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UNCLAS STATE 123678

VISAS - INFORM CONSULS

E.O. 12958: N/A

TAGS: CVIS

SUBJECT: SOP NO. 15: VISAS AND NON-COMPLIANCE WITH NATIONAL SECURITY  
ENTRY EXIT REGISTRATION SYSTEM (NSEERS)

REF: 02 STATE 186027

1. Summary. The National Security Entry Exit Registration System (NSEERS) was announced by the Attorney General on June 6, 2002, and the final rule to implement NSEERS was entered in the Federal Register on August 12, 2002. NSEERS is a program requiring the fingerprinting and photographing of certain aliens at U.S. ports of entry. DHS regulations allow for presumptive findings of ineligibility pursuant to INA section 212(a)(3)(A)(ii) of aliens who failed to comply with the NSEERS departure control requirements, and posts are receiving applications from aliens who have been entered into the lookout system by INS due to evidence of non-compliance. This cable provides guidance on how to process cases of persons who do not comply with departure control but wish to make a showing to try to overcome the presumption of ineligibility under section 212(a)(3)(a)(ii). FAM notes will follow septel. End Summary.

2. The DHS NSEERS regulations, 8 CFR 264.1(f)(8), state that if an alien fails to fulfill the departure control requirements upon leaving the U.S., he or she will thereafter be presumed ineligible under section 212(a)(3)(a)(ii) of the Immigration and Nationality Act for admission to the U.S.: "Any nonimmigrant alien subject to special registration who fails, without good cause, to be examined by an inspecting officer at the time of his or her departure, and to have his or her departure confirmed and recorded by the inspecting officer, shall thereafter be presumed to be inadmissible under, but not limited to, section 212(a)(3)(A)(ii) of the Act...as an alien whom the Attorney General {Secretary of Homeland Security} has reasonable grounds to believe,

based on the alien's past failure to conform with the requirements for special registration, seeks to enter the United States to engage in unlawful activity. An alien may overcome this presumption by making a showing that he or she satisfies conditions set by the Attorney General {Secretary of Homeland Security} and the Secretary of State."

3. 212(a)(3)(A)(ii) relates to any alien who a consular officer or the Attorney General {Secretary of Homeland Security} knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in

(ii) any other unlawful activity. Failure to comply with the NSEERS requirements constitutes unlawful activity for this purpose. However, because of the prospective nature of this ineligibility, a visa can only be refused based on reason to believe the applicant will not comply, and not on previous violation of NSEERS. Past failure to comply only justifies a rebuttable presumption that the alien is likely to violate the law in the future.

4. The DHS recognizes that aliens will be allowed an opportunity to show that they had good cause for failure to comply with NSEERS in the past, and therefore can overcome DHS ineligibility entries based on NSEERS violations. In an INS {DHS} memorandum of December 20, 2002, the agency provided the following field guidance relating to returning NSEERS violators:

5. "Another issue that has been of some concern is the repeated admission of prior registrants who have not complied with the departure registration requirement. As a reminder, registrants who fail (without good cause) to be examined upon departure shall thereafter be presumed inadmissible under, but not limited to, 212(a)(3)(A)(ii) of the Immigration and Nationality Act (the Act). Officers and their supervisors, as always, have the authority to take and consider evidence that the registrant had good cause for not being able to comply. However, the concern is repeated departures without registration. Good cause will always be a case-by-case determination by the officer through the appropriate chain-of-command. When such a determination is made there must be a comment placed in the registrant's ENFORCE record detailing the demonstration of good cause."

6. "If the registrant is unable to establish good cause for past failure to register departure, then the registrant must be able to successfully rebut the legal presumption that his future trip will be to engage in unlawful activity in order not to be found inadmissible pursuant to section 212(a)(3)(A)(ii) of the Act. Like the good cause analysis, a determination of whether the registrant has met his burden of proof in this regard should be made by the officer through the

appropriate chain-of-command. The determination of whether the registrant has rebutted the presumption of unlawfulness should examine all factors surrounding the registrant's prior and return trip to the United States, including, but not limited to, the type of visa, the duration of the prior and intended trip, the purpose of the trips, any documentary materials the registrant has in his possession, and any other verification that may be appropriate. Where the registrant has been found to be admissible despite the prior failure to register departure, comments in the registrant's ENFORCE record should clarify that the legal presumption has been successfully rebutted and the nature of material considered by the port-of-entry (POE) in making this determination."

7. Conoffs can issue visas to aliens entered into lookout as NSEERS violators, provided that the applicant can demonstrate good cause for the violation and/or reasonable assurances that the applicant will comply with these requirements in the future. In addition to the factors cited in the INS {DHS} memorandum, conoffs shall consider in determining if there was "good cause" for the violation whether the applicant had a credible explanation for the past failure to comply, based on something other than convenience. Reasons for non-compliance that could constitute good cause can include credible claims that the applicant was given confusing or wrong instructions, or had an emergent need to travel. Conoffs shall also consider whether the applicant can credibly demonstrate that the applicant now fully understands all the NSEERS requirements and will comply with these requirements in the future. In this regard, more than one NSEERS violation will reasonably support a very strong presumption that the alien will continue to violate NSEERS regulations.

8. If the conoff is satisfied that the alien satisfactorily overcomes the presumptive ineligibility, conoff shall annotate the visa "212(a)(3)(A)(ii) overcome", and provide a short explanation for the basis of the overcome in the CCD. Although Conoff cannot guarantee any applicant that this procedure will ensure an applicant with NSEERS violations will be admitted to the US, these procedures are consistent with the DHS guidelines and should in most cases be sufficient to allow the alien to be admitted to the U.S.

9. Minimize considered.

POWELL