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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 264

Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is removing outdated regulations relating to an obsolete special registration program for certain nonimmigrants. DHS ceased use of the National Security Entry-Exit Registration System (NSEERS) program in 2011 after finding that the program was redundant, captured data manually that was already captured through automated systems, and no longer provided an increase in security in light of DHS's evolving assessment of the threat posed to the United States by international terrorism. The regulatory structure pertaining to NSEERS no longer provides a discernable public benefit as the program has been rendered obsolete. Accordingly, DHS is removing the special registration program regulations.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background

History of the Special Registration Program

In 1991, the legacy Immigration and Naturalization Service (INS), then part of the Department of Justice (DOJ), published a final rule requiring the registration and fingerprinting of certain nonimmigrants bearing Iraqi and Kuwaiti travel documents, due to various factors, including concerns about misuse of Kuwaiti passports.¹ In 1993, INS removed the regulations specific to such nonimmigrants, but added to the regulations at 8 CFR 264.1(f) a provision that allowed the Attorney General to require certain nonimmigrants of specific countries to be registered and fingerprinted upon arrival to the United States, pursuant to section 263(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1303(a).² Pursuant to the amendment, the Attorney General could designate countries by Federal Register notice.³

In June 2002, after the September 11, 2001 terrorist attacks, INS proposed to expand the existing registration and fingerprinting program at 8 CFR 264.1(f) to require certain nonimmigrants to report to INS upon arrival, approximately 30 days after arrival, every 12 months after arrival, upon certain events such as a change of address, and at the time of departure from the United States.⁴ The proposed rule provided that the program would apply to nonimmigrants from countries that INS would designate in Federal Register notices and to individual nonimmigrants designated by either a U.S. consular

¹ 56 FR 1566 (Jan. 16, 1991). Those regulations were at 8 CFR 264.3.

² 58 FR 68024 (Dec. 23, 1993).

³ The Attorney General initially required nonimmigrants from Iraq and Sudan to be registered and fingerprinted under the new provision and later added Iran and Libya. See 58 FR 68157 (Dec. 23, 1993) (Iraq and Sudan) and 61 FR 46829 (Sept. 5, 1996) (Iran and Libya). The INS consolidated the two notices in 1998. 63 FR 39109 (July 21, 1998).

⁴ 67 FR 40581 (June 13, 2002).

officer or immigration officer at a U.S. port-of-entry as indicating a need for closer monitoring. Under the proposed rule, designated nonimmigrants would be required to be fingerprinted and photographed and to provide additional biographical information. The proposed rule also authorized INS to designate certain ports of departure for nonimmigrants subject to the program. In addition, INS proposed to amend 8 CFR 214.1 to require nonimmigrants selected for special registration to comply with 8 CFR 264.1(f) as a condition of maintaining nonimmigrant status.

The INS received 14 comments on the proposed rule, some in support of the proposed program and others opposed to it. In August 2002, INS finalized the proposed program, which became known as the National Security Entry-Exit Registration System (NSEERS), without substantial change.⁵ In September 2002, INS announced by Federal Register notice that the new program would be applied to those who were subject to the earlier registration program—nonimmigrants from Iraq, Iran, Libya, and Sudan—and added nonimmigrants from Syria.⁶ INS announced in November 2002 that only males 16 years of age and older from designated countries would be required to register under the program.⁷ Between November 2002 and January 2003, INS added another 20 countries to the compliance list, bringing the total to 25 countries.⁸ The responsibility for

⁵ 67 FR 52584 (Aug. 12, 2002).

⁶ 67 FR 57032 (Sept. 6, 2002).

⁷ 67 FR 67766 (Nov. 6, 2002).

⁸ See 67 FR 70526 (Nov. 22, 2002); 67 FR 77642 (Dec. 18, 2002); and 68 FR 2363 (Jan. 16, 2003). The 25 countries ultimately included in the compliance list were: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

administering NSEERS was transferred to the Department of Homeland Security (DHS) in 2003 as part of the Homeland Security Act of 2002.⁹

In December 2003, DHS amended the NSEERS regulations by interim final rule to suspend the 30-day post-arrival and annual re-registration requirements.¹⁰ DHS determined that automatically requiring 30-day and annual re-registration for designated nonimmigrants was no longer necessary as DHS was implementing other systems to help ensure that all nonimmigrants remain in compliance with the terms of their visa and admission.¹¹ The interim final rule provided that DHS would utilize a more tailored system in which, as a matter of discretion and on a case-by-case basis, the Department would notify nonimmigrants subject to the program to appear for re-registration interviews where DHS deemed it necessary to determine whether they were complying with the conditions of their status and admission. The interim final rule did not affect the procedures at ports-of-entry for nonimmigrants subject to the program.

