AMERICAN IMMIGRATION LAWYERS ASSOCIATION

May 29, 2018

Bureau of Consular Affairs, Visa Office
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

Submitted via www.regulations.gov
Docket ID No. DOS-2018-0002

Re: OMB Control Number 1405-0182
Department of State 60-Day Notice and Request for Comments:
Application for Nonimmigrant Visa, Form DS-160 and DS-156

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day notice and request for comments on the proposed revisions to Form DS-160 and DS-156, published in the Federal Register on March 30, 2018.[1]

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. The collective expertise and experience of our members makes us particularly well-qualified to offer views on the Form DS-160 and DS-156 that will benefit the public and the government.

I. Collection of Telephone Numbers Used During the Last Five Years

Visa applicants are currently asked for their current, secondary, and work telephone numbers on Form DS-160 and DS-156. The Department of State is proposing to add a question to Form DS-160 and DS-156, asking visa applicants, "Have you used any other telephone numbers during the last five years?" An affirmative response will prompt applicants to add additional numbers used.

As an initial matter, this type of broad information collection places excessive burdens on applicants and could have a chilling effect by discouraging well-intentioned and eligible individuals from applying for visas to the United States, to the detriment of U.S. citizens, U.S businesses, U.S. universities, and the U.S. economy as a whole. It is conceivable that many visa

[1] 83 Fed. Reg. 13807 (Mar. 30, 2018).

applicants will have difficulty recalling the full scope of information requested, in particular, the full range of phone numbers that they have used during the last five years. This could lead to unintentional errors or omissions in completing the form that could potentially result in the denial of a visa for misrepresentation and future bars to admissibility, with associated personal and business consequences.

Compounding the potential for unintentional errors or omissions is the way in which this question is posed. The question is overly broad and could generate substantial confusion and uncertainty among visa applicants regarding the scope of the question. The Merriam-Webster Dictionary defines the term "used" to mean "employed in accomplishing something."[2] Adopting such a definition to the question posed by the Department of State could potentially encompass any telephone number that a visa applicant has ever used to place or receive a phone call within the past five years, including all hotel rooms, hostels, bed and breakfasts, inns, motels, work phone numbers, and potentially even conference call bridge lines, among many other possible iterations. It is not clear, for example, whether the question as currently posed would include the telephone number of a hostel where a visa applicant stayed for five days while on summer holiday, if the visa applicant provided the phone number to family members as a point of contact while abroad and the visa applicant received one phone call from family members on the hostel's phone line during the holiday. Would such activity constitute a "use" of the telephone number for purposes of the Form DS-156 and DS-160? Visa applicants could have differing opinions and interpretations and could potentially face severe consequence, in the form of a finding of misrepresentation and future bars to admissibility, if they inadvertently omit a telephone number for the form. Similarly confusing is whether the question would encompass any conference call lines that a visa applicant has ever used in the past five years to set up conference calls between co-workers, clients, and business associates. As currently framed, the question could generate an endless array of possibilities that may be innocently overlooked or omitted by a visa applicant. In some cases, such extensive and broad reaching data would realistically be impossible for a visa applicant to track down and record on the visa application.

Given the endless possible iterations of phone numbers that could be encompassed by the question as currently posed, AILA recommends that the Department of State reframe the question as specifically and as narrowly as possible to prevent burdening visa applicants with the formidable task of recalling countless phone numbers that in many cases have only been used minimally or on a one-time basis and could be extremely difficult to track down. To help ensure visa applicants are properly informed regarding the scope of the question, AILA suggests that the Department of State provide a "help box" on the form with an explanation regarding the extent of telephone numbers which are encompassed by this question.

[2] MERRIAM-WEBSTER DICTIONARY (2018), *available at* https://www.merriam-webster.com/dictionary/used.

II. Collection of Email Addresses Used During the Last Five Years

Visa applicants are currently asked for their email address on Form DS-160 and DS-156. The Department of State is proposing to add a question to Form DS-160 and DS-156, asking visa applicants, "Have you used any other email addresses during the last five years?" An affirmative response will prompt applicants to add additional email addresses used.

