

November 5, 2012

Kelly Ryan

Acting Deputy Assistant Secretary, Immigration and Border Security

U.S. Department of Homeland Security

Washington, DC 20528

Re: **Implementation and Interpretation of "Department of Homeland Security Guidance on Treatment of Individuals Previously Subject to the Reporting and Registration Requirements of the National Security Entry Exit Registration System," (April 16, 2012)**

Dear Ms. Ryan:

Thank you for taking the time to meet with us on August 6, 2012, to discuss the residual effects of the NSEERS program. During the meeting we discussed at length the April 16, 2012 DHS memo addressing the treatment of individuals who failed to comply with the NSEERS registration and/or reporting requirements. As a follow-up to those discussions, we offer the following suggestions for implementing the April 16, 2012 memo which would provide a more just and fair approach to the treatment of a group of individuals who were unfairly targeted by what has proved to be a discriminatory and ineffective response to terrorism.

- Given the well-documented problems with the NSEERS program, as well as its discriminatory impact, DHS should instruct components to approach NSEERS cases with a generous eye and should encourage an expansive approach to the exercise of discretion.
- Failure to comply with NSEERS should be presumed to have been non-willful. This presumption should be rebutted only if the government is able to prove "willfulness" by clear and convincing evidence. DHS defines "willful" as that which was "deliberate, voluntary, or intentional, as distinguished from that which was involuntary, unintentional, or otherwise reasonably excusable." DHS should apply this definition broadly.
- A prior finding of willfulness, including a "willful violator" stamp issued to a late NSEERS registrant, should be completely disregarded when analyzing the record anew. As illustrated by the scores of people who were treated as "willful" violators upon late registration (in many cases because it was the only stamp ICE had on hand), these stamps are inherently unreliable and should not be considered when evaluating the record.
- A prior admission by the individual that noncompliance was willful should not be deemed conclusive evidence of willfulness. DHS must first confirm that the individual was actually subject to NSEERS, and, if so, look at the totality of the evidence anew before making a final determination.
- The memorandum provides a non-exhaustive list of evidence that would support a finding that noncompliance was not willful. The last bullet on the list permits consideration of "any other evidence showing that failure to appear was through no fault of the alien." DHS should

encourage components to view this catch-all category generously, and to not feel bound by the preceding four bullet points that provide very specific examples.

- In many cases, the primary, or even sole evidence that noncompliance was not willful will be a statement from the individual explaining why he or she failed to register or report. DHS should provide clarifying guidance to components that a detailed, credible statement from the individual, by itself, may be sufficient to support a finding that noncompliance was not willful.
- If DHS determines that an individual has willfully failed to comply with NSEERS, prosecutorial discretion should be exercised in a judicious manner.

While the initial measures outlined in the memo may potentially benefit some individuals affected by NSEERS, we remain deeply concerned by its significant limitations. For example, the memo fails to provide redress for *all* individuals who continue to face adverse immigration consequences as a result of NSEERS. To this day, individuals who voluntarily came forward and fully complied with NSEERS are suffering adverse and unjust consequences as a result of their compliance, including ICE's refusal to favorably exercise prosecutorial discretion to provide them with temporary relief from removal. We urge DHS, in consultation with individuals and organizations with expertise on NSEERS, to implement regulations that terminate the program in its entirety; remove residual penalties associated with NSEERS for all affected individuals; and discontinue the use of data collected through NSEERS.

Thank you for your attention to this matter. If you have any questions or require further information, please contact Aadika Singh, Policy Associate at Rights Working Group, at asingh@rightsworkinggroup.org.

Sincerely,

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