In 2011, DHS published a notice in the Federal Register indicating that DHS would no longer register nonimmigrants under NSEERS and removing all countries from the NSEERS compliance list.¹² DHS had added no new countries to the compliance list since 2003, and it had since implemented multiple new automated systems that capture information of nonimmigrant travelers to the United States and support individualized

⁹ See Homeland Security Act of 2002, Pub. L. 107-296, secs. 402, 441, 442, 451, 1512(d), 1517, 116 Stat. 2135 (6 U.S.C. 202, 251, 252, 271, 552(d), 557); Homeland Security Act of 2002 Amendments, Pub. L. 108-7, div. L, sec. 105 (2003); see also 6 U.S.C. 542 note; 8 U.S.C. 1103(a), 1551 note.

¹⁰ 68 FR 67578 (Dec. 2, 2003).

¹¹ Id. at 67579.

¹² 76 FR 23830 (Apr. 28, 2011).

determinations of admissibility.¹³ Among the new programs and practices that had been implemented by that time were the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT), which stores and manages the fingerprint scans and photographs required upon entry to the United States,¹⁴ and the Advance Passenger Information System (APIS), which requires that commercial vessels and commercial and private aircraft arriving in or departing the United States submit advance passenger and crew manifest information to U.S. Customs and Border Protection (CBP).¹⁵ In light of these and other improved programs and practices, as well as improved information sharing with foreign counterparts, DHS determined that the data captured by NSEERS, which DHS personnel entered manually, had become redundant and no longer provided any increase in security.¹⁶ Although the 2011 notice announced that DHS would no longer use the program for any countries, the notice did not remove the regulatory framework for NSEERS from the DHS regulations.

2012 DHS Office of Inspector General Report

In 2012, the DHS Office of the Inspector General (OIG) issued a report on border security information sharing within DHS that, among other things, recommended DHS fully eliminate NSEERS by removing the regulatory structure for the program.¹⁷ The OIG report found that processing NSEERS registrations constituted a significant portion

¹³ Id. at 23831 (stating that since the establishment of NSEERS, “DHS has developed substantial infrastructure and adopted more universally applicable means to verify the entry and exit of aliens into and out of the United States”).

¹⁴ See 8 CFR 235.1(f)(1)(ii).

¹⁵ See 19 CFR 4.7b, 4.64(b), 122.22, 122.26, 122.31, 122.49a, 122.49b, 122.75a, and 122.75b.

¹⁶ The manual collection of information required by NSEERS had also become a significant resource drain for CBP, particularly at its busiest ports of entry.

¹⁷ Department of Homeland Security, Office of Inspector General, Information Sharing on Foreign Nationals: Border Security, OIG-12-39 (Feb. 2012).

of CBP's workload at ports-of-entry while the program was in operation, and that the NSEERS database often did not function properly. The report noted that CBP officers believed NSEERS reporting to be of little utility and that the time spent processing registrations constituted an inefficient use of resources. The OIG report found that DHS's newer automated targeting systems enabled more sophisticated data analysis and intelligence-driven targeting than under NSEERS, as the newer targeting systems consolidate passenger data from various systems, can search across those systems for certain trends or patterns, and can be updated quickly without the need for public notification in the Federal Register. The OIG report also found US-VISIT to be the more logical system for capturing biometric information at ports-of-entry due to US-VISIT's superior functionality. The OIG report concluded that advancements in information technology had rendered NSEERS obsolete and that leaving the program in place did not provide any discernable public benefit.¹⁸ The OIG report thus recommended removing the regulatory structure of NSEERS from DHS regulations.

Removal of the NSEERS Framework Regulations

Although DHS retained the regulations that provide the NSEERS framework, subsequent experience has confirmed that NSEERS is obsolete, that deploying it would be inefficient and divert personnel and resources from alternative effective measures, and that the regulation authorizing NSEERS is unnecessary. Since the suspension of NSEERS in 2011, DHS has not found any need to revive or consider the use of the program. Indeed, during this period, DHS's other targeting, data collection, and data

¹⁸ See id. at p. 35 ("The availability of newer, more capable DHS data systems argues against ever utilizing the NSEERS data system again.").

management systems have become even more sophisticated. DHS now engages in security and law enforcement efforts that were not possible when NSEERS was established in 2002, and the Department continues to make significant progress in its abilities to identify, screen, and vet all travelers arriving to the United States; to collect and analyze biometric and biographic data; to target high-risk travelers for additional examination; and to track nonimmigrants' entry, stay, and exit from the country.

