S. citizens and international visitors while facilitating legitimate travel and trade.

The Outreach Team has created a strong brand for US-VISIT, including logo, tagline, graphics, and an overall look and feel that makes the program easily recognizable to international travelers. US-VISIT outreach materials are being developed in multiple languages, including English, Spanish, Portuguese, Japanese, Mandarin, Korean, Arabic, Haitian/Creole, Russian, Polish, Hebrew, Ukrainian, Vietnamese, French and German. The campaign currently includes the following materials: An in-flight animated video; an informational brochure, in print and electronic versions; boarding cards; airport posters and other signage; exit cards; video public service announcements; tool kits and press kits.

The Outreach Team has worked with the media to carry information about US-VISIT to critical constituents. Ongoing media relations activities include: editorial board briefings with selected domestic and foreign press, daily media monitoring and analysis, digital video conferences and other briefings with foreign press, and briefings at the New York and Washington Foreign Press Centers and at other selected events to spotlight the US-VISIT technologies and simple, fast procedures for travelers.

The Outreach Team has created a comprehensive relationship management system to keep all major stakeholders aware, informed, and educated about ongoing developments,

and to assure US-VISIT responsiveness to their needs and interests.

In addressing outreach efforts, commenters stated that US-VISIT should consult with foreign governments and clarify the different requirements for inspections of those travelers with nonimmigrant visas and those who are inspected under the VWP. US-VISIT meets regularly with DOS to coordinate and discuss any changes in policy for a particular country or group of countries. US-VISIT meets regularly with Canada and Mexico to discuss immigration policies and procedures. Since this interim rule adds VWP applicants to US-VISIT, we will continue to coordinate and explain the requirements of US-VISIT with affected foreign governments.

One commenter stated that reports were received that persons were "stared at" by those travelers who were not subject to US-VISIT. The outreach program includes information on which persons are not subject to US-VISIT. With continued outreach, any unfavorable perception on the applicability of US-VISIT should decrease or be eliminated.

Another commenter stated that US-VISIT has been applied to persons not subject to US-VISIT, and that such errors need to be rectified. DHS is committed to ensuring that US-VISIT requirements are applied to the correct population of travelers. Recently, a US-VISIT program team has reviewed data to determine whether data has been collected from travelers not subject to the biometric data requirements and, if so, whether that data should be removed. DHS will continue to conduct such data reviews and correct any issues that arise.

#### 18. Law Enforcement and Intelligence Capabilities

A commenter stated that there is nothing inherent in US-VISIT that will lead law enforcement to identify, locate and remove individuals in the United States who are engaged in terrorism or unlawful activities, and that a variety of other means is needed to enhance intelligence. Currently, biometric identifiers used by US-VISIT provide the capability to verify an alien's identity and to authenticate his or her travel documents. Individuals attempting to enter the United States fraudulently using another identity will be intercepted using biometrics and removed from the United States prior to being admitted. 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. However, as DHS receives new information concerning individuals who are risks to national security, US-VISIT will be able to ascertain whether those individual aliens are present within the United States, thereby providing a valuable law enforcement and national security tool.

Another commenter stated that US-VISIT needs procedures for detecting overstays. ICE has established a compliance unit that monitors entry-exit data available through US-VISIT, the National Security Entry-exit System (NSEERS), and other systems; analyzes overstay data; and targets individuals for field investigation. Through US-VISIT, ICE will be better able to identify aliens who overstay their period of authorized admission.

One commenter stated that DHS should not use US-VISIT as a substitute for increasing intelligence capacity. US-VISIT was not intended to supplant the existing roles of the nation's intelligence community. It was designed to meet the Congressional mandate for a system to both record the entry and exit of those individuals traveling to the United States, and to verify the identity of those individuals.

The principal law that mandates the creation of an automated entry-exit system that integrates electronic alien arrival and departure information is the DMIA. DMIA authorizes the Secretary of DHS, 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, the entry-exit system component must share information with other systems as 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. While the system must be interoperable and shared with other Federal law enforcement officials, neither the underlying laws nor any rulemaking mandates that US-VISIT serve as a substitute for increasing intelligence capacity.

