

**n a t i o n a l**  
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**p r o j e c t**  
of the National Lawyers Guild

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**Visa-Related Activity Chart<sup>1</sup>**

<p>Key</p> <p>MOU - Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning the Implementation of Section 428 of the Homeland Security Act of 2002 (Sept. 28, 2003)</p> <p>6 U.S.C. § 236 - codification of § 428 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002)</p>
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<b>Visa-Related Activity</b>	<b>Actor/Agency Responsible</b>	<b>Supporting Authority</b>
Administration and enforcement of consular officer functions in connection with the granting or refusal of visas	DHS Secy “vested exclusively” with this authority	6 U.S.C. § 236(b)(1)
Visa policy	MOU states that DHS Secy will “establish visa policy, review implementation of that policy, and provide additional direction” while respecting Secy of State prerogatives of managing conoffs, visa process, and foreign policy	MOU at 2
Issuance of visa guidance	DHS has final responsibility over visa guidance, except the Secy of State has responsibility over matters that: (1) Congress specifically assigned authority to Secy of State per 6 U.S.C. §§ 236(c)(2) and (d)(2); (2) involve existing statutes related to foreign policy statute or visa process management; (3) involve future statutes, Presidential Proclamations, or executive orders reserving authority to Secy of State; and (4) relate to Secy of State’s areas of assigned authority under paras 3 and 10 of the MOU.	MOU at 3
Regulations	DOS may prepare regulations; DHS must approve. Where possible, DHS and DOS Secretaries will jointly issue regulations.	MOU at 3

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Visa-Related Activity	Actor/Agency Responsible	Supporting Authority
Documentation	DHS Secy has “final responsibility” over visa guidance regarding information, evidence, and documentation needed to establish eligibility for a visa, admissibility, and NIV or IV classification; DHS Secy will consult with Secy of State	MOU at 5
Application venue	DHS Secy, but Secy of State determines venue for diplomatic/official visas and nationals of countries without a visa processing post	MOU at 5
Waive appearance at visa interview	DHS Secy has “final responsibility” over guidance, except Secy of State has final responsibility over guidance applicable to diplomatic/official visas	MOU at 5
Visa validity period	Secy of State and conoffs may waive certain nonimmigrant visa interviews	8 U.S.C. § 1202(h)
Visa validity period	Set by Secy of State, but DHS may prescribe a shorter period or place restrictions for persons/class of persons based on security interests	MOU at 6
Designation of VWPP countries	DHS Secy, in consultation with Secy of State	MOU at 6, but VWPP statute at 8 U.S.C. § 1187 only references Secy of State
Assignment of DHS employees to consular and diplomatic posts	DHS Secy; DHS employees will provide advice, training about security threats, review applications (see below) and conduct investigations about consular matters under DHS Secy’s jurisdiction	6 U.S.C. § 236(e); MOU at 8-13 (details of qualifications, support and functions)
	Conduct investigations and participate in terrorist lookout committee	MOU at 12-13
	Receive same training as conoffs on a reimbursable and space-available basis; DHS may develop its own training and propose changes to DOS training	MOU at 14-15
Refuse a visa – DHS	1. DHS Secy – must be “in accordance with law”	6 U.S.C. § 236(b)(1)
	2. Officer/employee designated by DHS Secy, provided the head of employee’s executive agency consents	6 U.S.C. § 236(b)(2)
	Only DHS Secy or HQ staff may direct “refusal or revocation” of a visa, by informing Secy of State to instruct conoff to deny visa	MOU at 8
	If DHS exercises authority, conoff must so note in the Consolidated Consular Database	MOU at 8

Visa-Related Activity	Actor/Agency Responsible	Supporting Authority
Refuse a visa – DHS (continued)	DHS employees abroad may recommend visa refusals to head of consular section. If head disagrees, post must initiate SAO/AO process and no visa can be issued in the interim. DHS Secy or HQ staff can override post’s decision to issue a visa.	MOU at 11
Revoke a visa – DHS	<p>DHS Secy has revocation authority; may delegate to DHS HQ staff</p> <p>DHS employees abroad may recommend visa revocation to head of consular section. If head disagrees, post must initiate SAO/AO process and no visa can be issued in the interim.</p>	<p>MOU at 8 (note: 6 U.S.C. § 236(b)(1) only confers authority to refuse a visa)</p> <p>MOU at 11</p>
Refuse a visa – State	<p>Secy of State may direct conoff to deny visa, provided refusal is necessary or advisable in the U.S.’s foreign policy or security interests</p> <p>-- if authority exercised, must notify DHS and make notation in Consolidated Consular Database</p> <p>Conoffs</p>	<p>6 U.S.C. § 236(c)(1)</p> <p>MOU at 8</p> <p>8 U.S.C. § 1201(g); 8 U.S.C. § 1101(a)(9) &amp; 1104(a)(1); 6 U.S.C. § 236(b)(1)</p>
Revoke a visa - State	<p>Secy of State and conoffs, provided revocation communicated to the AG</p> <p>Must also notify DHS and make notation in the Consolidated Consular Database</p>	<p>8 U.S.C. § 1201(i)</p> <p>MOU at 8</p>
Grant a visa	<p>Conoffs</p> <p>NOT DHS - 6 U.S.C. § 236(b)(1) expressly states that “the Secretary shall not have authority to alter or reverse the decision of a consular officer to refuse a visa to an alien”</p>	<p>8 U.S.C. §§ 1201(a), 1202(b); 8 U.S.C. § 1101(a)(9) &amp; 1104(a)(1); 6 U.S.C. § 236(b)(1)</p>
Review of visa applications	<p>Conoffs</p> <p>DHS officers abroad, if potential security issue, upon own initiative or request by conoff/other person charged with adjudicating such application</p> <p>DHS officer abroad and conoffs both conduct visa-related investigations</p>	<p>8 U.S.C. §§ 1201, 1202; 8 U.S.C. § 1101(a)(9) &amp; 1104(a)(1); 6 U.S.C. § 236(b)(1)</p> <p>6 U.S.C. § 236(e)(2)(B), MOU 10-11</p> <p>MOU at 12-13</p>

Visa-Related Activity	Actor/Agency Responsible	Supporting Authority
Review of visa applications (continued)	In Saudi Arabia, on-site DHS officers “shall review all visa applications prior to adjudication”	6 U.S.C. § 236(i)
Provide notice of visa denial (8 U.S.C. § 1182(b))	<p>DHS Secy has “final responsibility” over guidance about when and under what conditions can waive notice</p> <p>Secy of State has “final responsibility” over notice applicable to diplomats and official government representatives and may provide notice if advising applicant of the ground of the denial advances U.S. foreign policy</p> <p>Conoff “shall provide . . . timely written notice” of the denial and specific statutory provision/s on which it is based</p> <p>Secy of State may waive notice of a visa denial with respect to an individual or class of individuals</p> <p>Notice requirements under 8 U.S.C. § 1182(b)(1) not applicable to individuals inadmissible under 8 U.S.C. §§ 1182(a)(2) or (a)(3) (criminal or security related grounds)</p>	<p>MOU at 6</p> <p>MOU at 6</p> <p>8 U.S.C. § 1182(b)(1)</p> <p>8 U.S.C. § 1182(b)(2)</p> <p>8 U.S.C. § 1182(b)(3)</p>
Evaluate consular officers	<p>Secy of State, in consultation with DHS Secy</p> <p>DHS Secy may develop performance standards for conoffs (and DHS officers)</p> <p>DOS officer reviewing conoffs must take into consideration rating and/or input from DHS officers abroad (head DOS officer at post can give input to DHS employee evaluations also)</p>	<p>6 U.S.C. § 236(e)(3)</p> <p>6 U.S.C. § 236(e)(3), MOU at 13</p> <p>MOU at 13-14</p>
Stop issuing visas at certain posts per 8 U.S.C. § 1253(d) if country denies or delays accepting deportees	DHS Secy notifies Secy of State to instruct conoffs to stop	MOU at 5; <i>but see</i> 8 U.S.C. § 1253(d) (states that AG notifies Secy of State to give the order)
Granting of waivers of inadmissibility grounds	<p>DHS has “sole responsibility,” except:</p> <p>DHS Secy and Secy of State have joint responsibility over:</p> <ol style="list-style-type: none"> <li>1. § 1182(d)(4)(B) waivers (waives requirement of having valid entry document per § 1182(a)(7)(B)); and</li> <li>2. § 1182(l) waivers (also waives § 1182(a)(7)(B) for visitors to Guam or Northern Mariana Islands); authority shared with Secy of the Interior</li> </ol>	<p>MOU at 5</p> <p>8 U.S.C. § 1182(d)(4)(B)</p> <p>8 U.S.C. § 1182(l)</p>

Visa-Related Activity	Actor/Agency Responsible	Supporting Authority
Advisory Opinions (AOs)	<p>Secy of State may prescribe guidance concerning advisory opinions, but must consult with DHS Secy concerning changes</p> <p>DHS employees acting performing HSA § 428 [6 U.S.C. § 236(e)] will have access to all AO requests transmitted by the post unless Mission’s Chief or Deputy Chief determines to limit access to DHS where AO related to inadmissibility ground listed in para above. They then must inform DOS, who informs DHS HQ, and DHS may still recommend the post show the AO request.</p> <p>DHS must be copied on all outgoing AOs, “whether or not relating to security”</p> <p>DOS advisory opinions are “without prejudice to the authority” of DHS Secy “to refuse or revoke a visa”</p> <p>DHS has access to any AO and may seek consultation concerning “any opinion that may affect homeland security”</p>	<p>MOU at 7</p>
Security Advisory Opinions (SAOs)	<p>DHS Secy must concur in any changes in policy and procedures concerning SAOs prescribed by DOS, including when SAO requested and when transmitted to conoff, unless related to matters under 6 U.S.C. § 236(c)(2), 8 U.S.C. §§ 1182(f); (a)(2)(G); (a)(3)(B)(i); (a)(3)(B)(vi)(II); (a)(3)(E); (d)(8); and § 2225 of FARR Act of 1998, or retroactive application of § 411 of the PATRIOT Act</p> <p>DHS Secy may direct changes when it serves a DHS interest</p> <p>DHS must be copied on <b>ALL</b> SAOs; if third agency thinks visa should be denied but conoff disagrees, visa application “<b>will be referred</b>” to DHS Secy to “decide whether facts support denial of the visa in accordance with law”</p>	<p>MOU at 7</p> <p>MOU at 7</p> <p>MOU at 7</p>
Maintain systems and databases related to visa issuance, etc.	Shared access – some DOS systems and some DHS systems	MOU at 16-17
Visa-related litigation	Secy of State Legal Advisor and DHS General Counsel shall cooperate in litigation conducted by DOJ related to visa issuance/refusal by conoffs or by DHS personnel performing § 428 functions	MOU at 17