

Testimony of  
Maurice Emsellem  
National Employment Law Project

Hearing Before the  
U.S. Congress, House of Representatives,  
Committee on Homeland Security on the  
Transportation Worker Identification Credential

October 31, 2007

Maurice Emsellem, Policy Director  
National Employment Law Project  
405 14<sup>th</sup> Street, 14<sup>th</sup> Floor  
Oakland, CA 94612  
(510) 663-5700  
emsellem@nelp.org

Testimony of Maurice Emsellem Before the  
U.S. Congress, Committee on Homeland Security,  
October 18, 2007

Chairman Thompson and members of the Committee, thank you for this opportunity to testify on the subject of the new Transportation Worker Identification Credential (TWIC) required of the nation's port workers and the background checks which began earlier this month.

My name is Maurice Emsellem, and I am the Policy Director for the National Employment Law Project (NELP), a non-profit research and advocacy organization that promotes a more fair and effective system of employment screening for criminal records. Over the past two years, NELP has been training truck drivers subject to the Transportation Security Administration's (TSA) hazmat background checks and helping them access the appeal and waiver process. In recent months, we have also been reaching out to port workers to apply the experience with the hazmat program to help port workers negotiate the TWIC process.

At this critical stage in the TWIC program, when especially large numbers of port workers and truck drivers will begin enrollment all across the country, it is important to evaluate TSA's implementation of the key worker protections of the Maritime Transportation Security Act of 2002 (MTSA) (46 U.S.C. Section 70105). While we applaud TSA for taking seriously their responsibility to implement these worker protections, there are several key areas that fall short of the law's spirit and intent. Our testimony includes a description of the following key concerns and several recommendations for reform of the TWIC process.

- By failing to adequately verify the accuracy of the FBI's rap sheet before issuing an initial threat assessment, TSA is disqualifying large numbers of workers based solely on old arrests that have never led to a conviction (TSA's determination relies primarily on the FBI rap sheets, which the Attorney General has reported are 50% incomplete due to the failure of the states to update their arrest records after the disposition of the case).
- Given the limited number of "waivers" filed under the hazmat program, TSA and Lockheed Martin should do more to promote the TWIC waiver process. The TWIC waiver is the core feature of the MTSA that protects those workers who have turned their lives around from being unfairly designated as a terrorism security risk due to an isolated drug offense or other disqualifying crime.
- TSA and Lockheed Martin have not complied with federal safeguards that provide meaningful access to the ethnically diverse workforce whose limited-English proficiency requires translation and interpretive services to negotiate the criminal record and immigration background checks which are so critical the TWIC process.

## **I. The Basics of the TWIC Background Check Process**

Like the TSA criminal background check now required to qualify for a hazmat endorsement, the TWIC process described below incorporates several procedural protections required by the MTSA to ensure that workers are treated fairly as part of the background check.

In addition, the federal law sets forth the specific TWIC disqualifying offenses, which include especially serious “permanent” disqualifying offenses (like espionage and treason) and more common “interim” disqualifying crimes (like drug dealing and weapons possession). Both categories are limited to felony convictions, not misdemeanors, and the “interim” disqualifications apply to offenses that date back seven years from the date of the application, or five years from when the individual was released from incarceration (whichever is the more recent event).

1. 1. TWIC Pre-Enrollment: TSA has created an optional pre-enrollment process (available by phone or on-line) which allows the worker to enter his or her basic biographical information with TSA before officially enrolling in-person at the designated port facility. The pre-enrollment process is intended to help save time by providing the individual with an appointment for the in-person enrollment.

2. 2. Enrollment at Designated Locations: On October 16<sup>th</sup>, TSA and its contractor Lockheed Martin began enrolling individuals at the Wilmington port for the TWIC. Upon enrollment, all the necessary information is collected on the individual to qualify for the TWIC, including the fingerprints required to generate an FBI rap sheet. Under penalty of perjury, the applicants must sign a disclosure form (attached) indicating that they have accurately responded to a series of questions related to their criminal history, their immigration status and any adjudication or commitment due to mental capacity. Depending on the size of the port, TWIC enrollment will take several weeks or months to process all those determined to require unescorted access to secured areas of the ports. TSA will maintain an additional presence after the initial process to enroll new applicants.

3. 3. Threat Assessment Determination: Based on the background information provided by the applicants and the resulting search of the various criminal record, terrorist watch-list and immigration status databases, TSA will issue an initial threat assessment determination. According to TSA, a web-based system first “scores” the application. Then, the case is reviewed by at least four adjudicators (first two contractors, then two TSA staff) resulting in the threat assessment determination.