#### 19. Fees, Costs, and Fines

One commenter opposed the suggestion in the supplementary information of the rule that fees may have to be raised to cover biometric costs. Pursuant to section 286 of the INA, DHS has the authority to establish fees at a level needed to cover program costs associated with the inspections of

persons at air, land and sea ports of entry. If the determination is made that a change in fees is required, DHS will implement such change in fees pursuant to the applicable requirements of the APA (5 U.S.C. 553).

One commenter stated that airlines could be subject to costs for returning illegal aliens. Another commenter requested that the rule clarify that airlines will not be subject to fines if aliens refuse to provide biometrics. Two commenters stated that airlines should not be penalized if aliens are denied re-entry because of a failure to comply with US-VISIT exit requirements. At this time, there is no change to pre-existing regulations and procedures regarding the responsibility of transportation carriers. Carriers remain responsible for the removal of applicants who are determined to be inadmissible.

However, DHS recognizes that there will be circumstances where an alien will be deemed to be inadmissible ultimately due to the implementation of US-VISIT and where the carrier could have had no prior knowledge of the alien's admissibility. An example, as provided by the commenter, is if an alien with a valid visa and passport refuses to provide biometric information upon entry. However, sections 273(c) and (e) of the INA provide for remittance, reduction, or outright waiver of any fines by the Secretary of DHS in situations where the carrier did not know, and could not have found with reasonable diligence, that an alien was inadmissible; or when the carrier screens all passengers in accordance with established procedures; or where other circumstances exist that would justify a remittance, reduction, or waiver of any fines. In making these determinations, DHS will weigh very heavily the ability of the carriers to foresee an alien's inadmissibility as it relates to US-VISIT.

#### 20. Aliens in a Period of Stay Pursuant to a Pending Benefit Application

One commenter asked how DHS would handle aliens who left the United States after their initial period of admission expired, but otherwise complied with all aspects of US-VISIT and who had a pending benefit application at the time of departure. Pursuant to CIS policy, the timely and nonfrivolous filing of certain benefit applications will toll unlawful presence time from accruing until the adjudication of that benefit application.

As mentioned earlier, US-VISIT is an interoperable system, which can access data from other DHS systems, including the CIS system responsible for tracking

immigration benefit applications. Thus, aliens who fall under this scenario described above will not be adversely impacted by US-VISIT, since the US-VISIT system will have access to the CIS benefit processing information.

#### 21. Land Border Ports-of-Entry

Although the January 5, 2004 interim rule did not implement US-VISIT at land borders, three commenters discussed US-VISIT land border implementation in their comments. One commenter emphatically noted "we wish to make unequivocally clear that the circumstances of travel at land borders are monumentally different than at air and seaports and the hurdles are immeasurably higher." The commenter also expressed concern that DHS may not be able to meet the DMIA December 31, 2004 deadline unless DHS implemented systems that were not adequately tested, and that DHS should request that Congress provide additional time for implementing US-VISIT at land borders.

DHS recognizes that some of the challenges associated with implementing US-VISIT at land borders are potentially more complex than at air and sea ports of entry. Therefore, DHS is taking measured steps in land border implementation. For instance, the systems which encompass the US-VISIT system will have been operational for various periods of time prior to being used at land border ports of entry. Therefore, these systems have been adequately tested in an operational setting and DHS has gained proficiency in their use. DHS expects that the experience it has gained from implementing US-VISIT at air and sea ports of entry will allow it to implement US-VISIT at land ports of entry in an efficient manner.

DHS has been working to implement US-VISIT requirements at the 50 most highly trafficked land borders within the timeframe required under DMIA. As highlighted recently in the 9/11 Commission Report, there is an immediate security need to implement this phase of US-VISIT as soon as possible. Therefore, DHS will not be seeking additional time from Congress to expand US-VISIT to land borders. The implementation of US-VISIT at the 50 most highly trafficked land borders in the United States is discussed in greater detail in Section III A above.

