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# The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy

Penn State Law Immigrants' Rights Clinic

Rights Working Group

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# THE NSEERS EFFECT:

## A Decade *of* Racial Profiling, Fear, *and* Secrecy

*May 2012*

 **RIGHTS** working group

**PENN STATE LAW**

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## **ABOUT THE AUTHORS**

### **Rights Working Group**

Rights Working Group (RWG) formed in the aftermath of September 11th to promote and protect the human rights of all people in the United States. A coalition of more than 330 local, state, and national organizations, RWG works collaboratively to advocate for the civil liberties and human rights of everyone regardless of race, ethnicity, religion, national origin, citizenship, or immigration status. RWG has advocated for the full termination of NSEERS since the program's inception.

### **Center for Immigrants' Rights, Pennsylvania State University's Dickinson School of Law**

The Center for Immigrants' Rights is an immigration policy clinic at Penn State's Dickinson School of Law. At the Center, students produce practitioner toolkits, reports, and primers of national impact on behalf of client organizations. Working in teams, students build professional relationships with government and nongovernmental policymakers, academics, individual clients, and others. In 2009, the Center produced an analysis of the National Security Entry-Exit Registration System (NSEERS) for the American-Arab Anti-Discrimination Committee (ADC), which this current report builds on.

## ACKNOWLEDGMENTS

This report was prepared by students Mohita Anand and Constantin Schreiber as part of the Pennsylvania State University's Dickinson School of Law's Center for Immigrants' Rights, under the supervision of Shoba Sivaprasad Wadhia and on behalf of the Rights Working Group. The report was reviewed and edited by the following individuals: Sameera Hafiz, Jumana Musa, Aadika Singh, and Shoba Sivaprasad Wadhia.

Rights Working Group (RWG) and Penn State Law's Center for Immigrants' Rights (CIR) are enormously grateful to the following individuals and organizations for their contributions as interviewees to this report.

**Seth-Kaper Dale**, *Reverend at the Reformed Church of Highland Park, NJ*

Reverend Seth-Kaper Dale (Pastor Seth) has been serving as a Reverend at the Reformed Church of Highland Park, New Jersey since 2001. Throughout his ministry, he has helped promote interfaith dialogue amongst the different communities. He has become an integral component in advising and assisting the Indonesian community with NSEERS. <sup>1</sup>

**Mirwan Harahap**, *individual affected by NSEERS*

Mirwan Harahap faced religious harassment in his home country of Indonesia and thus fled to the United States on a tourist visa in 1997. He lived in Metuchen, New Jersey and worked for a car service company as a dispatcher. Around 2002, he complied with the NSEERS registration requirements. He was later deported in February 2009 and was forced to leave his child and wife behind. He currently lives in Jakarta, Indonesia. <sup>2</sup>

**Denyse Sabagh, Esq.**, *Head of Immigration Practice Group, Duane Morris LLP*

Denyse Sabagh serves as a partner at Duane Morris and heads the firm's Immigration Practice Group. Ms. Sabagh is the former national president and the general counsel of the American Immigration Lawyers Association. In 2010, Human Resource Executive magazine named her one of their top 15 immigration lawyers. She is listed in *Chambers Global and Chambers USA: America's Leading Business Lawyers for 2006* through 2011. She was also awarded the first Rose Bouzaine Nader Award by the American-Arab Anti-Discrimination Committee in June 2006 to honor her civic courage, organizing skills, and in advancing the just society with its pursuit of happiness, creativity, and foresight. <sup>3</sup>

**James Zogby**, *President and Founder of the Arab American Institute* Dr. James Zogby is the founder and president of the Arab American Institute (AAI), an organization focused on political and policy research for the Arab American community. Since 1986, Dr. Zogby has led Arab American efforts through the AAI for political empowerment in the United States, such as voter registration, education, and mobilization. Dr. Zogby has been involved in numerous Arab American issues. In the late 1970s, he co-founded and held a position of a chairman of the Palestine Human Rights Campaign and later served as the Co-Founder and Executive Director of the American-Arab Anti-Discrimination Committee.<sup>4</sup>

In addition to the contributors listed above, the authors of the report also interviewed other individuals knowledgeable about NSEERS who prefer to remain anonymous. Some of them have been quoted here, while others have only informed the content of the report.