- a. 1. TWIC Approved: If TSA fails to identify any disqualifying information, the individual is notified that he or she qualifies for a TWIC, usually within 5 to 10 days according to TSA.
- b. 2. Interim Denials Subject to “Appeal”: When TSA makes a determination that the individual has committed a disqualifying offense set forth in the SAFE Port Act, he or she receives an “Initial Determination of Threat Assessment” (IDTA) listing the disqualifying crime. If the information reported by TSA is incorrect, the individual

can “appeal” the case within 60 days by providing the official court documentation to correct the information. If the FBI rap sheet is incomplete due to an arrest where the disposition has not been reported, then the individual must provide the missing information to TSA or their application will be automatically denied after 60 days. The individual is not provided a copy of their FBI rap sheet along with the IDTA, although her or she may request a copy before appealing.

- c. Interim Denials Subject to “Waiver”: If the individual has a disqualifying criminal record that is accurate and complete, then he or she can seek a “waiver” of the initial threat assessment determination based on evidence of rehabilitation, a solid work history and other relevant factors. Selected “permanent” disqualifying offenses are not subject to the waiver process.<sup>1</sup> If the waiver request is denied by TSA, the worker has the right to review of the decision by an administrative law judge.

Currently, the optional TWIC pre-enrollment process is the only stage where information is to be made available in any language other than English (Spanish). There are apparently no plans to provide interpreter services at the time of actual enrollment at the ports, nor are any materials to be translated as part of the interim determination or the waiver or appeal process. TSA has authorized the family and friends of applicants to serve as translators during the enrollment process, requiring them to also be signatories under penalty of perjury to the TWIC application.<sup>2</sup>

As distinct from the TWIC enrollment deadlines recently published by TSA,<sup>3</sup> TSA has not indicated when the ports will have to actually start using the TWIC cards. Presumably, that will follow sequentially from when the TSA set up the enrollment process at each of the ports. The regulations require at least 90 days notice for the port to start implementing the TWIC.

## **II. The Serious Limitations of the FBI’s Rap Sheets Undermine the Integrity of the TWIC Process**

The TWIC criminal background check is dependent on the rap sheet provided by the FBI, which is an accumulation of the criminal records generated by the states. However, there are serious flaws in the FBI’s rap sheet that threaten to deny employment to large numbers of law-abiding workers and undermine the integrity of the criminal background check process.

---

<sup>1</sup> The offenses that are not subject to waiver include espionage, sedition, treason, terrorism, or conspiracy to commit these crimes. (49 C.F.R. Sections 1515.7, 1515.103(a)(1)-(a)(4)).

<sup>2</sup> Specifically, the “Helper/Translator” must sign the following statement contained on the enrollment form: “I certify that I assisted in the completion of this form at the request of the applicant named on this TWIC enrollment document, that the responses provided are based on all information which I have knowledge, or which were provided to me by the applicant, and that the completed enrollment form has been read to the applicant in the language the applicant speaks fluently for verification before he or she signed the application in my presence. I understand that a knowing and willful false statement or an omission of a material fact on this enrollment document can be punished by fine or imprisonment or both, and may be grounds for denial of a TWIC.”

<sup>3</sup> U.S. Department of Homeland Security, “DHS Agencies Announce Progress on TWIC Program” (October 3, 2007).

Incomplete State Arrest Records: Of special concern to TWIC applicants, the FBI rap sheets are routinely out-of-date and incomplete. Indeed, according to the U.S. Attorney General, the FBI's rap sheets are "still missing final disposition information for approximately 50% of its records."<sup>4</sup> Mostly, that includes arrest information which is never updated electronically by the states to reflect whether the charges have dropped, dismissed, or successfully prosecuted.

Indeed, in 15 states (out of 39 that reported data in response to a national survey), more than one-third of the arrests in the past five years have no final dispositions reported in the state criminal record repository, which means that the FBI's records are similarly incomplete for those states.<sup>5</sup> That includes large port states like Florida, where 40% of the arrests in the state's system do not include the final disposition. Only nine states have more than 90% of the arrests in their databases updated to reflect the final outcome of the case.

Non-Felony Offenses: In addition, the FBI's rap sheets often do not distinguish between felonies, misdemeanors and lesser categories of offenses, which is significant because the TWIC disqualifying offenses are expressly limited to felonies. Instead, the FBI rap sheet generally reports the specific offense as expressed in the state's penal code without characterizing the severity of the crime. For example, we handled the case of hazmat driver who was disqualified when his FBI rap sheet indicated he was convicted in California of "Charge 245A1 PC-FORCE ADW-NOT FIREARM," meaning assault with a deadly weapon not involving a firearm. Based on the FBI's rap sheet, TSA wrongly concluded that this was a felony offense when, in fact, it was a misdemeanor based on an assault involving a fingernail clipper.

Early Incarceration Release Dates: Under the MTSA, workers may not be denied a TWIC based on an interim disqualifying offense that took place more than seven years before the application or more than five years since the individual was released from incarceration. However, many states do not report the date when the individual was actually released from incarceration, thus that information does not appear on the FBI's rap sheet. As a result, large numbers of workers who have been released for good behavior before their minimum sentence expired will incorrectly show up as having been incarcerated within the five-year period based on the original sentence entered on the rap sheet. That is what happened to hazmat driver we represented, who received a 10-year sentence although he was released more than five years before the date of his hazmat endorsement application.