The information that was previously captured through NSEERS is now generally captured from nonimmigrants through other, more comprehensive and efficient systems. Below we describe several of DHS's data collections, systems, and procedures relating to nonimmigrants and their relation to the NSEERS program.

- Biometric Information. At the time of NSEERS' implementation in 2002, most nonimmigrants were admitted to the United States without being either photographed or fingerprinted.¹⁹ Today, in contrast, CBP fingerprints and photographs nearly all nonimmigrants, regardless of nationality, at the time of entry into the United States. Furthermore, systems such as the Automated Biometric Identification System (IDENT), which were initially implemented by US-VISIT, are now used throughout DHS.²⁰ IDENT is the central DHS-wide system for storage and processing of biometric and associated biographic information for a wide range of uses including national security, law

¹⁹ See 67 FR at 40581-82 (June 13, 2002) (noting in 2002 that "current procedures do not provide for the collection of fingerprints at the port of entry from many aliens"); 67 FR at 52586 (Aug. 12, 2002).

²⁰ The Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. 113-6, enacted on March 26, 2013, made dramatic changes to US-VISIT's mission set and organization. The 2013 Act transferred activities such as entry-exit policy and operations and overstay analysis to operational components within DHS. Responsibility for the DHS's Automated Biometric Identification System was given to the newly-created Office of Biometric Identity Management, a subcomponent of the National Protection and Programs Directorate.

enforcement, immigration and border management, intelligence, and background investigations. IDENT stores and processes biometric data—digital fingerprints, photographs, iris scans, and facial images—and links biometrics with biographic information to establish and verify identities. As noted above, these systems and procedures were not in place in 2002.

- Arrival and Departure Information. CBP receives arrival and departure data from commercial vessel and aircraft carriers, as well as private aircraft, through APIS. CBP tracks this information, which is vetted against various law enforcement databases, in its Arrival and Departure Information System. CBP confirms the accuracy of this data information as part of the interview process for travelers arriving in the United States. And the available biographic departure data are matched against arrival data to determine who has complied with the terms of admission and who has overstayed. These systems and procedures did not exist in their current form in 2002.
- Visa Information. Visa data is automatically vetted through various mechanisms through a joint coordination effort involving CBP, U.S. Immigration and Customs Enforcement, and the Department of State. This effort permits the relevant agency to take appropriate action, such as revoking visas or requiring additional scrutiny. These information sharing systems and procedures were not in place in 2002.
- Nonimmigrant Students. Data on nonimmigrant students is now entered into the Student and Exchange Visitor Information System (SEVIS) by designated school officials at certified institutions and responsible officials in the

Exchange Visitor Program. CBP officers at ports-of-entry can interface with SEVIS in real time to determine whether a student or exchange visitor has a current and valid certificate of eligibility to enter the United States. SEVIS did not exist when NSEERS was created.

- Visa Waiver Program. The Electronic System for Travel Authorization (ESTA) now captures information used to determine the eligibility of visitors seeking to travel to the United States without a visa under the Visa Waiver Program (VWP). All travelers who intend to apply for entry under the VWP are now required to obtain an ESTA approval prior to boarding a carrier to travel by air or sea to the United States.²¹ CBP continuously vets ESTA applications against law enforcement databases for new information throughout the validity period and takes additional action as needed, including revocation of an ESTA approval. In November 2014, February 2016 and June 2016, DHS strengthened the VWP's security by adding additional elements on the ESTA application and revising the eligibility questions.²² The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, enacted on December 18, 2015, prohibits certain travelers who have been present in or are nationals of certain countries to travel or be admitted to the United States under the VWP.²³ None of these measures related to the VWP were in place when NSEERS was promulgated.

²¹ See 8 U.S.C. 1187(a)(11), (h)(3); 8 CFR 217.5.

²² 79 FR 65414 (Nov. 4, 2014); 81 FR 8979 (Feb. 23, 2016); 81 FR 39681 (June 17, 2016).

²³ The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, sec. 203, enacted as part of Division O, Title II of the Consolidated Appropriations Act of 2016, Pub. L. 114-113, applies to

- Electronic Visa Update System: The Electronic Visa Update System (EVUS), which became effective on October 20, 2016, is an online system that allows for the collection of biographic and other information from nonimmigrants who hold a passport issued by an identified country containing a U.S. nonimmigrant visa of a designated category.²⁴ Nonimmigrants subject to these regulations must periodically enroll in EVUS and obtain a notification of compliance with EVUS prior to travel to the United States. Though currently limited to nonimmigrants who hold a B1, B2, or B-1/B-2 visa issued without restriction for maximum validity contained in a passport issued by the People's Republic of China,²⁵ additional countries could be added to address emerging national security issues.