## EXECUTIVE SUMMARY

In the wake of the tragic attacks of September 11, 2001, the landscape of immigration law and policy in the United States changed dramatically as the government scrambled to create counterterrorism programs to respond to potential national security threats. Many of these policies relied on discriminatory profiling of individuals from countries with predominantly Muslim populations and were based on the false assumption that people of a particular religion or nationality have a greater propensity for committing terrorism-related crimes. One of the most prominent of these programs is the National Security Entry-Exit Registration System (NSEERS) or “special registration” that was initiated by the Department of Justice (DOJ) in 2002 and inherited by the Department of Homeland Security (DHS) in 2003.

NSEERS served as a tool that allowed the government to systematically target Arabs, Middle Easterners, Muslims, and South Asians from designated countries for enhanced scrutiny. The most controversial piece of NSEERS required nonimmigrant males who were 16 years of age and older from 25 specific countries to register at local immigration offices for fingerprinting, photographs, and lengthy, invasive interrogations. Generally, the term “nonimmigrants” refers to individuals who are seeking admission to the United States temporarily for purposes of education, employment, pleasure, etc. Other than North Korea, each of the listed countries has predominantly Muslim populations.<sup>5</sup> Many individuals were deported through secret proceedings that took place without due process of law. The specifics of NSEERS reveal it to be a clear example of discriminatory and arbitrary racial profiling. More than 80,000 men underwent call-in registration and thousands were subjected to interrogations and detention, wasting taxpayer dollars through this counterproductive response to September 11th which has not resulted in a single known terrorism-related conviction.

From its inception, NSEERS elicited a strong negative response from Arab, Middle Eastern, Muslim, and South Asian communities in the United States. For a decade, advocacy organizations including Rights Working Group,<sup>6</sup> immigration lawyers and the private bar,<sup>7</sup> policy analysts,<sup>8</sup> and politicians<sup>9</sup> have spoken out against the discriminatory and ineffective program and called for its full termination.<sup>10</sup>

## **Impact on Families and Communities**

To this day, many families are separated geographically because a male family member was deported to his country of origin after attempting to comply with NSEERS, even if he did not have any relatives or contacts in that country.<sup>11</sup> In April 2011, the Department of Homeland Security (DHS) announced that the 25 NSEERS countries would be delisted and nonimmigrants from those countries would no longer need to comply with the program. Although DHS framed this policy shift as having “ended” NSEERS, the delisting of the specific countries through the April 2011 Rule did not eliminate the program’s underlying infrastructure. Individuals continue to face harsh immigration consequences resulting from the program, including deportation and the denial of immigration benefits for which they are otherwise eligible.

## **Continued Lack of Transparency and Misuse of Data**

Clear, publicly available information on NSEERS procedures and goals was unavailable from its inception and the program continues to lack transparency. Even today, the agencies involved in the program share little data or other information regarding its effectiveness. The issue of transparency is closely related to concerns about the misuse of data.

While NSEERS has been suspended, the data collected through the program is still available to DHS and potentially other government agencies. It is unclear how the data collected through the registration process has been and potentially is still being used. Much of the data gathered is very private and sensitive information, such as that related to individuals’ private financial matters. Those who registered have to live with the constant fear that this data could be used against them in the future.

## **NSEERS is Easy to Resurrect**

Subsequent to the April 2011 delisting, DHS admitted that the NSEERS program was not dismantled because the government wished to keep the regulations intact. This position is untenable as it ignores the numerous calls for full termination from advocates, members of Congress, and DHS’ own Office of Inspector General. Moreover, this lets-keep-it-in-our-back-pocket approach to addressing NSEERS suggests that the Obama Administration condones and intends to continue policies that rely on discriminatory racial profiling.