This type of broad information collection places excessive burdens on applicants and could have a chilling effect by discouraging well-intentioned and eligible individuals from applying for visas to the United States, to the detriment of U.S. citizens, U.S. businesses, U.S. universities, and the U.S. economy as a whole. It is conceivable that many visa applicants will have difficulty recalling the full scope of information requested, in particular, the full range of email addresses they have used during the last five years. This could easily lead to unintentional errors or omissions in completing the form that could potentially lead to the denial of a visa for misrepresentation and future bars to admissibility, with associated personal and business consequences.

Compounding the potential for unintentional errors or omissions is the way in which this question is posed. The question is overly broad and could generate substantial confusion and uncertainty among visa applicants regarding the scope of the question. The Merriam-Webster Dictionary defines the term "used" to mean "employed in accomplishing something."[3] Adopting such a definition to the question posed by the Department of State could potentially encompass any email address ever used by the visa applicant within the past five years, despite how marginal. This definition has the potential to apply so broadly as to include all work email address, all school-related email addresses, and any and all email accounts ever opened for purposes of accessing a service, regardless of how marginal or arbitrary the email account may be. In today's modern society, individuals have vast opportunities to open email accounts to access services of a particular provider, even if the user does not intend to do so, and often times without the user's knowledge of the account's creation (e.g., a Microsoft email account to access Microsoft products such as Windows 10, an internet service provider ISP email such as Comcast Xfinity, Verizon Fios, or an iCloud email account for users with an Apple ID). In addition, individuals may have multiple email accounts created for them through the same institution, often times without the knowledge or desire of the user. For example, some universities create an email account for a student enrolled at the university and subsequently create an alumni email address for the same student once the student graduates from the university. In other cases, some visa applicants may set up a "throw away" email address to prevent email spam from accumulating in their personal email account.

Given the endless possible iterations of email addresses that could be encompassed by the question as currently posed, AILA recommends that the Department of State reframe the question as

[3] *Id.*

specifically and as narrowly as possible to prevent burdening visa applicants with gathering and submitting email addresses that in many cases have only been used minimally or on a one-time basis and could be extremely difficult to gather. To help ensure visa applicants are properly informed regarding the scope of the question, AILA suggests that the Department of State provide a "help box" on the form with an explanation regarding the email addresses encompassed by this question (e.g., work email, student email addresses, personal email addresses, etc.) and whether email addresses created to access a service (such as Comcast Xfinity, Verizon Fios, an iCloud email account for users with an Apple ID, or a Microsoft email to access Windows 10) are required to be provided on the form.

III. Collection of Social Media Platforms & Identifiers Used During the Past Five Years

The Department of State is proposing to add a question to Form DS-160 and DS-156, asking all non-immigrant visa applicants, "Have you used any of the following social media platforms in the last five years?" The list of designated social media platforms would encompass 20 platforms, including Facebook, Flickr, Google+, Instagram, LinkedIn, Myspace, Pinterest, Tumbler, Twitter, and YouTube, among others. An affirmative response will prompt the visa applicant to disclose his or her social media identifier for each platform.

This type of broad information collection places excessive burdens on applicants and could have a chilling effect by discouraging well-intentioned and eligible individuals from applying for visas to the United States, to the detriment of U.S. citizens, U.S businesses, U.S. universities, and the U.S. economy as a whole. It is conceivable that many visa applicants will have difficulty recalling the full scope of information requested. This could easily lead to unintentional errors or omissions in completing the form that could potentially lead to the denial of a visa for misrepresentation and future bars to admissibility with associated personal and business consequences.