### **III. Priorities for Reform of TWIC Background Check Process**

Based on our experience representing workers negotiating the TSA hazmat endorsement program and our understanding of the new TWIC process, several key reforms would substantially improve the integrity of the TWIC and protect large numbers of hard-working employees against unfair denials and the loss of quality jobs in their community.

---

<sup>4</sup> U.S. Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006), at page 3.

<sup>5</sup> Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2003* (2006), at Table 1.

## 1. TSA Should Verify Incomplete & Unreliable Records Before Denying the TWIC

Under the current TWIC and hazmat criminal background check, the workers end up paying the price for the routine failure of the FBI's rap sheets to provide complete information on old arrests. That is because the policy of TSA (49 C.F.R. Section 1572.103(d)) is to automatically deny the TWIC to all those whose arrest information has not been updated unless official court documentation of the disposition is provided by the applicant in 60 days. Because literally 50% of the FBI's records are incomplete, we are concerned that very large numbers of workers fall in this situation of receiving an initial threat assessment based solely on the fact that they have an arrest, not a conviction as required by the MTSA.

When the burden to fill the gaps in the FBI's rap sheet falls almost entirely on the TWIC applicant in such significant numbers, far too many innocent workers will fall through the cracks of the system, especially in states like Florida where the state records are most often incomplete. In order to provide the complete or up-to-date arrest information required by TSA, workers have to navigate the court system where the judgment was entered, typically requiring the individual to appear in person at a local court that could be located in another state or county. In contrast, a call to the local courts by TSA or an on-line inquiry will often be enough for TSA to verify that the charge has been dismissed, thus precluding the need to require actual court documents from the applicant.

In addition, many hazmat endorsement applicants have been issued an initial threat assessment simply because TSA has not adequately verified that their offense rises to the level of a felony versus a non-disqualifying misdemeanor. It is not clear that TSA has devoted sufficient attention to identifying and correcting these cases before issuing an IDTA. Similarly, there is the problem of the FBI rap sheet's failure to indicate the date of release from incarceration, which often results in an initial threat assessment when the individual was released prior to the full sentence listed on the rap sheet. While the hazmat and TWIC enrollment forms include a space for the individual to indicate when he or she was released from prison, it is not clear that TSA adequately incorporates this information into the TWIC background check process.

According to TSA, literally 99% of the appeals filed under the hazmat program have successfully documented that the initial threat assessment was based on incomplete or incorrect information. One-third of the over 10,000 successful appeals were related to incorrect criminal records and the other two-thirds were attributed to immigration status issues. The overwhelming rate of success on appeal is a sure sign that there is a serious problem with the FBI's rap sheets and TSA's current policy, which puts the burden on the worker to track down the missing information. However, because of the problems described above, these 3,000 to 4,000 successful criminal record cases are probably just the tip of the iceberg. To determine the true magnitude of the problem, it is necessary for TSA to provide more complete data documenting the total number of IDTAs issued due to the absence of complete arrest information and the other routine errors described above.

Recommendations: TSA and Lockheed Martin can take several significant steps to produce a determination that is based on accurate information and protect the rights of TWIC applicants.

a. Track Down Missing Arrest Dispositions: The first priority should be for TSA and Lockheed Martin to track down missing dispositions before issuing an initial determination of threat assessment. In the case of federal gun checks required by the Brady Act, the FBI tracks down 65% of the missing dispositions within three days rather than simply denying the license based on old arrest information.<sup>6</sup> Similarly, in California, the law precludes the state criminal records repository from releasing state rap sheets for employment and licensing purposes unless it has been verified within the past 30 days that the case is still active in the courts or in the local District Attorney's office.

Here too, when there is a potentially disqualifying offense that lacks a disposition, TSA and Lockheed Martin should make a serious effort to determine the outcome of the case before issuing an initial determination. For example, any case that has been pending in the court system for more than one or two years without a disposition is far more likely to have been dismissed, thus such cases should be prioritized for follow-up inquiries by TSA. These verification procedures should be incorporated into the current review process, which now includes four levels of review by TSA and contractor adjudicators.

b. Identify Misdemeanors and Incarceration Release Dates: Prior to issuing an IDTA, TSA should prioritize those cases like drug offenses, weapons charges, and robberies, which will routinely result in non-felony convictions that are often presumed to be felonies by TSA. TSA should develop specific contacts with each state criminal history repository to clarify questions regarding offense levels reported on the FBI rap sheets. Similarly, in all cases where an applicant has indicated on the enrollment form that he or she has been released from incarceration more than five years before the date of the TWIC application, TSA and Lockheed Martin should verify the release date with the state corrections authorities, not deny the application based on the original sentence imposed.

c. Provide a Copy of the Rap Sheet with the IDTA: To help applicants evaluate the merits of their appeal and prevent unnecessary delays, all those who are issued an initial threat assessment based on a potential disqualifying criminal record should receive a copy of their FBI rap sheet when they receive the IDTA. This proposal corresponds to the protections of the Fair Credit Reporting Act which apply to private screening firms that conduct criminal background checks for employers (15 U.S.C. Section 1681b(b)(3)(A)).

