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– MARITIME INDUSTRY WHITE PAPER –

TWIC ELIGIBILITY FOR FOREIGN NATIONALS EMPLOYED IN THE MARITIME INDUSTRY AND ADMITTED TO THE UNITED STATES AS A B-1 BUSINESS VISITOR, OR FROM A VISA EXEMPT OR VISA WAIVER PROGRAM COUNTRY

ISSUE

We estimate that between 4,000 and 6,000 foreign nationals are employed in the maritime industry as shore staff and regularly visit ships berthed in the United States at MTSA-regulated marine terminals for business purposes. These professionals are employed by shipowners and ship managers as Company Security Officers, as well as auditors and technical/port superintendents responsible for cargo operations and essential internal auditing of ships for compliance with U.S. and international security, safety, and environmental standards. Many who have been visiting U.S. ports and terminals for years are not able to obtain a TWIC. This is because they are almost always admitted into the United States in business visitor (B-1) nonimmigrant classification, although they typically have a B-1/B-2 visa since the B-2 tourist designation is usually added when the B-1 designation is issued. Or, they may be from Canada (which is visa exempt) or countries participating in the Visa Waiver Program, where visas are not required for entry into the United States based on a determination that allowing citizens to enter from these countries without a visa will not adversely affect U.S. security, law enforcement, and immigration interests. Neither the B-1 nor B-1/B-2, as an equivalent, is explicitly listed on TSA's list of approved visas in 49 CFR § 1572.105; and, TSA's regulations do not account for individuals from visa exempt and visa waiver countries. Despite the flexibility and discretion contained in its regulations, TSA's position to date has been to not exercise that discretion and grant TWIC eligibility to B-1 visa holders and those from visa exempt or visa waiver countries based on merit and need.

OBJECTIVE

To establish a process that will facilitate essential maritime shore staff, such as those described above, to obtain a TWIC in the least burdensome manner possible for TSA, the Coast Guard, and the industry, while ensuring that those maritime shore staff do not pose a security risk to the United States.

The maritime industry's goal is that a meeting with TSA will result in a long-term, common sense approach to resolving the TWIC/visa issue. The industry recognizes, however, that a short-term interim approach that evaluates applicants on a case-by-case basis may be warranted for those now facing a true and demonstrated hardship.

LEGAL AUTHORITY

TSA's regulations give TSA the authority to add visa categories to its list and/or make determinations on a case-by-case basis that certain individuals with visas not explicitly on TSA's list may qualify for a TWIC. To wit, 49 CFR 1572.105(a) states that:

> "An individual applying for a security threat assessment for a TWIC or HME must be a national of the United States or– . . .
>
> (7) An alien in the following lawful nonimmigrant status who has restricted authorization to work in the United States– . . .
>
> (xi) Another authorization that confers legal status, when TSA determines that the legal status is comparable to the legal status set out in paragraph (a)(7) of this section."

TSA thus has the authority under paragraph (a)(7)(xi) of this section to make a determination that either an individual or a group in an unlisted visa status is eligible for a TWIC. In particular, the scope of this "catchall" provision clearly encompasses those TWIC applicants with B-1 visas, as well as those from visa exempt and visa waiver countries, under the following rationale. TSA can exercise its legally authorized discretion by deeming B-1 visas comparable to those set forth in paragraph (a)(7). That TSA contemplated exercising its discretion in this manner is unequivocally clear in the preamble to its September 28, 2007 final rule (page 55044) where TSA discusses its approach to H2-B visas. The approach to B-1 and B-1/B-2 visas should, at minimum, be similar.

Further, with respect to applicants from visa exempt or visa waiver countries, DHS has already determined that nationals from certain listed countries do not need to obtain a B-1 visa to enter the United States for temporary business purposes, based in part on the fact that individuals from these countries have been predetermined by the Department of State to be from "friendly" countries. It does not further security for TSA to require these foreign nationals to meet a visa requirement for TWIC purposes when DHS has already determined they do not otherwise need a visa to enter the United States. At minimum, TSA should treat individuals from a visa exempt or visa waiver country as equivalent to the status of an individual entering the United States with a B-1 visa.

Through the visa exempt and visa waiver programs, DHS has already done the first cut on screening those foreign nationals for entry into the United States. TSA's role should be to ensure that those employed in the maritime industry otherwise meet the security assessment and background check requirements required by the TWIC program.

THE B-1 VISA, VISA EXEMPT/ WAIVER COUNTRIES, AND NATURE OF BUSINESS

The B-1 or B-1/B-2visa classification is granted to visitors to the United States for business purposes. In addition, individuals from designated visa exempt or Visa Waiver Program countries enter the United States without a B-1 or B-1/B-2 visa, but in a status akin to B-1 status.