Furthermore, the U.S. government has failed to provide any data-supported justification for collecting this information. In fact, the government's own studies have not produced evidence that social media screening programs work.[4] While no public audits have been released for the Department of State's social media collection, an audit conducted by the Office of Inspector General in February 2017 of the Department of Homeland Security's existing social media pilot programs found that insufficient metrics were in place to measure the program's effectiveness, and concluded that existing pilots had provided little value in guiding the rollout of a department-wide

[4] *See, e.g.*, U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (REDACTED) (Feb. 27, 2017), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf. *See also*, George Joseph, *Extreme Digital Vetting of Visitors to the U.S. Moves Forward Under a New Name*, PROPUBLICA (Nov. 22, 2017), https://www.propublica.org/article/extreme-digital-vetting-of-visitors-to-the-u-s-moves-forward-under-a-new-name (acknowledging that "thus far, social media monitoring of visa applicants has not identified any potential threats that wouldn't have turned up in existing government databases.")

social media screening program.[5] Documents evaluating these pilot programs show in further detail how they are expensive and time consuming but provide little useful information.[6]

AILA also expresses concern that the Department of State has failed to clarify how this information will be used by consular officers to determine visa eligibility. This is concerning as the meaning of content and connections on social media is idiosyncratic and context dependent. Casual and innocent communications and exchanges on social media could easily be overanalysed and misconstrued by consular officers, resulting in unwarranted denials with associated personal and business consequences. In addition, because a review of social media profiles by necessity cannot be limited to the applicant, this raises significant privacy concerns regarding the collateral data that will be collected by the Department of State. Examination of social media accounts will undoubtedly extend to U.S. citizens and businesses.[7] This could chill constitutionally protected speech and could lead many U.S. citizens who interact online with foreign nationals to self-censor.

While we appreciate the fact that consular officers will not request user passwords, there are still concerns for those who wish to keep their online identity anonymous. By disclosing this information in writing to the Department of State, a record will be created which could potentially be exposed through a data breach or an unauthorized disclosure, to the detriment of potentially millions of visa applicants with associated consequences.

Lastly, making the disclosure of social media platforms and identifiers mandatory for all visa applicants on Forms DS-160 and DS-156 is not necessary to protect U.S. national security. Consular officers already have the ability to request social media information on a case-by-case basis using Form DS-5535 if they deem this information to be necessary, in their discretion, to determine whether an applicant is eligible for a visa. There has been no justification provided by the U.S. government that these type of case-by-case requests by consular officers is not sufficient.

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[5] U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, DHS' PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS (REDACTED) (Feb. 27, 2017), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf.

[6] *See* Aliya Sternstein, *Obama Team Did Some 'Extreme Vetting' of Muslims Before Trump, New Documents Show*, THE DAILY BEAST, Jan. 2, 2018, https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show.

[7] George Joseph, *Extreme Digital Vetting of Visitors to the U.S. Moves Forward Under a New Name*, PROPUBLICA (Nov. 22, 2017), https://www.propublica.org/article/extreme-digital-vetting-of-visitors-to-the-u-s-moves-forward-under-a-new-name (quoting Rachel Levinson-Waldman, Senior Counsel to the Brennan Center's Liberty and National Security Program who acknowledges that "social media surveillance would be difficult to carry out without collecting collateral data on thousands of American citizens in the process.")

IV. Information Collection for E Visa Applicants (Treaty Traders or Investors

a. E-Visa: Travel Information

On the "Travel Information" page to Form DS-160 (*see* page 12 of the "DS-160_Screenshots" PDF document that was provided as part of the supporting documents for this Notice and Comment period), the following information is displayed at the top of the page:

> Displayed for principal applicants who select the E1-EX (Executive/Manager/Essential Employee) Visa and choose 'YES' for the following question.

This language is confusing and omits E-2 executives/managers, as well as E-2 employees. AILA suggests that the language be revised as follows:

> Displayed for applicants who select the E1-EX (Executive/Manager/Essential Employee) Visa or the E2-EX (Executive/Manager/Essential Employee) Visa and choose 'YES' for the following question.

The following question is also posed on this page:

> Has the E1 principal Treaty Trader already been issued a visa?