Although the FBI rap sheet has already been paid for as part of the TWIC application, it is still not available to the workers unless they request a copy after the IDTA is issued, which makes it more difficult to evaluate the merits of the appeal thus creating unnecessary and prejudicial appeal delays. Not unlike a credit check report, TWIC applicants should be automatically provided a copy of the rap sheet to immediately verify that the information is complete and accurate. Accordingly, TSA should continue to identify the disqualifying offense in the IDTA, while also providing the FBI rap sheet if authorized by the individual when he or

---

<sup>6</sup> *The Attorney General's Report on Criminal History Background Checks*, at page 108.

she enrolls for the TWIC. The limited costs associated with this process, including copying and additional postage, should not be prohibitive.

d. Evaluate the Immigration Status Appeals Generated by the “SAVE” System: As part of the TWIC process, TSA must verify the immigration status of applicants to determine if they are lawfully present in the United States according to specific criteria (49 C.F.R. Section 1572.105).

In addition to the immigration documentation provided when they enroll, we are told by TSA that the applicant’s immigration status is checked against a federal database called the Systematic Alien Verification for Entitlements (SAVE) system, which is used by the Department of Human Services to verify eligibility for various benefit programs. However, the SAVE systems relies on automated data from immigration authorities which the U.S. Department of Justice has characterized as “flawed in content and accuracy.”<sup>7</sup>

Given the serious concerns with the accuracy of the SAVE system and the fact that two-thirds of successful hazmat endorsement appeals were the product of errors related to immigration status, we urge TSA to evaluate the source of the errors identified on appeal and adopt alternative procedures, if necessary, to verify immigration status under the TWIC program.

## 2. TSA Should More Actively Publicize the TWIC Waiver Process

When Congress adopted the waiver process in the MTSA for workers who have been convicted of a disqualifying crime, it created a promising model for all federal and state employment screening laws to follow to promote and reward rehabilitation. Indeed, for thousands of current workers with a criminal record who pose no terrorism security threat, the MTSA waiver is the only protection that keeps them employed in a good job after turning their lives around. Absent an effective waiver process, they risk being kicked back out on the streets where it is becoming harder and harder to find quality work with a criminal record.

To fully appreciate the significance of the TWIC waiver process, consider the impact of the record rates of incarceration of the past two decades on local communities, especially many urban communities where the ports employ large numbers of workers. For example, a record 700,000 people were released from U.S. prisons last year, and three out of four them served time for non-violent offenses.<sup>8</sup> Of special significance, drug sales, a TWIC disqualifying offense, represents over 20% of all the felony convictions handed down by the state courts each year.<sup>9</sup>

---

<sup>7</sup> Office of Inspector General, U.S. Department of Justice, *Immigration and Naturalization Service’s Ability to Provide Timely and Accurate Alien Information to the Social Security Administration*, Report No. 1-2003-001 (November 2002), at page 25.

<sup>8</sup> Bureau of Justice Statistics, *Probation and Parole in the United States, 2005* (2007).

<sup>9</sup> Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002 (December 2004)*, Table 1.



Nearly half of all non-violent offenders are African American (48%) and another 25% are Latino.<sup>10</sup> Indeed, one-third of African-American men (32%) are likely to serve a prison sentence according to the Bureau of Justice Statistics, which is six times the rate of white men.<sup>11</sup> Large numbers of these men of color are struggling to turn their lives around and find work in the urban communities where major ports are located, including Los Angeles, Oakland, New York, Miami and elsewhere. For example, in Oakland, where our offices are located, African Americans account for 40% of the maritime workforce and another 22% are Latino.<sup>12</sup>

Finally, the significance of the TWIC waiver process is underscored by the latest research documenting that those with a criminal record who have found steady work are especially unlikely to commit another crime. For example, a recent study found that people with a prior record who have not been arrested over a period of five years are statistically no more likely than someone with no prior record to commit a crime.<sup>13</sup> The likelihood of committing a terrorist act is even more remote, especially for port worker who are paid good union wages and have successfully turned their lives around despite the serious challenges in their communities.