#### *B. Solicitation of Public Comment on the Operation of US-VISIT to Date and the Expansion of US-VISIT Pursuant to This Interim Rule*

As stated previously, DHS places a great deal of importance on input from

the public on the performance and implementation of the US-VISIT program. Accordingly, DHS is soliciting comments from the public on all aspects of the current US-VISIT program, and any changes to the program as a result of this interim rule. DHS also invites comments on the implementation of the US-VISIT exit pilot programs. The pilot programs introduced three different methods of collection of identifying information pursuant to US-VISIT. DHS invites comments on the existing methods of collection of information, the methods considered and rejected by DHS (as discussed in Section II B above and in the **Federal Register** Notices published at 69 FR 482 (Jan. 5, 2004) and 69 FR 46556 (Aug. 3, 2004)), and suggested alternative methods for collection of biometric, biographic, or other identifying information under US-VISIT.

The comment filing process will use the standard procedure and instructions for filing are included at the beginning of this regulation. The comment period will be open until November 1, 2004. DHS also notes there is no plan to implement US-VISIT biometric data collection at any land border prior to the closing date for comments. Accordingly, as mentioned earlier in this supplemental section, the public will have an opportunity to comment on all land border issues prior to any US-VISIT land border implementation.

## V. Regulatory Requirements

### A. Good Cause Exception for an Interim Final Rule

Implementation of this rule without notice and the opportunity for public comment is warranted under the "good cause" exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b). The expansion of US-VISIT to the 50 most highly trafficked land borders and inclusion of aliens traveling under VWP are necessary to strengthen the ability of the United States to detect and deter aliens seeking admission into the United States who may not be lawfully admissible due to criminal records or suspected involvement in, or ties to, terrorist activities. Thus, this interim rule is integral to strengthening the security of the United States. Further, this interim rule will assist in meeting the goals and recommendations of the 9/11 Commission. Therefore, delay of the publication and effective date of this interim rule to allow for prior notice and comment would be impracticable and contrary to the public interest under 5 U.S.C. 553(b).

The immediate implementation of this second phase of US-VISIT will allow for the collection and comparison of biometric, biographic and other identifying information from aliens seeking admission into and departing from the United States through land borders. Issuing this interim rule before obtaining public comment is necessary to enhance the government's ability to identify persons who may pose a threat to homeland security.

Further, this interim rule will authorize DHS to obtain biometric information from persons traveling without visas under the VWP. Enrolling VWP travelers in US-VISIT will allow DHS to conduct biometric-based checks at time of a VWP traveler's application for admission into the United States. From a security standpoint, biometric checks are superior to biographic information checks. First, there are often a series of the same name in database checks, which can lead to confusion or mistaken identity, leading to time-consuming corrections. Second, biometric identifiers reduce the potential for fraudulent use of admission documentation.

Enrolling VWP travelers in US-VISIT freezes the traveler's identity and ties his or her identity to the travel document presented at time of initial admission. By making this link, US-VISIT greatly reduces the risk that the VWP traveler's identity could subsequently be used by another traveler seeking to enter the U.S. The biometric element provided by US-VISIT ensures that the alien is in fact presenting his or her own passport at the time of admission. As mentioned above, this biometric requirement helps to eliminate a common method of immigration fraud: assuming the identity of another by using their passport. Increasing the number of ports of entry where these checks are conducted, from air and sea to land border ports of entry, greatly increases the benefits of the process.

As discussed in Section II A above, since its implementation in January 2004, US-VISIT has proven that the use of biometrics to check identity and background is a highly effective law enforcement tool. US-VISIT has already prevented 196 criminal aliens from entering the United States, even though the program is currently operating on a limited basis. Expanding the classes of aliens subject to US-VISIT to VWP aliens immediately should result in additional aliens being identified on "lookout" lists being prevented admission or arrested as fugitives or wanted criminals. Further, expanding the program to include the major land

border ports-of-entry should result in even more "hits." Accordingly, expanding both the classes of aliens subject to US-VISIT, as well as the location of ports where US-VISIT will be implemented, will have a considerable and positive effect on national security. Any delay in the implementation of this interim rule to allow for public comment may increase the opportunity for aliens who may otherwise not be admissible to the United States, due to suspected terrorist affiliations or criminal records, to enter the United States using false identifies, and false, fraudulent or stolen passports or other travel documents.

Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to make this interim rule effective 30 days following publication in the **Federal Register**, before closure of the 60 day public comment period. DHS nevertheless invites written comments on this interim rule, and will consider any timely comments in preparing a final rule.

