U.S. Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship

and

U.S. Senate Judiciary Subcommittee on Terrorism, Technology, and Homeland Security

"The 9/11 Commission Staff Report on Terrorist Travel"

By

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Chairman Cornyn, Ranking Member Kennedy, Chariman Kyl, Ranking Member Feinstein, and Members of the respective Committees, I appreciate the opportunity to testify before you regarding the 9/11 Commission Staff Report entitled "9/11 and Terrorist Travel."

I understand that the purpose of today's hearing is to elicit testimony and debate on two issues highlighted in the Staff Report: (1) the training of immigration officers in terrorist travel indicators, and (2) the policy of not tailoring authorized admission periods to individuals entering on visitor visas. Because I have been out of government since 2000, I am not able to provide testimony on current training policies and practices. So I will focus primarily on the issue of visitor visa admission periods.

I. Admission Period for Visitors on Tourist Visas

A. Background

The policy guideline of six-month stays for temporary visitors for pleasure, the B2 visa, dates from the early 1980's. I was Acting Commissioner and then Executive Associate Commissioner of INS at the time that it was developed and first implemented. The policy was established as part of a broad effort to better manage adjudication workloads and to supply guidance to field offices and ports of entry that would result in greater consistency in decisionmaking by immigration offices and officials.

As remains the case today, adjudication demands far outstripped INS' ability to be current in processing cases, provide timely service, and manage its work to meet the goals of the nation's immigration law and policies. To improve the agency's

performance, INS introduced a broad range of procedural, case management, and regulatory changes. The most far-reaching was the establishment of the four Service Centers where the majority of immigration adjudications are now done.

Among the regulatory changes that were made was the six-month policy for B2 visas. The policy was based on a survey of INS district office workloads. It showed that a substantial proportion of the cases being handled by district officials were requests for extensions of stay of B2 visas. The key findings in the analysis were:

- The visa admission periods granted by inspectors at ports of entry who admitted B2 visitors were inconsistent and often arbitrary.
- Approvals for B2 extension of stay requests were almost always granted by the immigration examiners who adjudicated the cases; and
- Six months was the period typically granted by examiners that met the needs of the vast majority of applicants.

By establishing six months as the norm for B2 visas, INS eliminated the problem of one part of the agency unnecessarily generating work for another. More important, the change freed up precious examiner staff resources in district offices to concentrate on adjustment of status and naturalization casework which are more complex and consequential in safeguarding the integrity of the immigration system. Finally, the policy is a guideline; it did not preclude inspectors from designating less than six months if there is a rational basis for an individually tailored admission period.

B. Current status

The six-month policy has been widely regarded as sensible and successful both within INS and by its major stakeholders. However, in the 20 or more years since it has been in place, I am unaware of any serious review of its impact or broader implications for immigration policy or United States national interests. And had such a review been attempted, it would have been seriously hampered by insufficient data needed to reach sound conclusions.

Many things have changed since it was established. It is appropriate, therefore, to ask whether the policy continues to be sound, particularly against the backdrop of 9/11. The information that would be required to do a meaningful policy review is now being gathered through the US-VISIT system. As exit data is added, US-VISIT makes it possible to analyze trends and patterns of non-immigrant travel and stay in the United States. This is critical not only to detect and defend against possible terrorism as the 9/11 Commission report on terrorism travel recommends, but also to understand and assess questions surrounding issues like B-2 policy.

At the same time, it would be reckless in the utmost to rush to judgment about the six-month policy and change it absent a clear understanding of how it is working and whether it gives rise to national security or other problems. That is because (1) the numbers who would be affected and the workload implications are enormous; and (2) the

circumstances for which B2 visas are granted are wide-ranging, affecting countless stakeholders and many compelling public policy interests.

With regard to the numbers, B2 visas are the single largest category of non-immigrant visas the United States issues. In 2003, nearly 28 million visas were issued for non-immigrants. Slightly more than 20 million, or about 72%, were B2 visas. A large share of the B2's – more than 11 million – is visa waiver issuances. The remaining 8.5 million fall into the category of admission where the six-month guideline applies. This constitutes one-third of all the non-immigrant visas that are issued.