This question omits the E2-EX visa category. In addition, it appears that this question is intended to elicit information on whether the company has already applied for an E-1 or E-2 company registration. However, the use of the word "principal" is unclear and confusing. It appears that "principal" is intended to be the owner of the company. This question fails to take into account the many companies who may have already applied for and received E visas but the "principal" applicant is not the owner of the company (and perhaps the owner of the company has never applied for a visa), or situations where there are multiple owners who have already received E-1 or E-2 visas. For example, it would be very difficult for a visa applicant to answer this question if the visa applicant was an employee of a publicly traded company that has many employees in the U.S. on E-1 or E-2 visas; there is no principal applicant, but rather the first applicant, likely an E1-EX or E2-EX, whose application was submitted with the full corporate documentation requested in the DS-156E parts I and II.

Furthermore, as many companies have multiple, repeated E registrations, it is unclear whether this question refers to the applicant attached to the very first registration or the most recent registration. The Supporting Statement for Form DS-160 provided as part of this Notice and Comment period indicates that an affirmative response to this question will *eliminate* the trigger for visa applicants to complete the E business profile, which supports the suggestion that the question is intended to

ascertain whether the company has already been "vetted" or "registered" thereby eliminating the need to complete the business section (i.e., parts I and II of the DS-156E).
AILA notes that a revision of this question as follows would capture the information desired:

> Has an E-1 or E-2 visa already been issued to an owner, executive, managerial or essential employee of the business enterprise?

An affirmative response to the question "Has the E1 principal Treaty Trader already been issued a visa?" (which AILA proposes to be changed to "Has an E-1 or E-2 visa already been issued to an owner, executive, managerial or essential employee of the business enterprise?") prompts an additional question which requests the full name and date of birth of the principal applicant.

This question requests personal, and potentially sensitive, information about a person whom the visa applicant may not know or have access to. Additionally, as noted above, it is unclear who is intended by the term "principal applicant." Further, as noted above, many companies have multiple, repeated E registrations, and as a result, it is unclear whether this question refers to the applicant associated with the very first company registration, or the most recent registration.

AILA suggests that the Department of State modify this question to request information that is more readily available to visa applicants and does not involve personal, and potentially sensitive, information about a person whom the visa applicant may not know or have access to. AILA suggests modifying the question to ask for the month/year and consular post that the most recent DS-156E Parts I and II were submitted. Alternatively, AILA suggests that clearer language be provided regarding exactly what information is being requested with respect to the "principal applicant" (i.e., name of the applicant who was issued an E visa in connection with the company's most recent registration) and that the Department of State remove the request for the date of birth of such applicant, which is personal and potentially sensitive information that may not be readily available to visa applicants.

b. E-Visa: Business Profile

On the "E-Visa: Business Profile" page to Form DS-160 (*see* page 33 of the "DS-160_Screenshots" PDF document that was provided as part of the supporting documents for this Notice and Comment period), the following information is displayed at the top of the page:

> Displayed for applicants who selected the following E-Visa types: E1-TR, E2-TR, and E1-EXs who indicate they are without an E1-TR.

This language is confusing and omits E-2 executives/managers, as well as E-2 employees.
AILA suggests that the language be revised as follows:

Displayed for applicants who selected the following E-Visa types: E1-TR, E2-TR, E1-EXs, E2-EXs who indicate they are without an E1-TR.

c. E-Visa: Finance and Trade Information

In the "E-Visa: Finance and Trade Information" section of Form DS-160 (*see* page 35 of the "DS-160_Screenshots" PDF document that was provided as part of the supporting documents for this Notice and Comment period), AILA suggests that the Department of State use the same terms in this section that are used by the Internal Revenue Service on Form 1120, U.S. Corporation Income Tax Return, and Form 1065, U.S. Return on Partnership Income, namely "Gross Receipts and Sales" rather than "Operating Income" and "Taxable Income After Taxes" rather than "Operating Income after Taxes."