To its credit, TSA has granted 92% of the waiver requests submitted under the hazmat program, thus recognizing the large numbers of workers with a disqualifying offense who have an isolated felony that often dates back several years and a solid work history. However, we are concerned that the absolute number of waivers granted (about 1,000) is quite low compared to the likely number of deserving workers (of the 700,000 drivers screened by TSA) who have waivable disqualifying offenses. As applied to the TWIC program, with so many major ports located near urban areas where more workers may have drug convictions and other crimes common to the city streets, many more workers may have a disqualifying criminal record who would be serious candidates for a TWIC waiver.

Recommendations: We urge TSA to adopt the following measures to promote and clarify the TWIC waiver process.

Expand the Waiver Outreach & Education Process: To significantly expand the number of TWIC waiver requests, TSA and Lockheed Martin should do far more to publicize the process. For example, the various fact sheets designed to publicize the TWIC program at the ports (“TWIC is Coming,” “TWIC is Here,” “Enroll for TWIC Today”) only make a casual reference to the appeal and waiver process (one sentence), including the specific fact sheet listing all the disqualifying offenses. We urge TSA to distribute a “know your rights” fact sheet at the ports that specifically describes the waiver process and the key considerations that argue in favor of a waiver. TSA should also urge the ports to partner with local non-profit organizations that can help deserving workers prepare the TSA waiver application.

---

<sup>10</sup> Bureau of Justice Statistics, *Prevalence of Imprisonment in the United States, 1974-2001* (August 2005), Table 1.

<sup>11</sup> *Id.*

<sup>12</sup> Carol Zabin, et al., *Living Wages at the Port of Oakland* (Center for Labor Research & Education, December 1999), at page 45, Table 3.3b.

<sup>13</sup> Kurlycheck, et al., “Scarlet Letters & Recidivism: Does An Old Criminal Record Predict Future Criminal Behavior?” (2006).

In addition, more can be done to help workers prepare the waiver applications at the critical stage when they are notified of the interim threat assessment. To TSA's credit, the IDTA now comes with a four-page fact sheet ("How to Request Releasable Materials, Appeal a Security Threat Assessment, and File a Waiver") which is especially helpful in describing the waiver process and the material necessary to support the waiver applications. In addition, we have urged TSA to adopt a checklist as part of the cover sheet that accompanies the waiver request, allowing the worker to readily identify the major arguments favoring a waiver in their case.

### 3. TSA Should Provide Translation and Interpreter Services for the Diverse Population of Limited-English Speaking Port Workers

Today's workforce employed in the nation's ports and with the trucking firms they do business with is more diverse than ever before, representing large numbers of workers born in Spanish-speaking countries (Mexico and Central America), South Asian-speaking countries (India, Bangladesh) and Southeast Asia (Vietnam, Cambodia, Laos) in particular. Accordingly, the TWIC process should embrace this diversity by taking reasonable measures to accommodate the language needs of port workers.

To appreciate the special need for TWIC translation and interpreter services, consider the ethnic diversity of the West Coast port workers, especially those who drive trucks in and out of the ports. In the Port of Seattle, 54% of the drivers are foreign born, and 44% speak a language other than English at home (mostly a combination of Southeast Asian languages and Spanish predominantly).<sup>14</sup> In the Los Angeles and Long Beach ports, more than 90% of the truck drivers were born outside the U.S., mostly from Spanish-speaking countries.<sup>15</sup> In the Port of Oakland, 93% of the truck drivers were born outside the U.S., typically from Southeast Asian, South Asian and Latin American countries.<sup>16</sup>

According to Executive Order 13166 and a U.S. Department of Justice (DOJ) guidance, all federal agencies, including TSA, are expected to "take reasonable steps to ensure meaningful access to the programs and activities by limited-English proficient (LEP) persons."<sup>17</sup> Each program is called on to undertake a specific analysis of the following factors to determine the level of required services: 1) the number or proportion of LEP persons to be served or likely to be encountered; 2) the frequency with which LEP individuals come in contact with the

---

<sup>14</sup> Port Jobs, "Big Rig, Short Haul: A Study of Port Truckers in Seattle" (2007), at page 19.

<sup>15</sup> Kristen Monaco, Lisa Grobar, "A Study of Drayage at the Ports of Los Angeles and Long Beach" (California State University Long Beach, December 2004), at page 17.

<sup>16</sup> East Bay Alliance for a Sustainable Economy, "Taking the Low Road: How Independent Contracting at the Port of Oakland Endangers Public Health, Truck Driver, & Economic Growth" (September 2007), at page 25.

<sup>17</sup> Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), at page 1 (requiring all federal agencies to develop a plan "to improve access to its federally conducted programs and activities by eligible LEP persons."); Department of Justice, "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" (67 Fed. Reg. 41455, 41459, n.4, June 18, 2002) (The DOJ directive applies the Title VI standards to Federal agencies, as follows: "Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulation and the four-factor analysis set for the in the DOJ LEP Guidance are to additionally apply to the program and activities of Federal agencies, including the Department of Justice.")

program; 3) that nature and importance of the program, activity, or service provided by the program to people's lives; and 4) the resources available to the grantee/recipient and costs.<sup>18</sup>

We not aware of a specific analysis by TSA or Lockheed Martin of the TWIC program based on the factors described in the DOJ guidance. However, it is clear that the TWIC program satisfies the first three factors given the importance of the TWIC to the future likelihood of the workers, the large numbers of LEP workers employed in major U.S. ports, and the resulting frequency that LEP persons must apply for the TWIC. As described in the recommendations below and the DOJ guidance, the costs of providing the necessary TWIC translation and interpreter services can be minimized with adequate planning and current technologies.

Other federal agencies, including the Social Security Administration (SSA), routinely provide a broad range of translation and interpreter services to access their programs. For example, SSA's "Multilanguage Gateway" (<http://www.ssa.gov/multilanguage/>) includes scores of forms and documents required to access SSI benefits, Social Security numbers, and other critical materials that are available on-line in 15 languages (Spanish, Portuguese, Polish, Korean, Italian, Haitian-Creole, Greek, French, Farsi, Chinese, Armenian, Arabic, Vietnamese, Tagalog, Russian). SSA also provides free interpreter services where necessary to help workers access these programs, using a nationwide contract for telephone interpreter services in more than 150 languages and dialects.<sup>19</sup>

Recommendations: Thus far, the only LEP services made available by TSA and Lockheed Martin include the optional pre-enrollment form (available on-line in Spanish) and outreach material translated only in Spanish to help publicize the TWIC program at the ports. We believe these policies are insufficient to meet TSA obligations to provide LEP services. Thus, we urge TSA to adopt several cost effective LEP services to help port workers navigate the TWIC enrollment, appeal and waiver process.

a. Oral Interpretation at TWIC Enrollment: The ability to negotiate the TWIC enrollment process at the ports -- requiring the applicant to provide criminal history record, immigration documentation and other technical information -- will often determine the fate of the worker's future employment. Rather than provide professional interpreter services at this critical stage in the process, TSA has authorized workers to bring family or friends (called "helpers" on the TWIC disclosure form) to provide translation services.

---

<sup>18</sup> 67 Fed. Reg. at 41459.

<sup>19</sup> Social Security Administration, DI 230490.001 (January 31, 2006), DI 33010,030 (June, 9, 2004), DHU & DSS Directives, "Interpreters for Individuals with Limited English Proficiency (LEP) or Individuals Requiring Language Assistance." In addition to providing access to SSI benefits and Social Security documents, SSA translates key documents that explain the forms required to access the Medicare Prescription Drug Program ([www.ssa.gov/prescription help/](http://www.ssa.gov/prescription%20help/)). For more detail on other federal agency policies, see the Limited English Proficiency Federal Interagency Website which is specifically devoted to federal agency compliance with Executive Order 13166 ([www.lep.gov](http://www.lep.gov)).

Studies have shown that the reliance on family members and other informal interpreters is detrimental to the LEP person's ability to obtain services.<sup>20</sup> Indeed, the DOJ guidance contains an entire section on the use of family members and friends as interpreters, cautioning that they are often "not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may arise. LEP individuals may be uncomfortable revealing or describing sensitive, confidential, or potentially embarrassing medical, law enforcement . . . family, or financial information to a family member, friend, or member of the local community. (Emphasis added).<sup>21</sup>

These concerns are especially relevant to the TWIC enrollment process, where applicants are asked for specific information about their criminal history, immigration status, and mental health – all of which are sensitive, confidential and potentially embarrassing to reveal to family and friends. Family and friends are rarely qualified to translate this technical and sensitive information, including the following questions required by the TWIC disclosure form: "I meet the immigration status requirements described in 49 CFR 1572.105," "I have been adjudicated as lacking mental capacity, or committed to a mental health facility involuntarily," and "I was convicted, or found not guilty by reason of insanity, of a disqualifying crime listed in 49 CFR 1572.103(b)."

Indeed, TSA's decision compromises the TWIC process further by requiring the applicant's family and friends to verify under penalty of perjury that they have provided all the information they know about the individual, not just the relevant information that they have been specifically asked to translate. Specifically, as set forth in the TWIC disclosure form signed by the translators, they must verify that "the responses provided are based on all information of which I have knowledge, or which were provided to me by the applicant."

Recognizing the inherent limitations of family and friends serving as interpreters, DOJ recommends that competent interpreter services be provided free of charge to persons with limited-English proficiency. According to the DOJ guidance, "when particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical options."<sup>22</sup> Other federal agencies, including the Social Security Administration, also require professional translators while only authorizing family and friends to interpret when specifically requested as an alternative by the applicant.