A good illustration of the stakeholder issues arose in spring 2002 when, as part of the government's response to the 9/11 attacks, INS proposed new regulations that would have changed the six-month policy. The proposed rule would have replaced the six-month admission period for B–2 visitors with a period of time that is "fair and reasonable for the completion of the purpose of the visit." The rule continued, "in any case where there is any ambiguity whether a shorter or longer period of admission would be fair and reasonable under the circumstances, a B–1 or B–2 nonimmigrant should be admitted for a period of 30 days."[1] The proposals generated an outpouring of opposition from diverse sectors of the public and have seemingly been set aside.

Proponents of this or similar changes have argued that such changes would enhance our national security and reduce the probability that visitors establish ties in the United States and remain in the country illegally. I firmly support policies that foster this country's national security, and I believe that some immigration measures play a critical role in anti-terrorism efforts. But the idea that our national security would be strengthened by changing the admission period for B-2 visitors or restricting their eligibility to seek extensions of stay is pure conjecture at this point. An individual seeking to remain in the United States beyond the period of authorized stay is as likely to overstay a 30-day admission period as a six-month period, and a change that merely altered the allowable period of admission would provide no additional tools or resources to track and/or remove such individuals. The deeper assumption is that individuals who overstay their visas are more likely to do us harm, an assertion that is also guesswork.

Countervailing considerations include the impact on tourism, investment, commerce, and workloads, including the likelihood of greater delays at the ports of entry and increases in backlogs in case processing. In addition, reciprocal treatment for United States citizens traveling abroad would also have to be taken into account.

A comprehensive review of B-2 policy, relying in particular on analysis of the information being amassed in US-VISIT, could go a long way toward providing answers to what is now guesswork. It would also sharpen our understanding of the patterns and trends pertaining to B-2 visas so that public debate and decisionmaking about policy changes, both to combat terrorism and to better manage immigration policy, can be built on footings of solid information, not speculation. Absent the investment of time and

[1] 67 Fed. Reg. 18065–66 (Apr. 12, 2002).

effort to do homework of this kind and do it properly, I would strongly advise against changing the six-month policy.

There is an additional word of caution that is important here. The policy review and analysis that are needed are increasingly possible as information systems improve and massive public expenditures in broadly expanded controls are evaluated. At the same time, the questions surrounding B-2 policy that the committees and others are asking provide an excellent example of where the current structure of executive branch agencies charged with immigration missions is failing.

B-2 issues are cross-cutting and involve at least three separate parts of the Department of Homeland Security (DHS) as well as the consular functions of the Department of State (DOS.) Apart from the Secretary and Deputy Secretary of DHS whose responsibilities are extremely broad, the current configuration does not have a senior official or bureaucratic focal point where broad questions of immigration policy and the intersections between anti-terrorism and immigration policy can effectively be raised, pursued and decided.

There seems to be a growing recognition of this vacuum both inside and outside government. The most readily achievable "fix" would be to establish a new position of Undersecretary for Policy at DHS. An analogous structure has worked well in the Department of Health and Human Services. The responsibilities of the Office of the Undersecretary would be Department-wide policy development, coordination and assessment; with such a structure, immigration matters would constitute a significant (though by no means exclusive) element of the Undersecretary's portfolio. Without substantial strengthening of the capacity of DHS at the Departmental level, it is unlikely that questions such as those surrounding B-2 policy will be systematically addressed.

II. Visitor visa policy considerations

If the administration and Congress were to undertake a re-thinking of B-2 policy, some of the considerations that should inform the assessment are outlined below.

A. Visiting family members and cohabiting partners

Family members of foreign national employees often visit for extended periods of time. Mothers and grandmothers come to help out with a new baby, elderly parents need companionship, college-age children visit for the summer, and unmarried partners wish to remain together. In addition, foreign national parents often come to care for foreign students under the age of majority. Families often plan and save for these visits long in advance.