## **Failure to Meet Program Objectives**

NSEERS was ineffective and failed as a counterterrorism tool. There appears to be no evidence that NSEERS has led to the identification of anyone suspected of involvement in terrorism-related crimes. In February 2012, DHS's independent watchdog, the Office of the Inspector General (OIG), concluded that the NSEERS database was unreliable and found that the requirements of the program proved to be burdensome upon registrants, as they imposed lengthy questioning and multiple data checks. The OIG also characterized the program as an inefficient use of government resources which prevented DHS agents from conducting more targeted homeland security efforts.<sup>12</sup> DHS has estimated that the program cost American taxpayers more than \$10 million annually, and the OIG found that leaving the regulatory structure of the program intact provides no discernible public benefit. The OIG recommended fully terminating NSEERS and stated there is "no longer a value to the program."<sup>13</sup>

## **Postscript**

Following the final draft of this report in April of 2012, DHS released a new memorandum about individuals impacted by NSEERS, granting limited relief to individuals who failed to comply with NSEERS and who can demonstrate that their noncompliance was not willful. This memo is binding on all DHS personnel and requires each component of DHS to implement guidance within 60 days of the memorandum's issuance and related training.

## **Conclusion**

NSEERS is an ineffective, discriminatory program which relies on racial profiling. It continues to devastate individuals, their families and communities and its lasting impacts are not sufficiently corrected by the Obama Administration's recent policy shifts. Rights Working Group hopes that this report and its recommendations result in the full termination of the NSEERS program, redress for all individuals impacted by the program, and the discontinuation of the use of data collected through it.

## **Recommendations**

**Dismantle the Regulatory Framework of NSEERS:** NSEERS has failed as a counterterrorism policy, and national security needs can be addressed more effectively and efficiently through other existing programs and/or through programs targeting individuals based on suspect behavior, rather than through identity-based criteria such as race, religion, gender, or nationality.

**Remove Residual NSEERS Penalties:** DHS should, by regulation, remove the residual penalties associated with NSEERS and apply such regulations retroactively. DHS should additionally set aside immigration or criminal penalties against individuals who complied with, did not comply with, or are otherwise affected by the NSEERS program. DHS should also exercise prosecutorial discretion favorably in cases where an individual has positive equities but faces immigration consequences because he or she was targeted by NSEERS.

**Information Collected through NSEERS Should No Longer be Used for Any Purposes:** DHS should discontinue the use of data collected through NSEERS.

**Increase Oversight and Transparency:** NSEERS should be fully audited by DHS through the Office of Inspector General as well as by the Government Accountability Office to determine the program's effectiveness and to examine the continuing impact of NSEERS on individuals and the potential misuse of data. DHS should make statistics available on the number of individuals who were identified through the program and subsequently convicted of terrorism-related offenses. DHS should also provide complete statistics about the total number of individuals who registered with the program, as well as details about the enforcement actions that were taken against them.

**Support the End Racial Profiling Act:** To show his commitment to ending racial profiling, President Obama should make a clear statement in support of the End Racial Profiling Act (ERPA) of 2011. This bill was introduced in both Houses of Congress in 2011.<sup>14</sup> If ERPA were passed, it "would prohibit racial profiling by law enforcement at the local, state, and federal levels on the basis of race, ethnicity, national origin, religion, and gender."<sup>15</sup>

**Fix the DOJ Racial Profiling Guidance:** To effectively combat racial profiling, the 2003 Department of Justice Guidance on the Use of Race by Federal Law Enforcement Agencies must be reformed to cover profiling based on religion and national origin; remove the large loopholes that allow for profiling in the name of national security and border security; cover law enforcement surveillance activities; apply anywhere federal agents act in partnership with state or local law enforcement agents and to any agency that receives federal funds; and make the guidance enforceable.