Due to such changes, DHS has determined that the NSEERS model for border vetting and security, which focused on designated nationalities for special processing, is outmoded. Since the implementation of NSEERS in 2002, DHS has increasingly moved away from the NSEERS model and instead focused on a targeted, intelligence-driven border security model that identifies current and emerging threats in real time. For these reasons, DHS has concluded that NSEERS is obsolete and inefficient; that its

nationals of VWP countries who have been present in Iraq, Syria, countries listed under specified designation lists (currently Syria, Iran, and Sudan), or countries designated by the Secretary of Homeland Security (currently Libya, Somalia, and Yemen) at any time on or after March 1, 2011 (with limited government/military exceptions) and to nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria. See 8 U.S.C. 1187(a)(12). CBP modified the ESTA application on February 23, 2016 to include questions pertaining to dual citizenship or nationality, and travel to restricted countries. 81 FR 8979 (Feb. 23, 2016). CBP updated the ESTA application again on June 17, 2016 with new questions pertaining to the applicant's participation in the Global Entry Program and travel on or after March 1, 2011 to Libya, Somalia or Yemen. 81 FR 39680 (June 17, 2016).

²⁴ 8 CFR 215.23-215.24; 81 FR 72481 (Oct. 20, 2016).

²⁵ See 81 FR 72600 (Oct. 20, 2016).

implementation would be counterproductive to the Department’s comprehensive security measures; and that the regulatory authority for NSEERS should thus be rescinded. For these reasons, DHS is removing the special registration program regulations found in 8 CFR 264.1(f).

Conforming Amendment

DHS is making a conforming amendment to 8 CFR 214.1(f) to remove the specific reference to 8 CFR 264.1(f), which INS added when it implemented NSEERS in 2002. The amendment reinstates the text of 8 CFR 214.1(f) prior to the implementation of NSEERS, with a minor change to reflect the transfer of duties from INS to DHS.

Statutory and Regulatory Requirements

Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish a notice of proposed rulemaking in the Federal Register and provide interested persons the opportunity to submit comments.²⁶ The APA provides an exception to this prior notice and comment requirement for “rules of agency organization, procedure, or practice.”²⁷ This final rule is a procedural rule promulgated for agency efficiency purposes. DHS is removing regulations related to an outdated, inefficient, and decommissioned program. Thus, removing these regulations, which have not been used since 2011, reflects the current practice and procedure of DHS and will not affect the substantive rights or interests of the public.

²⁶ See 5 U.S.C. 553(b) and (c).

²⁷ 5 U.S.C. 553(b)(A).

The APA also provides an exception from notice and comment procedures when an agency finds for good cause that those procedures are “impracticable, unnecessary, or contrary to the public interest.”²⁸ DHS finds good cause to issue this rule without prior notice or comment, as such procedures are unnecessary. The removal of these regulations will have no substantive effect on the public because the regulations relate to a program which has not been utilized since 2011 and which has been made obsolete by DHS’s more advanced and efficient processes, programs, and systems.

Further, the APA generally requires that substantive rules incorporate a 30-day delayed effective date.²⁹ This rule, however, is merely procedural and does not impose substantive requirements; thus DHS finds that a delayed effective date is unnecessary.

Executive Orders 12866 and 13563

This regulation has been drafted and reviewed in accordance with Executive Orders 12866 and 13563. This rule is not a significant regulatory action under Executive Order 12866, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

Because DHS is of the opinion that this rule is not subject to the notice and comment requirements of 5 U.S.C. 553, DHS does not consider this rule to be subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Unfunded Mandates Reform Act of 1995

²⁸ 5 U.S.C. 553(b)(3)(B).

²⁹ 5 U.S.C. 553(d).

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

This rule does not include any unfunded mandates. The requirements of Title II of the Act, therefore, do not apply, and DHS has not prepared a statement under the Act.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Executive Order 13132 – Federalism

This rule would not 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 – Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Regulatory Amendments

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 264

Aliens, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, DHS amends chapter 1 of title 8 of the Code of Federal Regulations as set forth below.

8 CFR CHAPTER 1

PART 214 – NONIMMIGRANT CLASSES

1. The general authority for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

2. Amend § 214.1 by revising paragraph (f) to read as follows:

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

* * * * *

(f) False information. A condition of a nonimmigrant's admission and continued stay in the United States is the full and truthful disclosure of all information requested by DHS. A nonimmigrant's willful failure to provide full and truthful information requested by DHS (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act.

* * * * *

PART 264 – REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

3. The general authority citation for part 264 continues to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1303-1305; 8 CFR part 2.

* * * * *

§ 264.1 [Amended]

4. In § 264.1, remove and reserve paragraph (f).

Jeh Charles Johnson,

Secretary.

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