It is also common practice for cohabiting partners to accompany E, H, and L and other nonimmigrant workers to the U.S. for an extended period. The INS officially recognized this particular use of the B-2 visitor's visa in 1994, sanctioning its use for long-term visits

to accompany a nonimmigrant worker.[2] In 2001, the State Department formalized this practice by amending the *Foreign Affairs Manual* to provide specifically for the issuance of B–2 visas to cohabiting partners, as well as to extended family members and other household members not eligible for derivative status, such as the parents and adult children of these nonimmigrant employees, as well as parents coming to care for F-1 students under the age of majority.[3] In addition to family members of nonimmigrants who are not eligible for derivative status, the *Foreign Affairs Manual* also provides that "B-2 classification may also be accorded to a spouse or child who qualifies for derivative status (other than derivative A or G status) but for whom it may be inconvenient or impossible to apply for the proper H-4, L-2, F-2 or other derivative status."[4]

For all cases in which the above classes of individuals plan to remain in the U.S. for more than six months to accompany the nonimmigrant employee, the *Foreign Affairs Manual* instructs that "they should be advised to ask INS for a one-year stay at the time they apply for admission. If needed, they may thereafter apply for extensions of stay, in increments of up to six months, for the duration of the principal alien's nonimmigrant stay in the United States."[5]

These family members and cohabiting partners are, for the most part, not eligible for other nonimmigrant visas. In such cases, the 30-day admission period envisioned under the 2002 proposed rule, for example, would be seriously inadequate. Moreover, most such individuals would have been rendered ineligible for an extension of stay under the proposed rule's amended extension language, as the need for such an extension would be neither "unexpected" nor required for a "compelling humanitarian need."

Shortened admission times would also affect the ability of parents of United States citizens who reside abroad to visit their stateside families for practical periods of time. While parents of United States citizens are immediately eligible to immigrate, most of them choose not to become permanent residents. However, many of them enter the United States for extended stays to visit with grandchildren and other relatives.

A trip to the United States is costly and a more limited stay would be discouraging to most elderly parents. Additionally, those parents that do enter the United States would be forced to apply for costly extensions of stay, adding burdens to the system in ways that can easily be avoided by establishing realistic periods of stay from the outset.

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[2] Letter from Jacquelyn A. Bednarz, Chief of the Nonimmigrant Branch, INS Office of Adjudications, March 30, 1994, discussed and reproduced in 71 Interpreter Releases 993, 1009 (Aug. 1, 1994).

[3] U.S. Dept. of State, 9 *Foreign Affairs Manual* (*FAM*) 41.31 n11.4. See also "State Department Instructs on B-2 Classification for Cohabiting Partners," 78 Interpreter Releases 1175 (July 16, 2001); "INS Discusses B-2 Eligibility for Parents of Underage F-1 Students," 73 Interpreter Releases 970 (July 22, 1996).

[4] U.S. Dept. of State, 9 *FAM* 41.31 n11.4.

[5] Id.

B. Business visitors and potential investors

The 2002 proposed rule also encompassed changes for B-1 visitors who travel to the United States for business purposes. In 2003, almost 170,000 people received investor visas to come to the United States. These individuals were either principal investors or key employees of international companies that have made substantial investments in the U.S. Many first entered the country as visitors for business to evaluate investment opportunities or to establish new offices, plants and warehouses for their foreign companies.

The *Foreign Affairs Manual* provides that exploring investment opportunities in the United States is an appropriate use of the visitor for business (B–1) visa. More than four million visa were issued in 2003 to visitors for business. Many were prospective investors. With constricted opportunity to research and effectively plan their business investment by seeking out prime locations, quality employees, and adequate resources, foreign investors could be less likely to invest or conduct business here. The inconveniences of extending the period of admission to meet business demands could also become a factor in driving investment to other countries.

Other legitimate business activities that would be affected include circumstances where the B–1 visa is used by international companies for the short-term transfer of key personnel to the United States. This is a widespread practice. Both the State Department and the DHS recognize the "B–1 in lieu of H" visa as a valid use of the visitor for business classification. The *Foreign Affairs Manual* provides:

> There are cases in which aliens who qualify for H–1 or H–3 visas may more appropriately be classified as B–1 visa applicants in certain circumstances, e.g. a qualified H–1 or H–3 visa applicant coming to the United States to perform H–1 services or to participate in a training program for which the applicant will receive no salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay. For purposes of this Note, it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad….[6]

There are cases in which the B–1 is a more appropriate visa than the H, as the individual will continue to be paid from the foreign company, but may need to be in the United States for several months. Any uncertainty surrounding an initial period of admission and extensions of stay would likely render the use of the B–1 visa an historical curiosity for this important class of nonimmigrant workers. The increased cost and time required to transfer key personnel to the United States for brief periods of work or training would almost certainly function as a disincentive for international companies to do business in this country.