After considerable research and consultation with the maritime industry, we estimate that there are approximately 4,000 to 6,000 individuals in the maritime industry that need regular access to a MTSA facility to perform their job responsibilities. This is a very small percentage (less than 1 percent) of those 1.2 million individuals estimated to need a TWIC.

As previously noted, the individuals that may need a TWIC are primarily professional foreign nationals employed by shipowners or ship managers as shore staff serving as port superintendents; Company Security Officers responsible for compliance with the International Ship and Port Facility Security Code, which is implemented by MTSA in the United States; Designated Persons Ashore and Auditors responsible for ship and company compliance with the International Safety Management Code, as well as other international safety and environmental conventions and unique U.S. requirements; and other professionals with crew management and logistics responsibility. Collectively, these shore staff visit ships when they are in both U.S. and foreign ports to oversee cargo operations, inspect ships' condition, conduct maintenance, audit compliance, handle provisioning, and provide crew training. Port visits are essential since commercial vessels typically are continuously engaged in cargo operations or transits between ports and a ship's in-port time is typically 24 hours or less at berth after customs and immigration clearance. Access to these ships while they are in the United States is a necessity because approximately half of their port availability time is here.

EXAMPLES OF UNINTENDED IMPACTS TO DATE

Many maritime industry shore staff, as described, are not able to fulfill their job functions as a result of having been denied a TWIC. Escorts are not readily available in many terminals (due to resource constraints) and, in some cases, not available at all. This situation will only get worse once additional ports become subject to TWIC requirements over the next few months, such as San Francisco, New York, Houston/Galveston, and Los Angeles/Long Beach. More than one terminal operator has stated that it will not provide escorts for non-TWICed individuals trying to access a ship. In another case, a terminal operator trained a cab driver on TWIC requirements so that the cab driver, previously unconnected with the marine industry, can drive shore staff (in one case, a Canadian port superintendent) back and forth, approximately 300 feet, to the ship. Not only did this port superintendent incur excessive cab costs, but he also wasted an inordinate amount of time while waiting for the TWIC-trained cab driver to pick him up either from the ship or outside the fence line, and was not able to fully complete his superintendent duties in support of a port visit. This clearly is not the intent of the TWIC regulations and does not further the security of U.S. ports. While possessing a TWIC will not ensure unescorted access through terminals, it will allow unescorted access to occur where terminals permit it, thus facilitating movement of the shore staff without the added expense and delay that an escort will require.

PROPOSALS TO ADDRESS THIS ISSUE

The maritime industry proposes the following:

(1) Long Term Solution: Add the B-1 and B-1/B-2 classification for essential maritime shore staff to the list of acceptable nonimmigrant statuses through the rulemaking process. This would be ideal for the long term, but a short term solution is necessary because significant commercial

impacts are already a reality and will only get worse once additional ports become subject to TWIC requirements over the next few months, as noted previously

(2) Immediate Term Solution:

(a) TSA should deem maritime industry shore staff applicants admitted to the United States in B-1 classification as indicated by the Form I-94, along with those from visa exempt or visa waiver countries, as having a comparable legal status to the individuals listed as explicitly qualifying for a TWIC under TSA's regulations. This is legally sound as discussed above. B-1 or B-1/B-2 visa status or equivalent status (*i.e.*, visa exempt and visa waiver countries) is no different than the majority of those visa categories explicitly listed, in that all but two visa categories (B-1(OCS) and C-1/D) are not unique to the maritime industry.

(b) TSA can accomplish this most easily by exercising the discretion provided for in the law to make a policy determination of comparability and revising the "Immigration Manual" utilized by the TWIC enrollment centers or issue other internal policy guidance to specify what documents must be submitted as part of the TWIC eligibility criteria for these visa status categories. Documentation would include a passport, visa (as applicable), Form I-94, and a letter from the applicant's employer confirming his or her need for a TWIC to perform required job duties. This goes beyond what is required for any other non-maritime related visa category.

Further verification of employment or need is not necessary and is not utilized in any other TWIC visa category or for any other TWIC eligibility criteria. The applicant already must certify that "As part of my employment duties, I am required to have unescorted access to secure areas of maritime facilities or vessels in which a Transportation Worker Identification Credential is required." A false certification would subject the individual to criminal prosecution, including a fine of up to $250,000 and imprisonment.

(c) Once the individual has provided the required documentation to the enrollment center, the application is processed like any other application.

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