d. E-Visa: General Comment

AILA notes that the Department of State's proposed changes to Form DS-160 appears to incorporate the complete contents of the Form DS-156E, Nonimmigrant Treaty Trader/Investor Application directly into the Form DS-160. It is not clear whether the paper version of Form DS-156E will still be required for E1-TR, E2-TR, and E visa employee applicants filing an E visa application for the company for the first time, or whether it will be replaced by the new version of the DS-160. AILA recommends that the Department of State provide additional information and clarity regarding whether E1-TR, E2-TR and E visa employee applicants filling an E visa application for the company for the first time will still need to complete the paper version of Form DS-156E, in addition to all of the E visa pages of the DS-160 (i.e., E-Visa: Business Profile, E-Visa: Foreign Parent Business, E-Visa: Finance and Trade, E-Visa: Investment, E-Visa: U.S. Personnel 1, E-Visa: U.S. Personnel 2, E-Visa: Applicant Present Position, E-Visa: Applicant Position in the U.S., and E-Visa: Application Contact.

V. Family Information

In the "Family Information" section of Form DS-160, (*see* page 17 of the "DS-160_Screenshots" PDF document that was provided as part of the supporting documents for this Notice and Comment period period) visa applicants are asked, "Do you have any immediate relatives, not including parents, in the United States?" The DS-160 form provides a "help box" to the right-hand side of that question that explains the term "immediate relative." Specifically, the following explanation is provided: "Immediate relatives means fiancé/fiancée, spouse (husband/wife), child (son/daughter), or sibling (brother/sister). Given that the Department of State uses the term "immediate relative" differently than how the term is defined in the Immigration and Nationality Act (INA) section 210(2)(A)(i), which defines "immediate relative" as the children, spouses, and parents of a citizen of the United States, AILA recommends use of completely different

terminology. An alternative term that presents less opportunity for confusion would be "close family relatives."

Form DS-156, the paper version of Form DS-160, also asks about whether the visa applicant has any "immediate relatives" on page 8, however, no explanation is provided on Form DS-156 explaining the term "immediate relative." AILA recommends substituting use of the term "immediate relatives" for "close family relative." Alternatively, AILA recommends that the Department of State include a definition of "immediate relative" on Form DS-156, similar to what is provided on Form DS-160, to ensure that visa applicants are properly informed of how the Department of State defines the term "immediate relative" in the context of Form DS-156. This will help to prevent a visa applicant from inadvertently failing to provide information on the form due to a misunderstanding of which relatives constitute an "immediate relative" for purposes of Form DS-156. Such an explanation is particularly important given that the Department of State's definition is broader than the definition of immediate relative set forth in INA section 210(2)(A)(i).

VI. Previous Work/Education/Training Information

Form DS-156 collects information about a visa applicant's present and previous employment on Page 10. Specifically, the section "Previous Work/Education/Training Information" on Page 10 of Form DS-156 poses the following question, "Provide your employment information for the last five years that you were employed, if applicable."

For clarity and to avoid visa applicants inserting information about their current employment in this section (which is already collected in the "Present Work" section), AILA recommends revising the language in this section to state, "Provide employment information for the last five years that you were employed, other than your current employment."

VII. Repetitive Questions

AILA notes that several questions on Form DS-156 are repetitive. For example, the question "Have you ever been unlawfully present in the U.S. for more than one year in the aggregate at any time during the past ten years?" appears twice on Page 6 of Form DS-156. That exact same question appears again, *for a third time*, on page 16 of the Form DS-156.

Similarly, the question "Are you the spouse, son, or daughter of an individual who has been identified by the President of the United States as a person who plays a significant role in a severe form of trafficking in persons and have you, with [sic] the the [sic] last five years, knowingly benefitted from the trafficking activities?" appears *twice* on Form DS-156, on page 15 and again on page 17.

To minimize confusing visa applicants and burdening them with repetitive questions that ask for the same information, AILA recommends that the Department of State refrain from asking the exact same question more than once on Form DS-156 and DS-160.