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[6] U.S. Dept. of State, 9 *FAM* 41.31 n8.

C. Ports of entry operations and strengthened security

Visitors entering the U.S. currently spend an average of little more than one minute with a DHS inspector at the port of entry. Despite passage of the "Enhanced Border Security and Visa Entry Reform Act of 2002," section 403 of which repealed the previous 45-minute time limit on the inspection of arriving flights, current DHS resources continue to make it unlikely that inspectors would be able to devote the amount of time necessary to make a reasoned determination as to an appropriate period of stay for each individual visitor.

Requiring primary immigration inspectors to elicit from each international visitor the details of his or her prospective visit in order to determine "a period of admission that accurately comports with the stated purpose of the visit" would significantly add to the time required to process arriving travelers.

Current DHS Operations Instructions provide the following guidance to inspectors regarding the admission of B nonimmigrant visitors:

> ***If found admissible***, a B-2 shall be admitted for 6 months. The district director *may delegate individual review of the minimum admission period* no lower than a supervisory inspector. Referral of individual cases to the supervisor may occur when it is evident that the alien is admissible, but does not have sufficient resources available to maintain a 6 months visit. The Service does not require that an applicant for admission have with him or her funds to maintain a 6-month stay, but the applicant must demonstrate that he/she has access to sufficient resources.
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> A B-1 shall be admitted for a period of time which is fair and reasonable for completion of the purpose of the trip. Any decision to reduce a B-1's admission from the time requested shall be authorized by a supervisor.[7]

The current system allows DHS to focus its resources on "who" rather than on "how long." In other words, in the absence of evidence to the contrary, the difference between admitting an individual for 30 days, 90 days, or six months need not be a material concern if the individual's activities in the United States are appropriate to the visa classification and the person is otherwise admissible.

Just as when it was introduced, the six-month policy continues to minimize the need to adjudicate substantial numbers of applications for extensions of stay by nonimmigrant visitors for pleasure and business. With the workload pressures facing DHS to reduce

[7] INS Operations Instruction 214.2.

backlogs, changes likely to generate myriad additional filings and longer delays at the ports of entry should not be contemplated without strong evidence that national security would be strengthened with different visitor admission periods.

At the same time, measures that have demonstrated they can strengthen national security at ports of entry include adequate resources so that immigration inspectors have the tools necessary to make informed admissions determinations. Such resources include, but are not limited to, adequate numbers of thoroughly trained personnel, investigative support and state-of-the-art database systems that contain the necessary intelligence information.

In addition, technology at ports of entry has improved substantially. With the design and implementation of US-VISIT, vast amounts of detailed information about visitors and other classes of non-immigrants, including biometrics, are being gathered and stored. Inspectors and immigration officials have access to greater stores of information than ever before, and controls have improved significantly as a result.

However, the integration of federal data bases still needs improvement; training and staffing at ports continue to be insufficient; and entry/exit controls will not be fully in place until December 2005. Analyses and strategies need to be developed that effectively use all the new tracking information to strengthen immigration enforcement and increase law enforcement and intelligence officials' understanding of possible national security threats. In the face of this unfinished agenda, it would be highly premature to change the length of admission of visitors without first fully implementing measures that have shown their anti-terrorism effectiveness and then learning whether the length of admission bears any relationship to national security vulnerabilities.

Conclusion: Many of the problems in the nation's immigration system are interrelated as I believe this discussion of visitor visa policy demonstrates. In our post-9/11 world, strengthened security must include striking new balances between security and the lifeblood that flows of goods, capital and people represent for the United States. But to be successful, reforms must address our nation's needs and realities. I hope this hearing opens the door to a broad public debate on immigration and the American future. I and many others stand ready to assist your committees and the Congress in any way we can with that important work.

Thank you.