Testimony of
Laura Moskowitz
National Employment Law Project

Hearing Before the
U.S. House of Representatives
Committee on Homeland Security, Subcommittee on
Border, Maritime, and Global Counterterrorism

Transportation Worker Identification Credential: A Status Update

September 17, 2008

Laura Moskowitz, Staff Attorney
National Employment Law Project
405 14th Street, Suite 1400
Oakland, CA 94612
(510) 663-5705
lmoskowitz@nelp.org

Testimony of Laura Moskowitz Before the
U.S. House of Representatives Committee on Homeland Security,
Subcommittee on Border, Maritime, and Global Counterterrorism
September 17, 2008

Chairwoman Sanchez and members of the committee, thank you for this opportunity to testify on the status of the Transportation Worker Identification Credential (TWIC).

My name is Laura Moskowitz, and I am a Staff Attorney at 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. As part of our work to improve the fairness and accuracy of employee background checks, we have focused specifically on the TWIC program and its security threat assessment, especially the critical waiver and appeal procedures.

Over the past year, NELP has helped over 100 TWIC applicants file appeals and seek waivers after being initially denied by the Transportation Security Administration (TSA), and has spoken with hundreds of workers going through the TWIC application process. We have worked closely with the transportation unions to provide information and assistance about the TWIC application, appeal, and waiver process, and have conducted TWIC information sessions for longshore workers and port truck drivers across the country. We have visited the Lockheed Martin enrollment centers, worked closely with TSA program and adjudication staff, and participate in the TSA TWIC Stakeholder Communications Committee meetings. Our "Know Your Rights" TWIC materials are also featured on TSA's TWIC website.

As the TWIC program nears its one-year mark next month and the final compliance date is only six months away, it is not too late for TSA and Lockheed Martin to prioritize some key fixes that will become critical as the compliance date nears and the number of applications grows. Our testimony focuses on the following major problems facing TWIC applicants and key recommendations for improvement.

- Poor outreach and communication by TSA and Lockheed Martin have resulted in workers failing to apply for TWICs, including large numbers of eligible workers with criminal records, which has contributed to low enrollment. To maximize enrollment on the part of eligible workers, TSA and Lockheed Martin should specifically tailor communications for workers with criminal records, explain what the disqualifications are, assure workers with criminal records that they qualify, and encourage them to utilize the TWIC waiver process.

- Due to inadequate screening, TSA is disqualifying large numbers of workers whose criminal records do not make them ineligible, in violation of the standards under the Maritime Transportation Security Act (MTSA). Before issuing an initial denial, TSA should marshal its resources to track down missing information that is critical to the determination that someone has a disqualifying felony conviction.

- TSA is denying TWICs to large numbers of foreign-born U.S. citizens and other qualified workers due to poor training by Lockheed Martin of its "Trusted Agents" and poor communication with applicants regarding necessary citizenship and immigration documents. Lockheed Martin must more effectively train its Trusted Agents to accept the necessary documents during enrollment, and TSA must take far more proactive steps to ensure that documents needed by foreign-born applicants are brought to the enrollment center and sent to TSA.

- TSA and Lockheed Martin have not provided language-appropriate services to the ports' diverse immigrant workforce, thus hindering their ability to obtain TWICs. TSA and Lockheed Martin should make translations of vital documents available and hire bilingual staff or use a language interpretation telephone service at the enrollment centers and Help Desk.

NELP submitted testimony before the full Homeland Security Committee last October which featured many of the same recommendations, yet these problems have only become more apparent over the past year.

I. The Basics of the TWIC Background Check Process

By way of background, we describe below the TWIC security threat assessment process. We also note specific points where problems have been identified by NELP, the National Maritime Security Advisory Committee (NMSAC), and many of the transportation unions, before describing in more detail our primary concerns with the TWIC process.

The federal law sets forth 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. TWIC Pre-Enrollment: TSA created an optional pre-enrollment process which allows the worker to enter his or her basic biographical information with TSA before enrolling in-person at an enrollment center. The pre-enrollment process is intended to help save time by providing the individual with an appointment for the in-person enrollment, but the complicated process for setting up a password online has proven difficult for many applicants.

2. Enrollment at Designated Locations: During enrollment, all information relevant to TWIC eligibility is supposed to be collected, including the fingerprints required to generate an FBI rap sheet and documents pertaining to citizenship and immigration status. In practice, there have been widespread problems with fingerprints being rejected and necessary documents not being collected for transmission to TSA.