VIII. Sign and Submit

On the "Sign and Submit" page to Form DS-160 (*see* pages 65, 66, 68, 69, of the "DS-160_Screenshots" PDF document that was provided as part of the supporting documents for this Notice and Comment period), the following language is provided:

> Some visa applicants are required to undergo a medical examination with an authorized physician to assess visa eligibility consistent with INA Sections 212(a) and 221(d), and will be notified of the requirement. If you are notified and required to undergo a medical examination, failure to provide required information may cause delay or denial of my [sic] visa application. If required to undergo a medical examination, your medical examination may be collected and temporarily stored in the eMedical system hosted, operated, and maintained by the **Australian Department of Home Affairs.** If your medical examination is collected in eMedical, you will be requested to provide consent to its collection and temporary storage in such system, and being transferred to the U.S. Government for the purposes of enabling the U.S. Department of State to determine my medical eligibility and for the U.S. Centers for Disease Control and Prevention to undertake public health functions under the Public Health Service Act Section 325 and INA Section 212(a).
>
> (emphasis added)

It is not clear whether the reference to the Australian Department of Home Affairs in the "Sign and Submit" section of Form DS-160 is correct. In the event that this language is correct and medical examinations of visa applicants will be collected and temporarily stored in the eMedical system hosted, operated and maintained by the Australian Department of Home Affairs, this raises concerns about the privacy and security of medical examination records when they are outside the control of the U.S. government.

IX. Average Time Per Response

The Department of State indicates that the average time per response for non-immigrant visa applicants to complete Form DS-160 and DS-156 is 90 minutes, which includes the time required for searching existing data sources, gathering the necessary documentation, providing the information and/or documents required, and reviewing the final collection. The Department of State's estimated average time per response factors into the total estimated burden time, which is

estimated to be 21,000,000 annual hours. The Department of States does not explain how it calculated the average time per response and should carefully reconsider its projected burden on the public. The estimated average time per response of 90 minutes is extremely low and appears to be an inaccurate calculation of the average time it will realistically take visa applicants to search existing data sources, gather the necessary documentation, provide the information and/or documents required, and review the Form DS-160 and DS-156.

The DS-156 is a comprehensive 18-page form containing detailed questions regarding the visa applicant's passport information, biographic information, address information, phone information and email, social media, travel information, purpose of trip to the United States, SEVIS information, temporary work information, previous U.S. travel information U.S. point of contact and U.S. address information, family information, present work/education/training information, previous work/education/training information, as well as nearly five pages of detailed "additional questions" addressing the visa applicant's military service, languages spoken, all countries visited in the past 5 years, among many others.

Similarly, the DS-160, the online version of the DS-156 form, consists of 19 pages of detailed questions that the visa applicant must scroll through and complete. Depending on the visa applicant's answers to certain questions, for example, whether the applicant is married or has children, the visa applicant may have even more pages of questions to answer in order to complete the form. As an example, an H-1B visa applicant, who is married with 1 child and who previously studied in the U.S. as an F-1 student would need to scroll through and complete at least 21 pages of detailed questions to complete the form.

Compiling the requested information, particularly for visa applicants who do not keep meticulous records, could take several hours at a minimum, and possibly even several days for visa applicants to gather all the relevant documentation and information to complete the form. For example, visa applicants may need to dedicate several hours, if not days, to track down all of their prior email addresses and phone numbers used within the past five years as this information may be stored in a wide range of locations, particularly for visa applicants who are highly mobile. Similarly, the Department of State is proposing to ask visa applicants to provide information for at least 20 different social media platforms, ranging from Facebook and LinkedIn to Pinterest and YouTube, among many others. It could take an individual several hours at a minimum to track down all their social media identifiers across the 20 different social media platforms, particularly for applicants who have a large social media presence. Similarly, visa applicants will dedicate time to reviewing and confirming each social media platform carefully and verifying their accounts on each platform to confirm that they did not create an account several years ago that they have forgotten about.

In light of the foregoing, AILA anticipates that it will take visa applicants several hours, at a minimum, to complete the Form DS-160 and Form 156. Thus, AILA recommends that the

Department of State review and update the average time per response, and subsequently the total estimated burden time for this proposed information collection.

X. Conclusion

We appreciate the opportunity to comment on the proposed changes to Forms DS-160 and DS-156, and we look forward to a continuing dialogue with the Department of State on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION