

U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON SCIENCE AND TECHNOLOGY

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June 6, 2008

The Honorable Michael Chertoff  
Secretary  
U.S. Department of Homeland Security  
245 Murray Lane, S.W.  
Washington, D.C. 20528

Dear Secretary Chertoff:

It recently came to my attention that a number of foreign graduate oceanography students who had applied to the Transportation Security Administration (TSA) for a Transportation Worker Identification Credential (TWIC) to allow them access to American ports were denied this credential and told that they have been determined to “pose a security threat.” (See attached letter dated May 1, 2008 from TSA to one of the applicants [name deleted].)<sup>1</sup> A “security threat” is defined in TSA’s regulations as someone “whom TSA determines or suspects of posing a threat to national security; to transportation security; or of terrorism.”<sup>2</sup> This stigmatizing determination by TSA was not based on any such finding, but simply on the fact that the students’ visas (F-1 and J-1) were not on TSA’s list of eligible visa categories for a TWIC.

It appears TSA has misread the law that mandated a transportation security card for individuals with access to secure areas of vessels or port facilities to prohibit all foreign students, and has designated persons as a security threat that the law itself does not include. This determination is a great disservice to these students and could be extremely detrimental to their academic work and future careers. Moreover, TSA has refused to remedy its error – calling it an “unfortunate choice of words in a bureaucratic letter” – even though it has admitted that these students are not suspected of being terrorists nor do they actually pose a “security threat.”<sup>3</sup>

The law requiring TSA to issue “transportation security cards” does not limit these cards to port and transportation workers who access the ports’ “secure areas” on a regular basis, but

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<sup>1</sup> Letter Dated May 1, 2008, entitled “Final Determination of Threat Assessment” from John M. Busch, deputy director, Security Threat Assessment Operations, TSA.

<sup>2</sup> 49 CFR 1570.3

<sup>3</sup> “Blunt Federal Letters Tell Students They’re Security Threats,” *New York Times*, May 13, 2008, quoting Ellen Howe, a TSA spokesperson, and Maurine Fanguy. This statement was repeated to my staff which was told that the students were not a positive match with the “security list,” so had nothing to worry about.

refers to “individuals” with that need.<sup>4</sup> However, TSA translated that into a “transportation worker identification credential” (emphasis added) or TWIC. In fact, its credentialing regulations apply only to “certain maritime and land transportation workers.”<sup>5</sup>

The law itself spells out how TSA is to determine who is a “terrorism security risk.” The prohibited categories include all felons convicted within the previous seven years of felonies that the Secretary “believes could cause the individual to be a terrorism security risk to the United States” or involved a “severe transportation security incident,” including those felons released from incarceration within the last five years; persons who may be denied admission to the United States or have been removed from the country under 8 U.S.C. 1101 et seq., either as legal or illegal immigrants; and those whom the Secretary determines “otherwise pose a terrorism security risk to the United States.”<sup>6</sup>

These foreign students do not fit in any of these categories. First of all, they are not “certain maritime and land transportation workers,” nor did they claim to be.<sup>7</sup> They are not felons, they were not denied admission to the United States, nor are they in any removal process. TSA officials have told my staff and the media that the students are not suspected of being terrorists. Nonetheless, they have been so branded in what appears to be a bureaucratic overreaching on TSA’s part. TSA unilaterally decided in its regulatory process that anyone who did not have a permit to work in the United States would automatically be branded as a “security threat” if he or she applied for a transportation security card.

The students are enrolled in a joint program of oceanography and applied oceanographic science and engineering of the Massachusetts Institute of Technology runs with the Woods Hole Oceanographic Institute (WHOI). WHOI supports one of the largest research fleets in the United States, including *Atlantis*, one of the nation's newest research vessels, and *Alvin*, a deep sea submersible. The joint program is one of the nation’s premier graduate programs which attracts outstanding students from all over the world. As part of their research, the students frequently work on these ships and in designated secure areas. However, to facilitate accessing and loading the ships with necessary instruments and tools at both Woods Hole and other ports, the students were advised – apparently by the Coast Guard – to apply for the TWIC. Fifteen foreign students did so.

Unfortunately, neither the students nor their advisers were aware that holders of student visas were ineligible for the TWIC. However, instead of simply notifying the students that they were ineligible because of their non-immigrant student status, TSA told them initially that they were a potential security threat, but could appeal that finding. The students who appealed this initial determination received a letter from John M. Busch, TSA’s deputy director for security threat assessment operations, stating that a final determination had been made that they were an actual security risk.<sup>8</sup>

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<sup>4</sup> 46 U.S.C. 70105(a) and (c)

<sup>5</sup> 49 CFR 1572.1

<sup>6</sup> 46 U.S.C. 70105(c)

<sup>7</sup> Students with F-1 visas can, however, work in the United States, either on a part-time basis while in school (8 CFR 214.2(f)(9)(ii) or under an Optional Training Program after graduation (8 CFR 214.2(f)(10)).

<sup>8</sup> May 1, 2008, letter, *supra*. For those who forgo the appeal, the initial determination of posing a security risk becomes final in 60 days.

Although the final determination letter states that the reason for the applicants being determined to “pose a security risk” is that they do not possess a permissible visa category, not surprisingly, these students are now afraid to leave the United States, take a commercial airline flight or attempt to change their immigration status because of the possibility that they will be in various government databases as “security threats.”

TSA has, however, stated that this determination would not be changed and reaffirmed that position with my staff, stating that the language had been taken directly from the U.S. Patriot Act and the Maritime Transportation Security Act. However, the language concerning immigration status in the Maritime Transportation Security Act states only that persons who may be “denied admission to the United States or removed from the United States under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.)” should not be given a TWIC.<sup>9</sup> These students are not in these categories.

TSA officials assured my staff that the determinations made concerning these students would not be shared with any other agency outside of TSA, nor would their names be placed on any “watch” lists, such as the Terrorist Screening Data Base, maintained by the Federal Bureau of Investigation. Specifically, TSA officials said it would not be shared with immigration officials, the students’ home countries, the Federal Bureau of Investigation or any intelligence agencies. Furthermore, if or when they change their immigration status to one of the qualifying categories, they will be eligible to reapply. Despite this assurance, the TWIC Web site states that the information obtained from applicants would be shared with the FBI, “appropriate governmental agencies for licensing, law enforcement, or security purposes, or in the interests of national security; and to foreign and international governmental authorities in accordance with law and international agreement.”<sup>10</sup>

Through no fault of their own, the students are limited in their ability to carry out the research expected by their academic program, and are stigmatized as “security threats,” based entirely on their visa status. In these circumstances, I would strongly suggest that, at a minimum, TSA revise its process to declare such persons simply ineligible for the TWIC<sup>11</sup> or amend its regulations to allow the issuance of a TWIC to students who can demonstrate that they are carrying out legitimate oceanographic research.<sup>12</sup>

Therefore, by this letter, I am requesting that you provide the following information:

1. TSA officials have stated to my staff that its TWIC database is a stand-alone database and that it is not accessible by other agencies or connected to other data bases such as the Terrorist Screening Data Base maintained by the Federal Bureau of Investigation (FBI) or data bases controlled by any other federal agencies, despite the statements on the TWIC Web

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<sup>9</sup> 49 U.S. 70105(c)(1)(C.)

<sup>10</sup> “Information for Individuals Applying for a Transportation Worker Identification Credential,”

<https://twicprogram.tsa.dhs.gov/TWICWebApp/Privacy.do>

<sup>11</sup> TSA does declare that persons in removal proceedings or subject to removal are “ineligible” for a TWIC (49 CFR 1572.105(e)), but apparently doesn’t allow any other “ineligible” alien to be so designated.

<sup>12</sup> Also, under the Optional Professional Training program, persons with F-1 and J-1

site. Is that an accurate statement? If not, please explain who can access the TWIC database and under what circumstances.

2. Given the wide-ranging efforts of the FBI and the Department of Homeland Security to develop data-mining tools and software to link a wide array of data bases in their search for potential terrorist links, what assurances can you provide to these students that the TWIC data base with its "security threat" determinations will not be assessed by other agencies in the future?

3. If an applicant for a TWIC is determined to be ineligible for the TWIC solely because of visa status, resulting in a "determination" that he or she poses a "security threat," will that determination be shared with any local, state, national or international law enforcement, intelligence or immigration agencies? Under what circumstances would it be shared?

4. How can these students who have received "determinations" that they pose a "security threat" be assured that they can travel outside of the United States either for their research or for personal reasons and then be allowed to return to complete their studies? Please explain why TSA cannot reissue its determinations to state only that the students simply are ineligible.

5. Federal officials, business leaders and others frequently discuss the importance of educating the top foreign students in the United States. The actions by the TSA have the effect of telling oceanographic students that perhaps it would be best to do their graduate studies in another country. Is TSA considering modifying its credentialing system or its waiver procedures to accommodate this limited number of students and their institutions?

Please provide this information to the Committee by 5 p.m. on Friday, June 13, 2008. If you have any questions or need additional information, please have your staff contact Edith Holleman, Subcommittee counsel, at (202) 225-8459.

Your cooperation in this matter is greatly appreciated.

Sincerely,



BRAD MILLER  
Chairman  
Subcommittee on Investigations  
and Oversight

Attachment

Cc: The Honorable F. James Sensenbrenner  
Ranking Member  
Subcommittee on Investigations and Oversight

U.S. Department of Homeland Security  
Arlington, VA 22202



Transportation  
Security  
Administration

May 01, 2008

Re: TSA Final Determination of Threat Assessment

On April 4, 2008, the Transportation Security Administration (TSA) served upon you a determination that you pose or are suspected of posing a security threat pursuant to Title 49, C.F.R., Section 1572.5.

I have personally reviewed the Initial Determination of Threat Assessment, your reply, accompanying information, and all other information and materials available to TSA. Based upon this review, I have determined that you pose a security threat and you do not meet the eligibility requirements to hold a Transportation Worker Identification Credential (TWIC). Specifically, your Visa status does not meet the criteria under the permissible Visa categories to hold a Transportation Worker Identification Credential.

Accordingly, you may not hold or exercise the privileges of a TWIC card. For purposes of judicial review, this letter constitutes a final TSA order pursuant to Title 49, U.S.C., Section 46110.

Sincerely,

A handwritten signature in black ink that reads "John M. Busch". The signature is written in a cursive style with a horizontal line at the end.

John M. Busch  
Deputy Director  
Security Threat Assessment Operations