DHS also finds that good cause exists under the Congressional Review Act, 5 U.S.C. 808, to implement this interim rule 30 days after publication in the **Federal Register**.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). Because good cause exists for issuing this regulation as an interim rule, no regulatory flexibility analysis is required under the RFA. Nonetheless, DHS has considered the impact of this rule on small entities and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). There is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

### C. Executive Order 12866

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), requires a determination whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and subject to the requirements of the

Executive Order. DHS has determined that this interim rule is a "significant regulatory action" under Executive Order 12866, section 3(f) because there is significant public interest in issues pertaining to national security. Accordingly, this interim rule has been submitted to the Office of Management and Budget (OMB) for review and approval.

DHS has already performed a preliminary analysis of the expected costs and benefits of this interim rule. The anticipated benefits of this rule include: (1) Improving identification of travelers who may present threats to public safety and the national security of the United States through use of biometric identifiers; (2) enhancing the government's ability to match an alien's fingerprints and photographs to other law enforcement or intelligence data associated with identical biometrics; (3) improving the ability of the United States to identify individuals who may be inadmissible to the United States; (4) improving cooperation across international, Federal, State and local agencies through better access to data on foreign nationals who may pose a threat to the United States; (5) improving facilitation of legitimate travel and commerce by improving the timeliness and accuracy of the determination of a traveler's immigration status and admissibility; (6) enhancing enforcement of immigration laws, contributing to the increased integrity of the system of immigration in the United States, including the collection of more complete arrival and departure information on VWP travelers and aliens who seek to enter the United States through a land border port of entry; (7) reducing fraud, undetected impostors, and identity theft; and, (8) increasing integrity within the VWP program, through better data collection, tracking, and identification, allowing better compliance monitoring through increased and more accurate data.

The costs associated with implementation of this interim rule for travelers not otherwise exempt from US-VISIT requirements include an increase of approximately 15 seconds in inspection processing time per applicant over the current average inspection time of one minute, whether at a land, air, or sea port-of-entry. No significant difference is anticipated in the processing of an alien traveling with a visa as compared to a traveler without a visa under VWP.

DHS anticipates that, by December 31, 2005 when US-VISIT is required to be implemented at all land border ports of entry in the United States, approximately 3.2 million

nonimmigrant applicants for Form I-94 issuance could be affected at the designated land ports-of-entry. DHS, when conducting a cost-benefit analysis for the January 5, 2004 interim rule, estimated that the time required to obtain the biometric information required under US-VISIT was approximately 15 seconds per person. Since the implementation of US-VISIT at air and sea ports on January 5, 2004, DHS has not received reports of average processing times greater than 15 seconds nor any significant delays for travelers resulting from the collection of biometric information under US-VISIT. The limited 15 second processing time was not expected to cause significant delays for travelers at air or sea ports because persons not required to provide biometrics (e.g. U.S. citizens, lawful permanent residents, and visa-exempt non-immigrants) generally are routed through different inspection lines, thereby easing any impact of the biometric collection process. Because the same biometric information will be obtained at land border ports of entry, through a similar secondary inspection process, DHS does not anticipate any increase in the 15 second processing time or any significant delay for travelers at land border ports of entry in the United States.

In addition, over time, the efficiency with which the process is employed will increase, and the process can be expected to improve further. While DHS does not anticipate longer wait times at land border ports of entry due to the collection and processing of biometric information under US-VISIT, DHS has developed a number of mitigation strategies, not unlike those already available to CBP under other conditions that result in backups. DHS, while not anticipating significant delays for travelers, will nevertheless develop procedures and strategies to deal with any significant delays that may occur through unanticipated and unusually heavy travel periods.

The addition of aliens traveling under the VWP was anticipated in the calculation of costs and benefits for the implementation of US-VISIT at air and sea ports pursuant to the January 5, interim rule. DHS estimated that 13 million aliens traveling to the United States through air or sea ports under VWP would be affected under US-VISIT. The number of aliens traveling through the 50 most highly trafficked land border ports of entry in the United States is estimated to be 209 million, but only slightly over 3 million will be required to obtain an I-94, either as a nonimmigrant alien with a visa or a Mexican national with a DSP-150 BCC

seeking admission in the B-1/B-2 category. Thus, as a result of this rule, only approximately 3 million aliens annually seeking admission to the United States at a land border ultimately will be subject to US-VISIT requirements. DHS does not believe that the addition of VWP travelers or the 50 most trafficked land borders to US-VISIT will affect the average processing times or result in significant travel delays.