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. TWIC Approved and Card Production: If TSA fails to identify any disqualifying information, the individual is notified that he or she qualifies for a TWIC, and card production begins. Lockheed Martin's backlog in card production currently means that an applicant waits six to eight weeks after approval before being notified by the enrollment center that the card is ready to be picked up. There have been myriad problems with card pick-up and activation, as described in detail in the July 2008 NMSAC report.[1]

b. Initial Denials Subject to "Appeal:" When TSA determines that the individual has or may have committed a disqualifying offense, or when TSA cannot confirm citizenship/immigration status, the applicant receives an initial denial letter. If the information reported by TSA is incorrect and the individual is TWIC-eligible, the individual can "appeal" the case within 60 days by providing the official court or citizenship/immigration documentation to correct the information.

c. Initial Denials Subject to "Waiver": If the individual has a disqualifying criminal offense, then he or she can seek a "waiver" of the disqualification based on evidence of rehabilitation, a solid work history and other relevant factors. Selected "permanent" disqualifying offenses are not subject to the waiver process.[2] If the waiver request is denied by TSA, the worker has the right to review of the decision by an administrative law judge.

II. Due to Poor Outreach and Communication by TSA and Lockheed Martin, Workers Are Failing to Apply for a TWIC, Including Large Numbers of Eligible Workers with Criminal Records

"Some individuals are told [by the TWIC Program Help Desk] that if they have a permanent disqualifying offense on their records, they cannot obtain TWICs."

- National Maritime Security Advisory Committee, TWIC Working Group Discussion Items Report (July 30, 2008)

"Everyone down on the docks is saying if you have a criminal record, don't even bother trying to apply for a TWIC."

- Statement recently made by a longshore worker from Philadelphia helped by NELP to obtain a waiver of a disqualifying offense

---

[1] National Maritime Security Advisory Committee (NMSAC), TWIC Working Group, "Discussion Items" Report (July 30, 2008), at page 8.

[2] The offenses not subject to waiver include espionage, sedition, treason, terrorism, or conspiracy to commit these crimes. (49 C.F.R. § 1515.7, 1515.103(a)(1)-(4)). All the other "permanent" disqualifying offenses are waivable.

As the above statements show, misinformation and inaccurate rumors abound about the TWIC eligibility requirements. We have heard time and time again from workers who believe that if they have had any brush with the law, they need not apply for a TWIC. Many of them only have misdemeanors, which are not disqualifying. Many of them have convictions that are 20 or 30 years old and are no longer disqualifying. Many of them do have disqualifying offenses, but they do not realize that they can apply for a waiver and still obtain their TWIC card. All are afraid to apply and often seriously consider looking for work in other industries.

Based on our experience, it is clear that much of this confusion and fear is due to TSA and Lockheed Martin's failure to get the word out about the types of disqualifying offenses and the possibility of obtaining a waiver of these disqualifying crimes. When we asked Lockheed Martin representatives at the enrollment centers whether they discussed the waiver with applicants who indicated that they had disqualifying crimes, they responded that they did not. We have seen only one TSA flyer that addresses the disqualifying criminal offenses, and it conspicuously fails to emphasize the waiver process.

As NMSAC recently noted, "[o]ther than providing updates on when enrollment is beginning in certain ports, the [TWIC] communications team is not particularly visible."[3] Last week, for the first time, we saw two slides in a Lockheed Martin/Deloitte compliance presentation that encouraged workers with criminal records to apply and use the waiver process. However, to our knowledge, that material has not made its way to workers on the front lines.

These workers with records have often worked for decades at the port, along with generations of their family members, and they are the least likely to do anything that would risk the safety and security of the port and their livelihood. If they do not access the waiver process, the nation's ports risk losing some of their most experienced and dedicated workers, and the workers risk losing some of the few good jobs available for workers with criminal records.

To its credit, TSA has granted almost all of the waiver requests it has received, thus proving the indispensable value of the waiver process. We believe that TSA is thoroughly and fairly considering these waiver applications. However, we are concerned that the total number of waivers sought (809 as of September 5, 2008) is quite low compared to the likely number of workers who have waivable disqualifying offenses out of the estimated 1.5 million workers who will be screened by TSA.

Recommendation: TSA and Lockheed Martin should specifically tailor communications for workers with criminal records, explain what the disqualifications are, assure workers with criminal records that they qualify for TWICs, and encourage them to utilize the waiver process.

Promotion of the waiver process will increase enrollment by those who fear applying and thus postpone it as long as possible or seek work in other industries. In addition, providing basic information about the disqualifying offenses will encourage workers with non-disqualifying prior records to come forward and apply. The more workers see that their

[3] NMSAC "Discussion Items" Report, at page 2.

colleagues at the ports with criminal records are successfully obtaining TWICs, the more they will apply.

To improve enrollment, there is simply no substitute for aggressive and smart outreach, prioritizing the large ports where a significant number of applicants has still not applied. TSA and Lockheed Martin should distribute a "know your rights" fact sheet that specifically describes the disqualifying criminal offenses, the waiver process, and the key considerations that argue in favor of a waiver. Facility and vessel owner-operators should be provided with these outreach materials as well. The current outreach teams should also engage local employers and media in targeted communities to help get the word out. TSA should also urge the ports to partner with local unions and non-profit organizations that can help deserving workers prepare the TSA waiver application.

III. Due to Inadequate Screening, TSA is Disqualifying Large Numbers of Workers Whose Criminal Records Do Not Make Them Ineligible for TWICs, In Violation of the Standards Under the Maritime Transportation Security Act (MTSA)

Unfortunately, after applicants with criminal records make it through the enrollment process, they still often face an uphill battle to obtain their TWICs because TSA's flawed screening procedures routinely result in erroneous denials of eligible workers. TSA's cursory criminal history record review, which is limited to whatever appears on the face of an applicant's FBI rap sheet, is not -- as the law requires -- a true screening for disqualifying felony convictions.

For example, a longshore worker from Southern California was recently denied due to a misdemeanor marijuana sales conviction. As is commonly the case, the FBI rap sheet TSA used to make its determination did not indicate whether this was a felony or misdemeanor. Rather than taking steps to determine the degree of the offense by contacting the state repository or local courthouse, TSA issued an initial denial. The applicant then had to take off time from work, travel to the courthouse, and obtain documentation from the clerk's office showing that this was a misdemeanor in order to successfully appeal his denial.

As this example demonstrates, the FBI's rap sheets routinely lack the critical information TSA needs by law to determine whether the applicant has actually been convicted of a felony that meets the definition of one of the disqualifying offenses, within the requisite time period, and whether the person was released from incarceration more than five years before applying. The flawed screening procedures set up by TSA put the burden on applicants, thousands of whom are denied even though they are actually eligible, forcing them to take time off work, travel to courthouses, pay to obtain copies of official documentation, and submit appeals to prove eligibility. The emotional toll on workers is also significant; our clients who have been denied suffer from worry, stress, and nightmares as they and their families contemplate the loss of this job. The 99% success rate of appeals based on criminal history information shows that TSA's initial threat assessments are disqualifying an unacceptably high number of qualified applicants.[4]

---

[4] Under the hazmat program, which requires the same background check as TWIC, literally 99% of the appeals filed were successful as of October 2007. One-third of the over 10,000 successful hazmat appeals were related to

Not only is the burden on the worker to fill the gaps in the FBI's rap sheets, but far too many innocent workers fall through the cracks of the system, either because they do not understand what they need to do to prove their eligibility, they cannot afford to take time off work and track down the official court records they need to appeal their denials, or they think it is not worth the effort because they are convinced they will be denied by TSA. Indeed, almost 2,000 workers who received initial denials have simply not responded, thereby timing out and losing their opportunity to obtain a TWIC card and keep their jobs.

More specifically, we have identified the following problems that routinely result in erroneous denials:

Incomplete State Arrest Records: Of special concern to TWIC applicants, the FBI rap sheets are routinely incomplete. According to the U.S. Attorney General, the FBI's rap sheets relied upon exclusively by TSA are "still missing final disposition information for approximately 50% of its records."[5] Mostly, this includes arrest information that is never updated electronically by the states to reflect whether the charges have been dropped, dismissed, or successfully prosecuted. Regardless of the law's requirement that workers be disqualified only for convictions or outstanding charges open for prosecution, it is TSA's policy (49 C.F.R. Section 1572.103(d)) 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 within 60 days.

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.[6] 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.

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 are incorrectly denied because TSA believes they have been incarcerated within the five-year period based on the original sentence entered on the rap sheet.

---

incorrect criminal records and the other two-thirds were attributed to immigration status issues. We have heard unofficially from TSA that under the TWIC program, the large majority of appeals continue to be immigration-related, and that the success rates on appeal continue to be in the 99% range.

[5] U.S. Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006), at page 3 (available at http://www.usdoj.gov/olp/ag_bgchecks_report.pdf).

[6] Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2003* (2006), at Table 1.

Incomplete Information on Expungements and Convictions Overturned on Appeal: The FBI rap sheets frequently fail to include subsequent events beyond the initial arrest and/or conviction that affect applicants' eligibility, such as the expungement of a conviction or the reversal of a conviction on appeal.

Non-Felony Offenses: In addition, as discussed in the example, 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 offense without characterizing the severity of the crime.

Rap Sheet Items That Trigger Initial Denials But Are Not Actually Charges or Convictions: Entries appear on the FBI rap sheet each time an individual is fingerprinted for a criminal justice purpose and that fingerprint is submitted to the FBI. This includes temporary detention of individuals crossing the border who are questioned by Immigration and Customs Enforcement officers, as well as fingerprinting done by correctional institutions when the person enters custody. These items often show up as open, pending charges on FBI rap sheets, triggering an initial denial and causing the worker to demonstrate that there was no criminal prosecution associated with the entry.

Recommendation: Before issuing an initial denial, TSA should marshal its resources to track down missing information that is critical to the determination that someone has a disqualifying felony conviction.

TSA and its contractors should take several significant steps to produce a determination that is based on accurate information and in compliance with the MTSA standards.

a. Track Down Missing Arrest Dispositions: In order to correct the serious contravention of the law's requirement that only convictions and charges that are genuinely open for prosecution are disqualifying, TSA should prioritize tracking down missing dispositions for old arrests before issuing an initial denial. 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.

As is the practice of the FBI in reviewing gun checks under the Brady Act, TSA should designate staff to locate missing disposition information.[7] For the federal gun checks required by the Brady Act, the FBI is able to track down 65% of the missing dispositions within three days rather than simply denying the license based on old arrest information.[8] TSA staff is able to access state court records to research waiver applications. Staff should similarly be directed to investigate the dispositions of old arrests, using existing state and local court contacts, the states' and courts' online criminal history record information, or by telephoning the courts.

---

[7] The Brady Act and implementing regulations (28 C.F.R. Part 25) created a National Instant Criminal Background Check System (NICS), a special unit that performs "instant" criminal background checks for federal firearms licensees. Under the law, (18 U.S.C. 922(t)(B)(ii)), NICS is required to research the record and attempt to locate missing disposition information within three business days.

[8] *The Attorney General's Report on Criminal History Background Checks*, at page 108.

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, Non-Conviction Data, and Incarceration Release Dates: Again, to comply with the MTSA standards, TSA should develop contacts with each state criminal history repository and investigate the offense levels of potentially disqualifying criminal offenses before issuing an initial denial. TSA should prioritize cases like drug offenses, weapons charges, and robberies, which will routinely result in non-felony convictions. 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 should verify the release date with state corrections authorities instead of simply denying the application based on the original sentence imposed. Finally, where temporary border detentions and entry of custody data appear on the rap sheet, TSA should confirm whether these items were actually associated with any type of prosecution before issuing a denial.

IV. TSA is Denying Large Numbers of U.S. Citizens and Other Qualified Workers Due to Poor Training by Lockheed Martin of Its "Trusted Agents" and Poor Communication with Applicants Regarding Necessary Citizenship and Immigration Documents

It has become increasingly apparent that foreign-born applicants, including military dependents born on bases abroad and other U.S. citizens, are being denied in large numbers even though they are TWIC-eligible. Indeed, about two-thirds of all appeals are based on citizenship or immigration status issues. In our experience, these denials are due to Lockheed Martin's failure to properly train its trusted agents to collect items that prove citizenship and immigration status, such as U.S. passports, naturalization certificates, green cards, visas, and employment authorization documents.

For example, two U.S. Coast Guard-licensed merchant mariners, one born on a military base abroad and the other a naturalized U.S. citizen originally from Poland, recently applied for their TWIC cards. They brought their U.S. passports with them to the enrollment center, but their passports were not collected by the Lockheed Martin trusted agent for inclusion in the electronic package sent to TSA. Both were subsequently denied based on TSA's failure to determine their citizenship, even though each has maintained a U.S. Coast Guard-issued license (which requires U.S. citizenship) and has sailed into harm's way in support of military operations during their seagoing careers. One is former Navy reservist.

We have helped numerous workers from all over the country who found themselves similarly denied after bringing these documents to the enrollment center, only to have the trusted agents refuse to accept them because the applicants had already submitted identity-establishing documents such as a driver's license and social security card. When these applications reach the TSA adjudication office they often result in initial denials because TSA cannot complete this part of the background check without the additional documents. The applicants must then file an appeal and (re)submit this documentation to TSA. Large numbers of foreign-born workers are finding themselves in this situation, driving up the number of appeals sent to the adjudication office and placing an unfair burden and stigma on foreign-born

workers.

TSA also tells us that applicants fail to bring the necessary documents to the enrollment centers. However, TSA and Lockheed Martin communication materials detailing what documents are required have not made it clear that specific documents, such as a U.S. passport or naturalization certificate, are required, rather than optional, for foreign-born applicants in order for TSA to conduct this part of the background check.

Although TSA's adjudication office is quick to rectify these situations when workers respond and provide the appropriate documentation, it is not acceptable or proper under the law to deny at the outset so many qualified foreign-born applicants. In addition, as discussed in more detail below, these applicants often have the hardest time navigating the application and appeal process due to language barriers.

> **Recommendation: Lockheed Martin must more effectively train its Trusted Agents to accept the necessary documents during enrollment, and TSA must take more proactive steps to ensure that documents needed by foreign-born applicants are brought to the enrollment center and properly scanned and sent to TSA.**

TSA recently tripled the number of staff handling appeals due to the high volume of immigration appeals. We commend TSA for directing additional staff where needed to keep the appeals moving efficiently, and for their interest in trying to find ways to communicate better to foreign-born applicants regarding the documents needed.

TSA should revise its materials on the documentation required for TWIC to make clear that foreign-born applicants have different requirements, and ensure that this information is consistently communicated so that the information TSA needs to conduct this part of the background check is coming in on the front end, in order to reduce the number of denials and the burden on workers to fix these problems on the back end. In addition, Lockheed Martin must continue to train its trusted agents to collect the necessary citizenship and immigration status materials.

V. TSA and Lockheed Martin Have Not Provided Language-Appropriate Services to the Ports' Diverse Immigrant Workforce, Thus Hindering Their Ability to Obtain TWICs

TSA and Lockheed Martin have not complied with federal laws designed to provide meaningful access to the ethnically diverse TWIC applicants whose limited-English proficiency (LEP) requires translation and interpretive services to navigate the enrollment, appeal and waiver processes. Indeed, the only materials available in a language other than English are the pre-enrollment and outreach materials online in Spanish. TSA has just translated its disclosure form into 12 languages (it has yet to be deployed by Lockheed Martin), but no translation of vital documents such as denial letters has been made available, nor have any interpreters been provided to assist workers during the enrollment process.

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. For example, consider the ethnic diversity of the West Coast port truck drivers. In the Port of Seattle, 54% of the drivers are foreign born, and 44% speak a language other than English at home (most commonly Spanish, Punjabi and languages from Ethiopia).[9] In the Los Angeles and Long Beach ports, almost 90% of the truck drivers were born outside the U.S., mostly in Spanish-speaking countries.[10] 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.[11]

The lack of language-appropriate services has created serious barriers for LEP applicants. For example, when the Oakland enrollment center opened last fall, a Chinese-speaking applicant had to wait for hours for someone to translate for him – finally, some Chinese and English-speaking applicants arrived and helped him. In addition, an employer from Florida who contacted NELP for assistance had to help his Spanish-speaking drivers through the entire application, denial and appeal process because no translation or interpretation was available. At significant time and expense, a union in Long Beach now helps numerous Spanish-speaking port truck drivers navigate the application, appeal, and waiver process, particularly because so many of the drivers there were born in Latin America and were being turned down, as discussed in the previous section.

None of these applicants should have to rely on the goodwill of others to help them obtain a government license that is critical to maintaining their livelihood. Pursuant to Executive Order 13166, each federal agency is required to "prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons."[12] Unfortunately, despite reaffirmation of this Executive Order under the current administration,[13] the Department of Homeland Security (DHS) has not yet prepared such a plan. While the DHS plan is under development, the agency's activities should be in compliance with the U.S. Department of Justice (DOJ) LEP guidance, which sets forth the criteria by which recipients of federal funding (such as contractor Lockheed Martin) will be evaluated for their compliance with Title VI of the Civil Rights Act of 1964's prohibition on national origin discrimination."[14] The DOJ directive also applies the Title VI standards to federal agencies."[15]

---

[9] Port Jobs, "Big Rig, Short Haul: A Study of Port Truckers in Seattle" (2007), at pages 19-20 (available at http://www.portjobs.org/bigrig_shorthaul.pdf).

[10] 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 15.

[11] East Bay Alliance for a Sustainable Economy, "Taking the Low Road: How Independent Contracting at the Port of Oakland Endangers Public Health, Truck Drivers, & Economic Growth" (September 2007), at page 25 (available at http://www.workingeastbay.org/downloads/Coalition%20Port%20Trucking%20Report.pdf).

[12] Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" (August 11, 2000), at page 1.

[13] Letter of Ralph J. Boyd, Jr., Assistant Attorney General, U.S. Department of Justice, Civil Rights Division (July 8, 2002).

[14] U.S. 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 (June 18, 2002).

[15] The guidance states: "Pursuant to Executive Order 13166, the meaningful access requirement of the Title VI regulations 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[.]" *Id.* at 41459 n.4.

Where, as here, there is a significant number of LEP persons whose lives will be affected by a program, the DOJ guidance recommends providing both oral interpretation services and written translation of vital documents.[16] Recognizing the impropriety of family and friends serving as interpreters – TSA's chosen route – DOJ recommends that competent interpreter services be provided free of charge to persons with limited-English proficiency.[17] According to the DOJ guidance, "when particular languages are encountered often, hiring bilingual staff offers one of the best, and often most economical options."[18] Where necessary due to more limited demand and to save costs, the DOJ guidance also recommends contracting with professional interpreters and using telephone interpretation lines provided by AT&T and other major contractors.[19]

With respect to written translation, the DOJ guidance recommends that "vital" written material be translated where each LEP language group constitutes 5% of the population served or 1,000 people, whichever is less.[20] Given the large numbers of foreign-born workers employed in many of the nation's largest ports, the TWIC materials clearly rise to the level of DOJ's recommended thresholds for multiple languages, not just Spanish.

Recommendation: TSA and Lockheed Martin should make translations of vital documents available and hire bilingual staff or use a language interpretation telephone service at the enrollment centers and Help Desk.

Oral Interpretation: In the case of Spanish and the languages most commonly spoken by port workers, an adequate number of staff employed at the enrollment centers should be bilingual in those languages. 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 and contract with a telephone interpretation service for less-common languages. The TWIC Help Desk should also contract with a telephone interpretation service so that it can adequately respond to questions from LEP applicants.

Translation of "Vital" TWIC Documents: The TWIC program should include written translation of critical documents, including the TWIC disclosure forms (this is in progress), the form consenting to the FBI criminal background check, and the initial denial letter, which includes the critical description of TWIC appeal and waiver rights. In the interim, at the very

---

[16] *Id.* at 41459-60.

[17] 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 feel 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." 67 Fed. Reg. at 41462 (emphasis added). 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.

[18] 67 Fed. Reg. at 41461.

[19] *Id.* at 41462.

[20] *Id.* at 41463-64.

minimum, all initial denials should include a "tag line" in multiple languages directing the individual to call a dedicated number to obtain a translation of the letter in the appropriate language.

VI. To Properly Monitor the Program's Effectiveness, TSA Should Report Additional Data on the Status of the Security Threat Assessment, Waivers and Appeals

Finally, we urge TSA to provide additional data in the TWIC Dashboard or another format to better assess the effectiveness of key features of the TWIC process. Specifically, TSA should include: (1) denials broken down by immigration status, criminal record, and other; (2) denials broken down by type of criminal offense; (3) the success rate of appeals based on immigration status, criminal record, and other; and (4) the number of appeals and waivers that are pending. This information, if provided monthly, will go a long way to monitor the effectiveness of the TWIC process heading into this critical period of enrollment.

* * *

Thank you again for the opportunity to testify on this important issue as we reach the one-year mark and still have an opportunity to improve the program from an applicant's perspective. We look forward to working with TSA and the committee to ensure a more fair and effective TWIC process.