Thus, in the case of Spanish and the languages most commonly spoken by port workers, an adequate number of staff employed by the TSA/Lockheed Martin enrollment centers should be bilingual in those languages. Of course, these enrollment staff will also be qualified to process English-speaking workers when necessary. In the case of languages spoken often by workers at certain ports and not others (including Southeast Asian and South Asian languages), Lockheed Martin could move specialized personnel to various ports as the enrollment process rolls out in different locations. Where necessary due to more limited demand and to save costs,

---

<sup>20</sup> For a helpful summary of the research, see National Health Law Program, "Why Relying on Family Members, Friends and Children as Interpreters is Dangerous and Should be Discouraged" (undated).

<sup>21</sup> 67 Fed. Reg. at 41462.

<sup>22</sup> 67 Fed. Reg. at 41461.

the DOJ guidance also recommends contracting with professional interpreters and using telephone interpretation lines provided by AT&T and other major contractors.

b. Translation of “Vital” TWIC Documents: The TWIC program should include written translation of critical documents, including the TWIC disclosure forms, the form consenting to the FBI criminal background check and the Initial Determination of Threat Assessment (IDTA), which includes the description of the TWIC appeal and waiver rights. To our knowledge, none of these documents have been translated by TSA.

The DOJ guidance recommends that such “vital” written material be translated where each LEP language group constitutes 5% of the population served or 1,000 people, whichever is less.<sup>23</sup> Given the large numbers of foreign-born workers employed in many of the nation’s largest ports, the TWIC forms clearly rise to the level of DOJ’s recommended thresholds for multiple languages, not just Spanish.

Accordingly, TSA should take the following specific steps to translate vital TWIC documents:

1. TSA should undertake an analysis of the languages spoken most often by port workers and truck drivers servicing the ports.
2. TSA should translate the TWIC enrollment and consent forms in multiple languages before enrolling individuals at the ports where the largest population of LEP workers are employed.
3. Without delay, TSA should prepare “know your rights” flyers in multiple languages containing information on the waiver and appeal process to distribute when applicants enroll for the TWIC.
4. TSA should translate the IDTAs and match them when issued with the language spoken by the applicant as determined upon enrollment.
5. Once translated, the IDTAs should be made immediately available on the Internet with other translated material as part of a “Multilanguage Gateway” to the TWIC program.
6. Finally, all IDTAs issued in the interim should include a “tag line” in multiple languages directing the individual to the translated material on the TSA website.

These are mostly one-time investments that will go a long way to create a more fair and accurate TWIC process for the diverse population of U.S. port workers.

\* \* \*

Thank you again for the opportunity to testify on this critical issue of concern to thousands of port workers and truck drivers and their communities. We looking forward to working with the Committee to help workers access the rights guaranteed by the MTSA and to ensure a more fair and effective TWIC process.

---

<sup>23</sup> 67 Fed. Reg. at 41464.



## Transportation Worker Identification Credential (TWIC) Disclosure Form and Certifications

The Transportation Security Administration (TSA), in coordination with the United States Coast Guard, developed the Transportation Worker Identification Credential (TWIC) Program in response to the Maritime Transportation Security Act of 2002 (MTSA). MTSA requires a biometric identification credential for individuals who require unescorted access to secure areas of maritime facilities and vessels. Before issuing a TWIC, TSA must conduct a security threat assessment on the TWIC applicant. An applicant who, as a result of the assessment, is determined to not pose a security threat, will be issued a TWIC.

Each applicant for a TWIC must provide biographic information, identity documents, biometric information including fingerprints and a digital photograph, and pay the established TWIC fee. TSA will send pertinent parts of the enrollment record to the FBI, as well as within the Department of Homeland Security (DHS), so that appropriate terrorist threat, criminal history, and immigration checks can be performed. TSA will review the results of the checks to determine if the person poses a security threat, and will notify the applicant of the results. When TSA determines that an applicant qualifies to receive a TWIC, a credential will be produced and sent to the enrollment center at which the applicant applied. The applicant will return to the enrollment center for issuance and activation of the TWIC. Possession of a TWIC does not guarantee access to secure areas because the owner/operator controls which individuals are granted unescorted access to the facility or vessel. Rather, TWIC is a secure, verified credential that can be used in conjunction with the owner/operator's risk-based security program that is required in security regulations issued by the Coast Guard.

**Privacy Act Notice: Authority:** The authority for collecting this information is 49 U.S.C.114, 40113, and 5103a. **Purpose:** This information is needed to verify your identity and to conduct a security threat assessment to evaluate your suitability for a Transportation Worker Identification Credential. Furnishing this information, including your SSN or alien registration number, is voluntary; however, failure to provide it will delay and may prevent completion of your security threat assessment. **Routine Uses:** Routine uses of this information include disclosure to the FBI to retrieve your criminal history record; to TSA contractors or other agents who are providing services relating to the security threat assessments; to 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.

**PAPERWORK REDUCTION ACT STATEMENT:** Statement of Public Burden: TSA is collecting this information to determine your eligibility for a TWIC. This is a voluntary collection of information but failure to provide the information may result in an inability to approve your eligibility for a TWIC. TSA estimates that the total average burden per response associated with this collection for enrollment is approximately 90 minutes. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The control number assigned to this collection is OMB 1652-0047, which expires 04/05/2008.

### Certifications -- (Initial each of the items below)

\_\_\_\_\_ 1. As part of my employment duties, I am required to have unescorted access to secure areas of maritime facilities or vessels in which a Transportation Worker Identification Credential is required; or, I am now, or I am applying to be, a credentialed merchant mariner; or I am a commercial driver licensed in Canada or Mexico transporting hazardous materials in accordance with 40 CFR 1572.201.

\_\_\_\_\_ 2. I acknowledge that if TSA determines that I pose a security threat, my employer, as listed on this application, may be notified. If TSA or other law enforcement agency becomes aware of an imminent threat to a maritime facility or vessel, TSA may provide limited information necessary to reduce the risk of injury or damage to the facility or vessel.

\_\_\_\_\_ 3. You must answer each of the following questions by checking with either the "Yes" or "No" box. If your answer indicates that you intend to request a waiver, the waiver process will not begin until you receive an Initial Determination of Threat Assessment (IDTA). Complete instructions on how to file a waiver request will be provided with the IDTA. If you request it, the Trusted Agent will provide a copy of the applicable TWIC rule sections that are mentioned in the questions and define the disqualifying offenses.



**Transportation  
Security  
Administration**

- a. I was convicted, or found not guilty by reason of insanity, in a civilian or military jurisdiction of a crime listed in 49 CFR 1572.103(a)(1) through (a)(4).  Yes  No  
**Note:** If you answer “Yes” to this question, you are ineligible to receive a TWIC and you cannot be granted a waiver. List is available electronically via our web site <http://www.tsa.gov/twic> under “Eligibility” or on hard copy at our Enrollment Work Centers.
- b. I was convicted, or found not guilty by reason of insanity, in a civilian or military jurisdiction of a crime listed in 49 CFR 1572.103(a)(5) through (a)(12), but, if I am initially denied a TWIC, I intend to request a waiver.  Yes  No
- c. I was convicted, or found not guilty by reason of insanity, of a disqualifying crime listed in 49 CFR 1572.103(b), in a civilian or military jurisdiction, during the seven years before the date of this application, but, if I am initially denied a TWIC, I intend to request a waiver.  Yes  No
- d. I was released from incarceration, in a civilian or military jurisdiction, for committing a disqualifying crime listed in 49 CFR 1572.103(b), during the five years before the date of this application, but, if I am initially denied a TWIC, I intend to request a waiver.  Yes  No
- e. I am wanted or under indictment, in a civilian or military jurisdiction, for a disqualifying criminal offense identified in 49 CFR 1572.103, but, if I am initially denied a TWIC, I intend to request a waiver.  Yes  No
- f. I have been adjudicated as lacking mental capacity, or committed to a mental health facility involuntarily, but, if I am initially denied a TWIC, I intend to request a waiver.  Yes  No
- g. I meet the immigration status requirements described in 49 CFR 1572.105.  Yes  No
- h. I have served in the military. If “yes”, provide the following:  
 Branch of service: \_\_\_\_\_  
 Date of discharge: \_\_\_\_\_  
 Type of discharge: \_\_\_\_\_  
 Yes  No
- i. I have been informed that, if I receive a TWIC, Federal regulations at 49 CFR 1572.19 impose on me a continuing obligation to disclose to TSA if I am wanted, under indictment, convicted, or found not guilty by reason of insanity, of a disqualifying crime under 49 CFR 1572.103(a) through (b); adjudicated as lacking mental capacity, or committed to a mental health facility; or no longer meet the immigration standards.  Yes  No

The information I have provided on this application is true, complete, and correct, to the best of my knowledge and belief, and is provided in good faith. I understand that a knowing and willful false statement, or an omission of a material fact on this application, can be punished by fine or imprisonment or both (see 18 U.S.C. 1001), and may be grounds for denial of a Transportation Worker Identification Credential.

\_\_\_\_\_  
 Printed Name of TWIC Applicant

\_\_\_\_\_  
 Signature of TWIC Applicant Date

\_\_\_\_\_  
 Printed Name Helper/Translator

\_\_\_\_\_  
 Signature Date

\_\_\_\_\_  
 Daytime Telephone

\_\_\_\_\_  
 Address

I certify that I assisted in the completion of this form at the request of the applicant named on this TWIC enrollment document, that the responses provided are based on all information of which I have knowledge, or which were provided to me by the applicant, and that the completed enrollment form has been read to the applicant in the language the applicant speaks fluently for verification before he or she signed the application in my presence. I understand that a knowing and willful false statement or an omission of a material fact on this enrollment document can be punished by fine or imprisonment or both, and may be grounds for denial of a TWIC.