

Statement of
Kathleen Campbell Walker
on behalf of the American Immigration Lawyers Association

concerning
Ensuring Homeland Security While Facilitating Legitimate Travel:
The Challenge at America's Ports of Entry

before

The Committee on Homeland Security
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Mr. Chairman and distinguished members of the House Committee on Homeland Security, I am Kathleen Campbell Walker, National President of the American Immigration Lawyers Association (AILA), headquartered in Washington, D.C., and head of the Immigration Department of the Kemp Smith LLP law firm, with offices in El Paso and Austin, Texas. I am honored to have this opportunity to appear before you today.

AILA is the immigration bar association of over 11,000 lawyers, who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is affiliated with the American Bar Association (ABA). The association has 35 chapters and numerous national committees engaged in liaison with federal agencies as well as advocacy, professional conferences and publications, and media outreach on immigration topics. AILA members have assisted in contributing ideas to increased port of entry inspection efficiencies, database integration, security enhancement and accountability, and technology oversight, and continue to work through our national liaison activities with federal agencies engaged in the administration and enforcement of our immigration laws to identify ways to improve adjudicative processes and procedures.

Being from El Paso and practicing immigration law here for over 22 years, my practice has focused on consular processing, admissions, database integration, private/public partnerships for improved inspections at our ports, biometrics in immigration processing, business-based and cross-border immigration issues, naturalization, citizenship, and family-based cases. I previously served as the president for four years of the El Paso Foreign Trade Association, a member of the Texas Comptroller's Border Advisory Council, a member of the board of the Border Trade Alliance, and a member of the executive committee of the Texas Border Infrastructure Coalition for the city of El Paso. During my tenure as president of the El Paso Foreign Trade Association, the association served as a leader in creating the first Dedicated Commuter Lane in the State of Texas, which was in El Paso. I have previously testified in hearings before committees and subcommittees of the U.S. Senate and House as well as before certain committees of the Texas State Senate and House on the topics of immigration and border security.

I. BACKGROUND

A. Summary

The El Paso/Cd. Juarez area has served as an example of the use of positive public and private partnerships to balance the flow of trade and people between countries with the increased need for security. El Paso represents the historic border town between the U.S. and Mexico. The virtual border of today includes as our first line of defense, the Department of State's (DOS) U.S. consular posts abroad as well as Pre-Clearance Operations (PCO) and the Immigration Security Initiatives (ISI) of Customs and Border Protection (CBP) at foreign airports. In addition, we use advance passenger manifests from arriving airplanes provided to CBP, the USVISIT registration process, the integration capabilities of our enforcement databases, and the operations of our intelligence networks.

What are the true parameters of "securing" this virtual border? The border demarcated by the Rio Grande between the U.S. and Mexico is a last line, not a first line, of effective control of those coming to the U.S. This border must be porous enough to facilitate our economic growth and yet impervious enough to withstand the efforts of those wishing to do our nation harm. My testimony will review concrete efforts by this border community to achieve such results via numerous security related technologies and infrastructure initiatives. It is difficult for a community steeped in secure trade initiatives, however, to support an "enforcement only" or "enforcement first" response to our current immigration problems generally, and to the conundrum of illegal immigration specifically given years of failure to fund and be accountable to the American public for border security issues. Where were the funds and the accountability for trade and inspections' infrastructure as well as consular visa processing support in the last fifty years that would meet

the joint demands of security and trade?

A day does not pass without innumerable talking heads lambasting our lack of control of our borders. We here on the border know that talk is cheap and action, including funding and oversight, much harder. For example, the Immigration and Naturalization Service (“INS”) Office of Administration reported in the 2nd Data Management Improvement Act (“DMIA”) report to Congress in 2003, the following shortages in space for the federal inspection area at land border ports of entry:

- 64 ports have less than 25 percent of required space.
- 40 ports have between 25 and 50 percent of required space.
- 13 ports have between 50 and 75 percent of the space required.
- Some existing ports lack any land for expansion.¹

The funding backlogs for facility requirements of land ports of entry have been extensive for years. In fiscal year 2003, for example, the funding backlog was over \$500 million.² Where is the follow-up report evaluating this lack of infrastructure and the plan of action to deal with this issue? If “border security” means sufficient infrastructure at our land border ports, when is this objective actually achievable?

B. Accountability and Technology Solutions for Border Security

In a 2005 Immigration Policy Center (IPC) study on the impact of border fencing, Professor Jason Ackleson of New Mexico State University noted, “Viewing border security as a solely national security matter tends to neglect the larger economic and social forces that underpin the flow of Mexicans and others into the United States to fill gaps in the U.S. labor force.”³

As to the decisions that must be made to use effective technology as a complement to the human factor, the statement of Nancy Kingsbury, the Managing Director of Applied Research and Methods for the then Government Accounting Office is instructive. Ms. Kingsbury states that the following three key considerations must be addressed before a decision is made to design, develop, and implement biometrics into a border control system:

1. *Decisions must be made on how the technology will be used.*
2. *A detailed cost-benefit analysis must be conducted to determine that the benefits gained from a system outweigh the costs.*
3. *A trade-off analysis must be conducted between the increased security, which the use of biometrics would provide, and the effect on areas such as privacy and the economy.*⁴

Stephen E. Flynn, Ph.D., former Commander, U.S. Coast Guard (ret.) and a Jeanne J. Kirkpatrick Senior Fellow in National Security Studies has stated that, “Hardened borders also transform the cost-reward structure so amateur crooks are replaced by sophisticated criminal enterprises and corruption issues become more pronounced. In short, the experience of the southwest border suggests that aggressive border security measures end up contributing to problems that inspired them in the first place.”⁵ Commander Flynn noted the following:

¹ DMIA Task Force: Second Annual Report to Congress, at 33 (December 2003) (herein “2nd DMIA Report”).

² *Id.*

³ Ackleson, Jason, Ph.D., “Fencing in Failure: Effective Border Control is Not Achieved by Building More Fences,” Immigration Policy Center Brief, American Immigration Law Foundation, p. 6 April 2005.

⁴ Kingsbury, Nancy, Testimony before the Subcommittee on Terrorism, Technology, and Homeland Security and Subcommittee on Border Security, Immigration, and Citizenship, Committee on the Judiciary, United States Senate, March 12, 2003 GAO 03-546T, at 13.

⁵ Flynn, Stephen E. Ph.D., Testimony before a hearing of the Committee on Foreign Relations,

To adopt the “smart border” agenda throughout North America will require that Washington countenance an alternative approach to dealing with the issues of illicit drugs and immigration. It will require the federal agencies for whom border enforcement has been a growth business to acknowledge the unintended consequences of their collective effort has been to actually make the border regions more difficult to police and secure.⁶ Well designed border crossings that are adequately staffed with inspectors who are well trained in behavior pattern recognition can be more effective than reliance on high technology when dealing with this foot traffic...a biometric device is useless in detecting behaviors such as excessive anxiety that should arouse suspicion.⁷

C. The Human Element

It is critical to recognize the importance of the human element in concert with technology advancements. We must never forget the actions of Diane Dean, the customs inspector, who with her colleagues intercepted and arrested an Al Qaeda terrorist named Ahmad Ressam at the U.S.-Canada border in late 1999. She questioned Ressam and found his answers suspicious. In addition, Jose Melendez-Perez was an INS inspector who denied entry to a man named Mohamed Al Quatrain at the Orlando airport in August of 2001. Mr. Melendez just felt that something in his story did not add up. Later, Al Quatani was captured fighting with the Taliban. The importance of such intuition and inspection training cannot be forgotten or undervalued at our collective security peril.

This critical human element within CBP is suffering. The November 2007 GAO report noted that in 2006, nonsupervisory CBP staff scored their work environment as lower than elsewhere in the federal government on 61 of their survey's 73 questions.⁸ The report further notes that as to staffing, CBP staff gave low marks to CBP for adequacy of resources to get the job done and for work being done to recruit those with necessary talents and skills. In addition, as to training, less than half of the CBP staff were satisfied with the quality of training received.⁹ At some ports, managers had to cancel training sessions to deal with staffing shortages. At one port, management estimated that they would need \$4 million in overtime to provide its officers with four basic cross-training courses, including one in processing immigration cases.¹⁰

It is imperative that effective congressional oversight of staffing and training at ports of entry evaluate the number of personnel actually on site and available for inspection work. Often, a port may be listed as fully staffed, but the information is only relevant as to allocation versus actual on site inspectors. In addition, CBP has reduced public information as to these staffing numbers. Several years ago, the Western Region of the southern land border for CBP included the Phoenix and San Diego Districts, while the Central Region included the El Paso, Harlingen, and San Antonio Districts. At that time, the Western Region had 13 ports of entry and processed 132,774,790 applications for admission, while the Central Region with 28 ports processed 190,808,224 applications for admission. Based on 788 authorized inspector positions for the Western Region versus 697 authorized inspector positions for the Central Region, the Central

U.S. Senate on “U.S.-Mexico: Immigration Policy & the Bilateral Relationship,” March 23, 2004, at p. 3.

⁶ *Id.* at p. 10.

⁷ *Id.* at p. 6.

⁸ U.S. Government Accountability Office (GAO), *Border Security Despite Progress, Weaknesses in Traveler Inspections Exist at Our Nation's Ports of Entry*, GAO-08-219, November 2007 at p. 54.

⁹ *Id.*

¹⁰ *Id.* at p. 36.

Region inspectors carried a load of 275,592 inspections per position versus 166,139 inspections per Western Region inspector. These figures must be provided by CBP to congressional oversight committees to determine realistic staffing needs and demands.

The president of the CBP union, the National Treasury Employees Union (NTEU), Colleen M. Kelley, sent a Letter to the Editor of the El Paso Times, which was published on October 21, 2007, stating that there are about 18,000 CBP officers staffing our nation's 326 ports of entry, with Congress hiring 200 more in FY 2008. She noted that while the addition of 200 might seem significant, that at least 22,000 CBP officers were needed—a deficit of 3,800 CBP inspectors. How can we expect CBP to have a chance to accomplish its inspections missions without sufficient staffing ---- and what really is the true number of on the ground inspectors needed to avoid massive overtime demands? This valid question should be readily answerable by any congressional oversight committee. Technology cannot achieve objectives without sufficient staffing resources and appropriate infrastructure. Thus, artificial deadlines to make constituents think security objectives are being achieved are an optical artifice at best.

II. TECHNOLOGY CHALLENGES AND HISTORY

It is imperative that we have a “no tolerance” policy for technology, which does not enhance security as advertised or for technological failures tied to inadequate funding and oversight by Congress and/or the agency charged with implementing such technology. While technology can provide useful enhancements to security capabilities, even the most promising technological plans can be thwarted or sabotaged based on a variety of factors such as:

- Inadequate pilot testing on sight to determine the true capacity of the technology.
- Failures to perform cost-benefit analyses before implementation as well as appropriate follow-up on performance of implemented technologies.
- Inadequate integration of field-testing replies on technology in strategizing implementation methodologies.
- Improper cannibalization of technologies during the request for bid process resulting in potential performance reductions.
- Failure to adhere to implementation schedules due inadequate funding and staffing.
- Inability to provide maintenance due to funding or lack of availability.
- Failure to analyze and address crossover agency issues in the implementation of technologies.
- Failure to provide adequate initial and on-going training to utilize technologies.
- Failure to admit mistakes and learn from them in technology implementation.
- Mandated percentages of technology use for inspections without consideration of effectiveness.
- Failure to preserve biometric data for future use/review.
- Failure to fully integrate watch list databases to improve effectiveness.

Any implementation of technology is always an experiment. The land border has had its share. The following section provides a few examples:

License Plate Readers - Several years ago, license plate readers were installed in our passenger vehicle lanes in El Paso to read plates of northbound cars to the U.S. to reduce primary inspection times by ending the need to manually input plate numbers. Unfortunately, the technology had problems with the different Mexican plate permutations and the ability to read such plates would at times be at a less than 50% level. The capacity has improved over time, but usage of the system can still be problematic.

Document Scanners - Section 303 of the Enhanced Border Security Bill of 2002 (Pub. L. No. 107-713), required that as of October 26, 2004, all U.S. visas, other travel and entry documents

issued to foreign nationals, and passports with biometric identifiers issued to Visa Waiver Program country applicants for admission must be used to verify identity at all ports of entry via a biometric comparison and authentication. This deadline was extended for one year by Pub. L. No. 108-299. Note that this requirement is separate from the recordation of admission under USVISIT procedures. Thus, along the U.S./Mexican border, even exempted Mexican laser visa holders under USVISIT procedures (e.g. crossers within 25-mile area of border/75 miles in Arizona for 30 days or less) require scanning for admission as well as holders of currently valid I-94s. This requirement applies to pedestrians, persons in passenger vehicles, as well as commercial vehicles. At El Paso ports alone, those inspected in one day can exceed 100,000 people.

In April and May of 2004, scanners were installed at El Paso ports in preparation for the October 2004 deadline. Mexican laser visas and legal permanent resident cards were scanned using this Biometric Verification System (“BVS”), which involved the scan of a print to confirm identity as well as a scan of the identity document. The system did not record the entry date. In addition, the system did not scan the person against watch lists upon intake of the biometric data without further manipulation by the inspector of the database. The card scanned would often get stuck in the BVS readers. In addition, the no-read rate for the scanners exceeded 40% at certain ports of entry. Such failures were tied to “wallet-crud” on the cards, damaged cards, and sweaty or dry fingers.

US VISIT, RFID, and Inspection – Due to the infrastructure, staffing, inspection volume, and technology limitations of the southern border, as of fiscal year 2004, only 1.4 percent of land port of entry admissions were processed through USVISIT.¹¹ In fiscal year 2004, land border inspections totaled 335.3 million in comparison to 75.1 million for air ports of entry and 14.7 million for sea ports of entry.¹² Any implementation of an increased percentage of applicants for admission being subjected to further biometric or document review at land ports of entry must be reviewed in context of these volume realities at our land border ports of entry.

In addition to the scanner failure referenced above as to the laser visa, which will be in circulation for ten years in 2008, CBP primary inspection officers are unable to utilize the chip technology in the e-passport to verify document authenticity because e-passport readers are not available at 83 air ports of entry and are not designated for U.S. citizen inspections at 33 other air ports of entry.¹³ In addition, primary inspectors are not able to utilize the available fingerprint records of the laser visa, which are stored on optical media of the laser visa card.¹⁴ Due primarily to the large volume of admission applications at land border ports of entry, primary officers only machine read travel documents or manually enter biographic data when deemed appropriate tied to traffic flow and wait times. Thus, a primary inspector may only scan 40% of machine-readable documents on the southern land border.¹⁵ Most land border crossers are U.S. citizens and legal permanent residents, and are exempt by from enrollment in US-VISIT by statute.¹⁶ Canadians and Mexican citizens comprised about 41% of the land border crossers, of whom less than 2% were required to enroll in USVISIT.¹⁷ Thus, it is important to apply the lessons from USVISIT to the tremendous task ahead created by the implementation of the Western Hemisphere Travel Initiative (“WHTI”) for land border crossings.

¹¹ U.S. Government Accountability Office (GAO), *Homeland Security US-VISIT Program Faces Operational, Technological, and Management Challenges*, Statement of Richard M. Stana, Director of Homeland Security and Justice Issues, GAO-07-632T, March 20, 2007 at p.7.

¹² *Id.*

¹³ GAO, *Border Security Security of New Passports and Visas Enhanced, but More Needs to be done to prevent their Fraudulent Use.*, GAO-07-1006, July 2007 at p.32.

¹⁴ *Id.* at p. 34.

¹⁵ *Id.*

¹⁶ In fiscal year 2004, U.S. Citizens and lawful permanent residents comprised about 57% of land border crossers. *Id.* at p. 15.

¹⁷ *Id.*

In attempts to implement USVISIT in the land border environment, CBP tested radio frequency identification (RFID) technology. In February of 2007, DHS officials decided to cease the use of RFID technology to try to track exits from the U.S. In some instances, RFID read rates were at only 14% versus the target of at least 70%. In addition, CBP experienced problems with cross reads, in which multiple RFID readers at a border crossing picked up an I-94 with an RFID tag. In the tests conducted by CBP, US-VISIT embedded the tag in a modified I-94 (arrival/departure card). USVISIT officials acknowledged that no technology now exists to reliably record a traveler's exit from the country.¹⁸ The same officials noted that a biometrically based solution that can definitively match a visitor's entry and exit will be available in 5 to 10 years.

As background, RFID is a form of wireless technology. A computer chip is attached to an antennae (the tag), which communicates wirelessly with a reader or interrogator via radio waves. Proximity RFID cards require a card to be presented within 4 inches of a reader and conform to the ISO 14443 standard. Vicinity RFID cards may be read from a range of 20 feet from the reader, but long range RFID cards are subject to snooping and forgery.

WHTI - The Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458), as amended (IRTPA) provides that upon full implementation, U.S. citizens and certain classes of nonimmigrants may enter the U.S. only with passports or such alternative documents as the Secretary of Homeland Security designates to establish identity and work eligibility. As of January 31, 2008, the Department of Homeland Security (DHS) has announced that all U.S. and Canadian citizens 19 years of age and older who enter the U.S. at land and sea ports of entry from within the Western Hemisphere will need to present a government issued photo ID such as a driver's license as proof of identity along with proof of citizenship, such as a birth certificate, naturalization certificate, or a passport. Children age 18 and under will be able to enter the U.S. by presenting proof of citizenship alone. Other acceptable documentation for WHTI admission purposes includes a U.S. military ID card, a NEXUS card (at NEXUS kiosks only), a DOS Passport Card (when available), a SENTRI card (at SENTRI lanes), a FAST card (at FAST lanes), a laser visa, and a Merchant Mariner Document (MMD) (when traveling on official maritime business).

In the later part of 2007, local CBP officials at the El Paso ports of entry started to check government issued photo identification cards to attempt to verify the identity of those claiming to be U.S. citizens. This minor test drive of WHTI at a 65% review rate caused substantial delays at the ports of entry. To believe that poorly staffed and undertrained CBP officers at our ports will be able to evaluate a government issued identity card and birth certificate or naturalization certificate for U.S. citizens at land borders on January 31, 2008 is foolhardy and premature. This conclusion is especially true due to the difficulties in starting the application process for the DOS PASSCARD and problems with RFID cards and document or e-technology scanners.

According to the testimony of Frank E. Moss, Deputy Assistant Secretary for Passport Services for DOS, presented on April 27, 2006 before the U.S. Senate Committee on Foreign Relations, Subcommittee on Western Hemisphere, Peace Corps and Narcotics Affairs, DOS believes that about 6 million U.S. citizens who do not have a passport will require formal documents under WHTI for travel by air or sea. As to land border travel to Canada or Mexico, Mr. Moss estimated that 27 million Americans may need formal documents to travel during the next five years. Mr. Moss stated that DOS predicted that passport applications would reach about 16 million in FY-2007 and perhaps a sustained demand of 17 million or more in FY-2006 and beyond. In FY-2006, DOS processed approximately 13 million passport applications. Currently, a basic initial passport application costs \$97.00.

PASSCARD/Citizenship Card - In light of the WHTI requirements, DOS announced in October of 2006 that it would propose a limited use passport card for land and sea travel between the

¹⁸ US GAO Report, *Border Security US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry*, GAO-07-248, December 2006 at p. 59.

U.S., Mexico, Canada, the Caribbean, and Bermuda. The proposed card would cost \$10 for children and \$20 for adults plus a \$25 execution fee. DOS indicated that the proposed card would use long range, vicinity RFID technology. The card itself would not contain any personal information, but would contain a unique identifier to link the card to a database. There is some historical support for a citizenship card used for Western Hemisphere Travel. The Immigration and Naturalization Service from 1960 to 1983 issued a citizen identification card to naturalized citizens living near the Canadian and Mexican borders who needed them for frequent crossings to the U.S. The cards were called an I-179 or I-197. The only biometric feature of these cards was a photograph and the cards were not tamper resistant. To resurrect such cards would require a review of the same biometric issues faced by DOS with the PASSCARD. Unfortunately, DOS may not even start accepting applications for a PASSCARD until February of 2008 or later depending upon regulatory clearances.

It is currently expected that in the summer of 2008, WHTI's requirements will be fully implemented, and birth certificates will no longer, along with a government issued photo identification, serve as satisfactory evidence of citizenship. DHS must be cautious in pushing this deadline ahead of training, staffing, document issuance, and infrastructure capabilities. Connecting the dots on realistic capabilities of CBP inspectors and DOS adjudicators will be critical to avoid a catastrophic interruption in cross border travel.

REAL ID and the Enhanced Driver's License - Congress passed the Real ID Act as part of the Emergency Supplement Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005 (Pub. L. No. 109-13), which the president signed into law on May 11, 2005. The Real ID Act provides that beginning three years after enactment, driver's licenses cannot be accepted by federal agencies for any official purpose unless the licenses meet the requirements of the Act. States will have until May of 2008 to make their licenses and issuance processes conform with Real ID. States can choose whether to implement Real ID requirements. In 2006, the National Conference of State Legislators (NCSL) and the American Association of Motor Vehicle Administrators (AAMVA) in conjunction with the National Governors Association (NGA) conducted a nationwide survey of state motor vehicle agencies (DMVs). Based on the results of the survey, NGA, NCSL, and AAMVA concluded that Real ID would cost more than \$11 billion over five years, have a major impact on services to the public, and impose unrealistic burdens on states to comply with the Act by the May 2008 deadline. Since that time, the state government of Maine passed a resolution in January of 2007 to reject implementation of the REAL ID Act. Arkansas, Idaho, Montana, and Washington have also passed similar legislation to reject Real ID. At least 24 other states are also considering opting out of REAL ID, placing conditions on their participation in the law, or urging Congress to repeal it. A table that lists and summarizes these proposals is set forth at www.nilc.org in a chart entitled, "2007 State REAL ID Legislation."

Some of the driving forces behind the passage of REAL ID were to improve the process of driver's license issuance to reduce fraud, improve consistency in issuance processes among the states, and to require proof of lawful immigration status. As to immigration status, under REAL ID, a driver's license applicant must demonstrate proof that he or she: (1) is a U.S. citizen; (2) is lawfully admitted for permanent or temporary residence; (3) is a conditional permanent resident; (4) has a pending or approved application for asylum; (5) is a refugee; (6) is a nonimmigrant with a valid, unexpired visa; (7) has a pending or approved application for temporary protected status; (8) has approved deferred action status; OR (9) has a pending application for permanent residence or conditional permanent residence.

Some states opposing REAL ID have chosen to proceed with a Memorandum of Understanding with DHS to create an enhanced driver's license for compliance with WHTI requirements. Washington State is an example of this approach. Vermont, Arizona, and New York are apparently also heading down this path. In Texas, S.B. 2027 introduced by State Senator Eliot Shapleigh of El Paso amended Section 521.032 of the Texas Transportation Code as of September 1, 2007 to allow those U.S. citizens residing in the State of Texas to apply for an

enhanced driver's license, which requires the Texas Department of Public Safety to implement a one-to-many biometric system for such licenses and to secure any RFID chip used in such licenses from unauthorized access. While laudable in effort, the state enhanced driver's license (EDL) option to deal with WHTI demands is a redundant and unnecessary precedent. It steps squarely onto the issue of federal preemption under the U.S. Constitution.

WHTI deals with the issue of documenting citizenship and applying federal immigration/citizenship laws. The federal courts have repeatedly commented on the complex nature of immigration law. "Immigration laws bear a "striking resemblance .[to] King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." Lok v. INS, 546 F.2d 37, 38 (2d Cir. 1977).

In addition, DOS and DHS with all of their experience trying to create machine-readable admission documents are still not utilizing the full biometric capacity of documents for admission to the U.S. Biometric scanning options have not met with success even with the use of greater federal resources. The issuance of international admission documents for U.S. citizens is not an area for the State of Texas to waste funds upon when the PASSCARD will soon be available for issuance. Instead, efforts should be focused upon demanding that the federal government implement enhanced inspection processes as well as infrastructure and staffing improvements. DHS cannot even figure out a way to allow SENTRI and NEXUS holders to use their admission documents interchangeably at the northern and southern borders. Contemplate the use of state issued EDLs at all ports of entry.

SENTRI and NEXUS - §7208(k) of IRTPA regarding expediting travelers across international borders via the use of registered traveler programs mandates that applicants be provided with clear and consistent eligibility guidelines. Although CBP has information on such registered traveler programs on www.cbp.gov as well as published regulations at 8 CFR § 235.7 as to automated inspection services, users and those desiring to use frequent traveler programs continue to receive conflicting messages from CBP enrollment centers and management as to eligibility standards for such programs as SENTRI, NEXUS, and FAST. This criticism was outlined in the Office of Inspector General report entitled, "A Review of the Secure Electronic Network for Travelers Rapid Inspection Program," dated April of 2004 (OIG- 04-14). Page 15 of this report notes, "CBP has not established thresholds for allowable violations, arrests, or convictions before an application must be denied." This criticism is still applicable. As noted in the September 27, 2007 issue of the *Northern Light*:

Despite broader uses for the NEXUS card, including the likelihood it will be accepted as an alternative to a passport when they become mandatory for entering the U.S. next year, membership in the program appears to be dropping. This summer the original memberships in the program – 25,446 issued in the second half of 2002 – began to expire. According to figures provided by Hicks, 2205 renewals were issued (two were denied) in July and August 2007, outpacing the new applications, 1428 of which were approved during that period (133 were denied). However, by the end of August Hicks reported 3,198 memberships had expired and not been renewed. During the same period, 96 people had their NEXUS memberships revoked. The program therefore lost almost as many members as it gained in a two-month period – perilously close to negative growth. What determines admissibility to the program? Those who have been denied membership complain that they don't know why, with letters stating only that they are "otherwise ineligible" to participate in a trusted traveler program," but not providing the basis for determining ineligibility.

Decreased usage of registered traveler programs does not improve security. Currently, the statement in 8 CFR §235.7 allowing an officer to deny a PORTPASS to someone who is "otherwise determined by an immigration officer to be inadmissible to the United States or

ineligible to participate in PORTPASS...” should be void for vagueness. This language and that of the similar provisions published on www.cbp.gov (e.g. “cannot satisfy CBP of their low-risk status) provides the public no predictability as to program eligibility as mandated by the ITRPA. Furthermore, for those caught in this purgatory of the bar or ejection from participation due to this vague provision, the current process of review provided through the CBP ombudsman allows no meaningful review or confirmation of any security risk presented. Often, the applicant is not questioned to clarify whether certain rumors regarding the applicant might have any basis in fact. This status quo is totally unacceptable and serves no security interests, if indeed the desire of our government is to apply intelligent security risk assessments.

CBP should follow the recommendations of the OIG report and publish more specific guidelines as to the security risk assessment bases for ineligibility to frequent traveler programs. A zero tolerance policy does not provide a valid risk assessment. The following points, which are utilized daily in the review of various waiver eligibilities under U.S. immigration law, should be considered:

- A. Length of time since commission of offense;
- B. Penalty imposed for commission of offense;
- C. Potential risk to national security (identify risk and allow submission of documentation for review as well as a personal interview);
- D. An arrest versus a conviction shall not serve as the sole basis for denial of frequent traveler privileges.

The standards of inadmissibility under §212(a) of the Immigration and Nationality Act could also be applied in a parallel manner to the frequent traveler programs of NEXUS, FAST, and SENTRI. As to frequent traveler programs needing to set a higher standard due to decreased primary inspections, this higher standard is already applied because of the increased biographic and biometric review mandated by the programs. Further, the review process on denials and revocations in these programs must allow for a personal interview and the provision of additional information. The refusal to make sure that information being used is accurate serves no security purpose.

III. CROSS-BORDER CONSULTATION AND COOPERATION HAVE A LONG AND SUCCESSFUL HISTORY ALONG OUR SOUTHWEST BORDER

The Paso del Norte region has a rich and long trade history. El Paso was originally founded by Spanish explorers in 1581. In 2003, trade through the land ports along the U.S.-Mexico border represented about 83% of the trade between the countries. As to numbers of inspection of people, El Paso surpasses all ports of entry in Texas. This trade volume and active cooperation between local community groups and their corresponding associates from Mexico have resulted in several firsts from a security and trade perspective in El Paso:

1. First Dedicated Commuter Lane in the State of Texas using Secure Electronic Network for Travelers Rapid Inspection (“SENTRI”) through a partnership with the El Paso Chamber Foundation for infrastructure funding.
2. First Expansion of an Existing Cross-Border Bridge (Bridge of the Americas - “BOTA”) funded with local trade community voluntary funding project.
3. First and second commercial Fast and Secure Trade (“FAST”) lanes for commercial traffic in the State of Texas.
4. First pilot land border use of the Pulsed Fast Neutron Analysis (“PFNA”) technology.

Regular meetings are still held between federal, state, and local U.S. and Mexican counterparts regarding the ongoing operations of the FAST and SENTRI lanes operating between El Paso and Ciudad (Cd.) Juarez, as well as concerning our shared ports of entry over the Rio Grande river.

IV. INSPECTION IMPROVEMENTS

In order to improve efficiency and security at our ports of entry, we should consider:

- A. Options to maximize limited resources, such as the additional staffing necessary to allow for staggered inspections booths to be placed on inspection lanes to increase lane capacity.
- B. Assess port's capacity by reviewing available full-time inspectors and inspection demands to determine allocation and need for additional resources.
- C. Create a port of entry devoted to FAST commercial crossings.
- D. Increase Frequent Traveler Program use by establishing standards that are more predictable and a meaningful review process.
- E. Even if DOS does not have the PASSCARD (for US citizens) ready to process -- establish a way to allow for electronic intake of the application now due to the implementation date of WHTI. Note that when the Dedicated Commuter Lane was started in El Paso, the local Chamber and Foreign Trade Association provided information on the process and initial data intake to reduce the processing burden. Another option may be to expand the capacity of the EVAF electronic visa application system or the INFOPASS system used by CIS to accept PASSCARD information. DHS should also be required to report to Congress on the readiness of all ports based on staffing levels and infrastructure to use PASSCARDS as well as e-passports and resident alien cards for admission purposes. The same information must be provided to Congress as to interim measures requiring inspectors to review birth certificates or other documentation of U.S. citizenship.
- F. The SENTRI inspection process should be geared to eliminate primary inspection. There should be no need for questions in primary, unless there is a reasonable suspicion of some violation, which should result in secondary referral.
- G. Security and legal compliance have suffered due to the One Face at the Border program in which inspectors are to become jacks-of-all-trades and arguably masters of none. Senior specialists must be assigned to provide regular training and review of the application of customs, immigration, and agricultural laws among others at our ports of entry. Advancement must be tied meeting educational and performance criteria within CBP.
- H. We still do not have consistency on the return process of the I-94 card. When the I-94 is sent to Kentucky by those who do not turn it in upon departure, we do not determine if the entry in the database made by Kentucky office as to departure compliance is accurate. So, do not require I-94 return at the ports, but do create a standard process for submitting information as to departure, which can be input into USVISIT as needed. Give the I-94 holder some grace period (e.g. 30 days) to confirm departure electronically. If banks can be required to report if money is coming from outside the U.S. for reporting purposes, surely departures must be able to be reported electronically.
- I. Add a subset to frequent traveler programs by allowing B-1/B-2 I-94 applicants to provide additional information as required to obtain a pro forma one-year I-94 for business and visitation purposes to reduce the need to apply for multiple I-94s during the year. The regulations already provide this latitude, but this validity period will reduce the burden on CBP to keep reissuing shorter-term I-94s to those with a ten-year laser/BCC or B1/B2. In addition, provide expedited processing lanes to separate those with valid I-94 cards.
- J. Add a benefit to the Customs Trade Partnership Against Terrorism (CTPAT) program from the immigration area by allowing current employees of CTPAT certified manufacturers to be approved for one year business visitor I-94s, if the person possesses a B-1/B-2 or laser visa. In addition, provide for a specific time frame and location for such I-94 applications to be made to reduce processing times. In addition, allow such companies to report I-94 departure compliance through uploading such information to the company's CTPAT information on the CTPAT database.
- K. Create product line inspection lanes and train inspectors to be able to process those types of admission applications. For example, a lane for U.S. Citizen and legal permanent residents. Another lane could be established for those with valid I-94s.
- L. Establish a state of the art methodology for determining current wait times at each port to allow for timely shifting of resources.

M. Work on modification of union agreements as necessary to enhance the flexibility of resource use.

N. Provide incentives for efficient passenger inspection without loss of security similar to those provided for drug busts.

O. CIS already has overseas offices. Establish a CBP office at the U.S. Consulate in Cd. Juarez to provide pre-input of data necessary to effectuate admission of the nonimmigrant or nonimmigrant visa holder. A standard CBP initial I-94 could be provided at the consulate for swiping upon application for admission. Think of airline processes for data scan for use in this scenario.

P. Establish inadmissibility specialists to prepare appropriate documentation to improve efficiency and accuracy.

Q. Provide clerical and administrative support sufficient to free up CBP inspectors to focus on tasks, which utilize their training to its highest and best use.

V. RECENT DEVELOPMENTS AND OPPORTUNITIES FOR COLLABORATION

If signed by the President, the Consolidated Appropriations Act of 2008 (H.R. 2764) (Omnibus bill) will provide some necessary relief regarding the current pressures being placed upon the land border by the Western Hemisphere Travel Initiative. Section 545 of Division E of the bill delays implementation of section 7209 (b) of the Intelligence Reform and Terrorism Prevention Act of 2004¹⁹ regarding the use of certain travel documents by U.S. Citizens and other applicants for admission for whom documentation requirements have been waived (e.g. Canadian Citizens) until June 1, 2009. This delay makes sense in light of delays in the implementation of the DOS PASSCARD as well as the upcoming wave of renewal demands for Mexican laser visas upon the State Department. In the interim though, border communities and the relevant federal agencies engaged in visa issuance and admission inspection must consider alternative private and public sector informational and process initiatives to improve and facilitate the issuance of Frequent Traveler Cards as well as PASSCARDS.

In addition, the Registered Traveler Programs promoted in section 7208 of ITRPA as well as section 565 of the Omnibus bill will not flourish without a thorough review of the current Zero Tolerance Policy applied in the NEXUS and SENTRI programs. U.S. immigration laws provide a long history of risk assessment from an admission perspective, which has been seemingly ignored by the current less than transparent standards required for participation in registered traveler programs. To improve enrollment as well as security, it is imperative that this policy be revised and clarified, and that true security threats be readily assessed and addressed. A registered program must be devised to include those who are frequent border crossers without such high enrollment costs and the Mexican government must be fully engaged to reduce the prohibitive costs applied on SENTRI enrollees in the El Paso area. Further, inspection processes must be further abbreviated for those enrolled in these programs. I am sure that the El Paso community would be an excellent test site for a variety of options to try to define and create these programs.

¹⁹ Pub. L. No. 108-458 (ITRPA).