

Practice Advisory¹

January 6, 2015

**Visa Activity in the Post-Homeland Security Act Era: the Division of Responsibilities
between the Departments of Homeland Security and State**

A little-known fact, even among immigration lawyers, is that consular officers employed by the Department of State (DOS) and stationed at U.S. embassies and consulates abroad do not possess ultimate control over visa activity, including visa refusals. Through the enactment of § 428 of the Homeland Security Act of 2002 (HSA),² Congress delegated ultimate authority over the functions of consular officers and authority over most visa refusals to the Secretary of the then-newly formed Department of Homeland Security (DHS). *See* HSA § 428 creating 6 U.S.C. § 236(b). Section 236(b)(1) of Title 6 provides that the DHS Secretary:

shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provisions of such Act, and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State), which authorities shall be exercised through the Secretary of State, except that the Secretary shall not have authority to alter or reverse the decision of a consular officer to refuse a visa to an alien; and ...

Thereafter, DOS and DHS signed a Memorandum of Understanding Between Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act (Sept. 28, 2003). According to 6 U.S.C. § 236 and the Memorandum of Understanding, the accompanying charts illustrate: (1) which actors are responsible for certain visa-related activities, including visa refusals; and (2) which actors are responsible for administering certain visa-related statutory provisions, including the grounds of inadmissibility.

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² Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).