AMERICAN IMMIGRATION LAWYERS ASSOCIATION

May 29, 2018

Bureau of Consular Affairs, Visa Office (CA/VO)
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

Submitted via www.regulations.gov
Docket ID No. DOS-2018-0003

Re: OMB Control Number 1405-0185
Department of State 60-Day Notice and Request for Comments:
Electronic Application for Immigrant Visa and Alien Registration, Form DS-260

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-260, Electronic Application for Immigrant Visa and Alien Registration, 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 Form DS-260 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-260. The Department of State is proposing to add a question to Form DS-260 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. 13806 (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 a 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 Form DS-260? 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 for the Past Five Years

Visa applicants are currently asked for their email address on Form DS-260. The Department of State is proposing to add a question to Form DS-260 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 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 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-260 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-260 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. Sign and Submit

On the "Sign and Submit" page to Form DS-260 (*see* pages 82, 83, 84, and 85 of the PDF document entitled "OMB-Submission_DS260_March 2018" that was provided as part of the supporting documents for this Notice and Comment period), the following language is provided:

> Immigrant 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). I understand that failure to provide required information may cause delay or denial of my visa application. If required to undergo a medical examination, I understand that my medical examination may be collected and temporarily stored in the eMedical system hosted, operated, and maintained by the **Australian Department of Home Affairs.** If my medical examination is collected in eMedical, I understand and consent to its collection and temporarily being storage in such system, and being transferred to the U.S. Government for the purposes of enabling the U.S. Department of State to undertake public health functions under the Public Health Service Act Section 325 and INA Section 212(a).
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> (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-260 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.

V. Conclusion

We appreciate the opportunity to comment on the proposed changes to Forms DS-260, and we look forward to a continuing dialogue with the Department of State on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION