



BACKGROUND

August 2003

50 F Street, NW, Suite 300

Washington, DC 20001

(202) 347-0040

Fax: (202) 347-0058

www.immigrationforum.org

Immigration Under the Department of Homeland Security

The Homeland Security Act of 2002 (the Act) created a new Department of Homeland Security (DHS). This cabinet-level agency merged 180,000 workers from 22 federal agencies, including the Immigration and Naturalization Service (INS). March 1, 2003, marked the abolishment of the INS and the birth of a reorganized immigration system. The Act split the immigration functions, placing the enforcement piece of immigration into a "Border and Transportation Security Directorate" (BTS), the largest division of DHS. The Act created a separate Bureau of Citizenship and Immigration Services to house the immigration service functions. The Executive Office for Immigration Review (EOIR, immigration court system) was retained within the Department of Justice. The care and placement of unaccompanied alien children was transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services. Below is a summary of the key immigration provisions transferred to DHS:

Immigration Services: The Bureau of Citizenship and Immigration Services (BCIS) houses service-related functions of immigration, including immigrant visa petitions, applications for citizenship, applications for asylum and refugee status, and other services. The Act also created a Chief of the Office of Citizenship for BCIS, responsible for promoting citizenship and producing related educational and training materials. Separately, the Act established a Citizenship and Immigration Services Ombudsman, responsible for identifying, reporting and monitoring service problem areas. Both the Director of BCIS and the Ombudsman report to the Deputy Secretary for Homeland Security.

Immigration Enforcement: The Directorate of Border and Transportation Security (BTS) is responsible for securing our nation's borders, carrying out our immigration enforcement functions (includes detention and removal, intelligence, investigations, inspections, and border patrol), and administering related policies. Two different bureaus within BTS are responsible for enforcing immigration laws. The Bureau of Customs and Border Protection (BCBP) absorbed border and inspection enforcement functions from the INS, Customs Service, and the Animal and Plant Health Inspection Service of the Department of Agriculture. The Bureau of Immigration and Customs Enforcement (BICE) absorbed the detention, removal, and intelligence functions of INS, U.S. Customs Service, and the Federal Protective Service. BCBP and BICE are headed by a Commissioner and Assistant Secretary, respectively, both of whom report to the BTS Undersecretary.

Officer for Civil Rights and Civil Liberties: The Officer for Civil Rights and Civil Liberties (OCRCL) is responsible for reviewing and assessing abuses related to civil rights, civil liberties, and racial and ethnic profiling by Department staff and employees. The OCRCL is also responsible for conducting public outreach about the office. The Secretary is required to submit an annual report to Congress regarding the implementation of this position. The OCRCL reports to the Secretary.

Visa Issuance: The Act vests the Secretary with the authority to enforce and administer all laws and to issue regulations related to a consular officer's grant or refusal of a visa, authority that had previously rested with the Secretary of State.

Will the current organization of the immigration function work? For years, the National Immigration Forum, and other immigration advocacy organizations, supported fundamental restructuring of the INS to create separate but coordinated units to perform the two different but related missions of the agency: enforcing immigration law and providing immigration-related services to citizens, immigrants, and visitors. The government reaffirmed half of this mission by recognizing our immigration system was broken, and by creating separate immigration enforcement and services functions in DHS. However, the new structure for immigration leaves opens a number of questions.

- **Coordination:** While the DHS clearly separates the two enforcement bureaus from the Bureau of Citizenship and Immigration Services, each new bureau follows a separate chain of command up the line and has different leaders, policy makers, and legal counsel. Without coordination and a powerful executive managing both sides, immigration policy could go off in different directions. More specifically, each Bureau might have different and possibly contradictory or competing interpretations of immigration law, regulations, policies, and legislative priorities.
- **Funding:** Enforcement and adjudications work hand in hand and merit equal attention, support and funding. BCIS must be adequately funded. Immigrants pay fees to have their applications processed. Each time new procedures are implemented or systems are upgraded, however, fees that are meant for processing are diverted to pay for these expenses. Immigration services are subject to new congressional or federal mandates without accompanying funding. The result: enormous backlogs are a chronic problem. It remains to be seen whether BCIS can reduce the backlogs and keep pace with incoming applications, but direct congressional appropriations must supplement user fees to ensure the adequate delivery of services.
- **Training and Expertise:** Immigration functions are assumed by three different bureaus in the department. The Bureau of Immigration and Customs Enforcement alone draws a workforce of 14,000 persons from three different federal agencies. BCBP and BICE officers should maintain the specialized functions of their former agencies. Overall, our immigration functions must be staffed with officers who are trained and experienced in immigration law and policy.
- **Congressional Oversight:** Congress will need to take an active role in ensuring that the new agency has the framework and resources necessary to accomplish its mission. The Judiciary Committee should maintain oversight responsibilities for the immigration functions of DHS. It is this committee that has the training, knowledge and experience to best handle oversight of our immigration functions.
- **Jurisdiction:** Final regulations issued on February 28 by the Department of Justice (DOJ), reflect the allotment of jurisdiction between DHS and DOJ over immigration functions. What appeared as technical rules that moved authority from old agencies into new ones, are in fact a deliberate and far-reaching move by Justice to maintain jurisdiction over substantive immigration rulemaking that was clearly intended by Congress to transfer to DHS. The potential impact of concurrent jurisdiction is conflicting rules and policies between DOJ and DHS, backlogs and delays while these conflicts are being resolved, wasted executive resources, and prolonged ambiguity about the agency in charge of immigration. Congress may have to clarify again that DHS has primary authority over immigration law, including the making of regulations, while DOJ retains authority over the immigration court system.

- **Ports of Entry:** Officers at our ports of entry continue to suffer from lack of training on basic computer data systems and terrorism awareness. Basic training for new officers must be adequately funded and provided. Given the reorganization of three federal agencies into BCBP and the potential for a former agricultural inspector to play the role of an immigration inspector for business travelers, tourists, and asylum seekers, BCBP officers must be trained and experienced in immigration law and policy. BTS should collaborate with NGOs when developing training manuals or conducting training in the field.
- **Local Immigration Offices:** Local offices continue to suffer from inadequate staffing, funding, and antiquated technology, all of which have a disastrous impact on processing times for immigrant petitions and applications. Staffing shortages and new mandates have also caused officers to be pulled from adjudications in order to perform enforcement-related functions, like the National Security Entry and Exit System (NSEERS). Local immigration offices must be provided with increased and experienced staff, and updated databases.
- **Citizenship and Immigration Services Ombudsman:** This office is responsible for identifying, reporting, and monitoring service problem areas. This office should collaborate with BCIS to ensure that local problems are identified and addressed in a timely manner.
- **Office of Citizenship:** The Chief of the Office of Citizenship for BCIS is responsible for promoting citizenship and producing related educational and training materials. This office should be adequately funded and play a primary role in outreach to immigrants and shaping the meaning and value of citizenship. This office should have authority to provide grants to community based organizations related to the mission of the office.
- **Visa Policy:** With the authority to enforce and administer all policies related to a consular officer's grant or refusal of a visa, DHS must ensure that such policies balance national security with our tradition as a nation open to people from around the world.
- **Refugees:** America has standing among the nations of the world as a safe haven for refugees fleeing persecution. The new Department must create a procedural and substantive mechanism for responding to asylum-related issues that touch all three immigration bureaus. Decisions regarding the grant or denial of asylum at the border or inside the United States must be made by trained and experienced immigration officers. BCIS should maintain the Asylum Corps and Refugee Corps.
- **Civil Rights Protections:** While the Act recognizes the need for internal oversight by including a civil rights officer and a privacy officer in the new Department, it does not empower these officials to investigate the civil rights and liberties of persons who will come in contact with DHS personnel. The recent report by the Office of Inspector General on the treatment of September 11 detainees in the Department of Justice makes plain that DHS must create strong and effective oversight over civil rights. The history of immigration enforcement is rife with civil rights abuses. With immigration enforcement now conducted by an agency with a strong counterterrorist mission, immigration officials have to be more vigilant against abuse.

Moving our immigration agency into a homeland security department sends a powerful message to the millions of students, tourists, businessmen, refugees, and immigrants who cross our borders. Their entry is being viewed through the lens of anti-terrorism. The challenge for the new Department will be to balance our national security goals with policies and laws that uphold our tradition as an open society, welcoming people from all over the world.