The additional costs to the Government and the public to implement the requirements of this rule are approximately \$155 million for all 50 ports during fiscal year 2004, or approximately \$3.1 million at each of the ports. These expenditures are required to upgrade the information technology hardware (i.e. desktop hardware and peripherals, upgrading local and wide area networks) at the affected ports.

#### *D. Executive Order 13132*

Executive Order 13132 requires DHS 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." Such policies 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."

DHS has analyzed this interim rule in accordance with the principles and criteria in the Executive Order and has determined that this interim rule would not have a substantial direct effect 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. Therefore, DHS has determined that this interim rule does not have federalism implications. This interim rule provides for the collection by the Federal Government of biometric identifiers from certain aliens seeking to enter or depart from the United States, for the purpose of improving the administration of federal immigration laws and for national security. States do not conduct activities with which the provisions of this specific rule would interfere.

#### *E. Executive Order 12988*

This interim rule 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, before proposing legislation or promulgating regulations,

to determine the impact of those proposals on civil justice and potential issues for litigation. The Order requires that agencies make reasonable efforts to ensure the regulation clearly identifies preemptive effects, effects on existing federal laws and regulations, identifies any retroactive effects of the proposal, and other matters. DHS has determined that this regulation meets the requirements of Executive Order 12988 because it does not involve retroactive effects, preemptive effects, or other matters addressed in the Order.

#### *F. 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 requires DHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome option that achieves the objective of the rule. Section 205 allows DHS to adopt an alternative, other than the least costly, most cost-effective, or least burdensome option if DHS publishes an explanation with the final rule. This interim 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, DHS is not required to prepare a written assessment under UMRA.

#### *G. Small Business Regulatory Enforcement Fairness Act of 1996*

This interim rule is a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804, as this interim rule will result in an annual effect on the economy of \$100 million or more as the Federal government expects to spend \$155 million to upgrade technology and hardware at the 50 ports of entry in 2004/2005. However, because this rule is expected to have little effect on trans-border commerce, this interim rule will not have a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, or innovation of small businesses, or on the ability of United States-based companies to compete with

foreign-based companies in domestic and export markets.

#### *H. Trade Impact Assessment*

The Trade Impact 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. DHS has determined that this interim 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. In addition, DHS notes that this effort considers and utilizes international standards concerning biometrics, and will continue to consider these standards when monitoring and modifying the program.

#### *I. National Environmental Policy Act of 1969*

DHS is required to analyze the proposed actions contained in this interim rule for purposes of complying with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and Council on Environmental Quality (CEQ) regulations, 40 CFR Parts 1501–1508. An agency is not required to prepare either an environmental impact statement (EIS) or environmental assessment (EA) under NEPA if the proposed action falls within a categorical exclusion, and no extraordinary circumstances preclude use of the categorical exclusion. 40 CFR 1508.4. DHS has analyzed this interim rule and has concluded that there are no factors in the expansion of US–VISIT pursuant to this interim rule case that would limit the use of a categorical exclusion under 28 CFR part 61 App. C, as authorized under 6 U.S.C. 552(a). Therefore, DHS finds that this interim rule is categorically excluded from further environmental documentation.

#### *J. Paperwork Reduction Act*

This interim rule permits DHS to require certain aliens who cross United States borders to provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival at designated ports or departure from designated locations. These requirements constitute an information collection under the Paperwork

Reduction Act (PRA), 44 U.S.C. 507 *et seq.* OMB in accordance with the Paperwork Reduction Act has previously approved this information collection for use. The OMB Control Number for this collection is 1600–0006.

Since this rule adds a new category of aliens who must be photographed, fingerprinted, and who may be required to provide other biometric identifiers, the Department has submitted the required Paperwork Reduction Change Worksheet (OMB–83C) to the Office of Management and Budget (OMB) reflecting the increase in burden hours and the OMB has approved the changes.

In addition, this interim rule requires that the same classes of aliens who are required to provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival at air and sea ports-of-entry under US–VISIT must also provide these biometrics when entering the United States at land border ports-of-entry. The requirement to collect these biometrics under US–VISIT are considered information collections under the Paperwork Reduction Act. OMB has previously approved the information collection requirements for US–VISIT. The OMB Control Number for this collection is 1600–0006.

#### *K. Public Privacy Interests*

As discussed in the January 5, 2004 interim rule, 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 US–VISIT 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 Department's 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. Affected persons will have a three-stage process for redress if there is concern about the accuracy of information. An individual may request a review or change, or a Department officer may determine that an inaccuracy exists in a record. A Department officer can modify the record. If the individual remains unsatisfied with this response, he or she can request assistance from the US–VISIT Privacy Officer, and can ask that

the Privacy Officer review the record and address any remaining concerns.

The Department's Privacy Office will exercise oversight of US-VISIT to ensure further 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 also has a program-dedicated Privacy Officer to handle specific inquiries and to provide additional oversight of the program.

Finally, DHS will maintain secure computer systems that will ensure that the confidentiality of an individual's personal information is maintained. In doing so, the Department and its information technology personnel will comply with all laws and regulations applicable to 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. section 552.)

#### List of Subjects

##### 8 CFR Part 215

Administrative practice and procedure, Aliens, Travel restrictions.

##### 8 CFR Part 235

Aliens, Immigration, Registration, Reporting and Recordkeeping requirements.

##### 8 CFR Part 252

Air Carriers, Airmen, Aliens, Maritime carriers, Reporting and recordkeeping requirements, Seamen.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### PART 215—CONTROL OF ALIENS DEPARTING FROM THE UNITED STATES

■ 1. The authority citation for part 215 continues to read as follows:

**Authority:** 8 U.S.C. 1104; 1184; 1185 (pursuant to E.O. 13323, published January 2, 2004), 1365a and note, 1379, 1731-32.

■ 2. Section 215.8 is amended by:

- a. Revising paragraph (a)(1); and
- b. Revising paragraph (a)(2)(ii).

The revisions 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 land border ports-of-entry, and 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, a Form DSP-150, B-1/B-2 Visa and Border Crossing Card, or section 217 of the Act, who departs the United States from a designated 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) \* \* \*

(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 certain officials of the Taipei Economic and Cultural Representative Office, who are 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);

\* \* \* \* \*

#### PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 3. The authority citation for part 235 continues to read as follows:

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

■ 4. Sections 235.1 is amended by revising paragraphs (d)(1)(ii) and (d)(1)(iv)(B), as follows:

#### § 235.1 Scope of examination.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(ii) The Secretary of Homeland Security or his delegate may require nonimmigrant aliens seeking admission to the United States pursuant to a nonimmigrant visa, a Form DSP-150, B-

1/B-2 Visa and Border Crossing Card, or section 217 of the Act, at a port-of-entry designated by 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 Act, or other relevant grounds in section 212 of the Act.

\* \* \* \* \*

(iv) \* \* \*

(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, and certain officials of the Taipei Economic and Cultural Representative Office, 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);

\* \* \* \* \*

#### PART 252—LANDING OF ALIEN CREWMEN

■ 5. The authority citation for part 252 is revised to read as follow:

**Authority:** 8 U.S.C. 1103, 1184, 1185 (pursuant to E.O. 13323 published on January 2, 2004), 1258, 1281, 1282; 8 CFR part 2.

■ 6. Section 252.1(c) is revised to read as follows:

#### § 252.1 Examination of crewmen.

\* \* \* \* \*

(c) *Requirements for landing permits.*

Every alien crewman applying for landing privileges in the United States is subject to the provisions of 8 CFR 235.1(d)(1)(ii) and (iii), and must make his or her application in person before a Customs and Border Protection (CBP) officer, present whatever documents are required, establish to the satisfaction of the inspecting officer that he or she is not inadmissible under any provision of the law, and is entitled clearly and beyond doubt to landing privileges in the United States.

\* \* \* \* \*

Dated: August 26, 2004.

**Tom Ridge,**

*Secretary of Homeland Security.*

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