## INTRODUCTION

*In the national trauma caused by 9/11, civil liberties came face to face with national security. Arab-Americans, American Muslims, and South-Asian Americans faced national origin and religious profiling. To take just one example, the Special Registration program targeted Arab and Muslim visitors, requiring them to promptly register with the INS or face deportation. At the time, I called for the program to be terminated because there were serious doubts it would help combat terrorism. Terrorism experts have since concluded that Special Registration wasted homeland security resources and alienated Arab Americans and American Muslims. More than 80,000 people registered, and more than 13,000 were placed in deportation proceedings. Even today, many innocent Arabs and Muslims face deportation because of Special Registration. How many terrorists were identified by Special Registration? None.<sup>16</sup>*

--- Senator Dick Durbin (D-Illinois)

In the wake of the September 11, 2001 attacks (9/11), the landscape of immigration law and policy in the United States changed dramatically as the government scrambled to create counterterrorism programs to respond to potential national security threats. Many of these policies relied on discriminatory profiling of individuals from predominantly Arab and Muslim countries based on the false assumption that people of a particular gender, race, ethnicity, religion, or nationality have a greater propensity for committing terrorism-related crimes.<sup>17</sup> One of the most prominent of these programs is the National Security Entry-Exit Registration System (NSEERS) or “special registration” that was initiated by the Department of Justice (DOJ) in 2002 and later inherited by the Department of Homeland Security (DHS) in 2003. Since its inception, NSEERS elicited a strong negative response from Arab, Middle Eastern, Muslim, and South Asian (AMEMSA) communities in the United States. Advocacy organizations including Rights Working Group,<sup>18</sup> immigration lawyers and the private bar,<sup>19</sup> policy analysts,<sup>20</sup> and politicians<sup>21</sup> have spoken out against the discriminatory and ineffective program.<sup>22</sup>

On June 5, 2002, U.S. Attorney General John Ashcroft announced the creation of NSEERS,<sup>23</sup>

marketing it as a counterterrorism tool.<sup>24</sup> According to DHS, NSEERS was originally designed to

[R]ecord the arrival, stay, and departure of certain individuals from countries chosen based on an analysis of possible national security threats. The NSEERS registration required approximately 30 minutes in secondary inspection, per person, per arrival; and NSEERS registrants were also required to register upon departure at one of the 118 designated ports of departure, limiting travel flexibility.<sup>25</sup>

NSEERS targeted visitors from predominantly Arab and Muslim countries.<sup>26</sup> The registration process required certain individuals<sup>27</sup> to be fingerprinted, photographed, and interrogated about their background and biographical information (including details about their families, birthdays and birth places, financial information, etc.) at a port of entry/exit or at local immigration office.<sup>28</sup> Particularly in the beginning, the program's regulations and guidelines were communicated and distributed ineffectively, and at times even inaccurately, making it exceedingly difficult for individuals to comply.<sup>29</sup> Although NSEERS has undergone several changes since its inception in 2002, it remains a discriminatory program which relies on racial profiling. NSEERS continues to devastate individuals, their families, and communities, and its impacts have not been sufficiently corrected through the Obama Administration's policy shifts.

This report adopts the definition of racial profiling contained in the End Racial Profiling Act of 2011 (ERPA),<sup>30</sup> where it is defined as "[t]he practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, gender, or religion—

- (i) in selecting which individual to subject to routine or spontaneous investigatory activities or
- (ii) in deciding upon the scope and substance of law enforcement activity following the initial investigatory activity."<sup>31</sup>

On April 28, 2011, DHS announced the "end" of NSEERS through a notice in the Federal Register (April 2011 Rule).<sup>32</sup> Specifically, the April 2011 Rule stated "that it is no longer necessary to subject nationals from these countries to special registration procedures, and this notice deletes all currently designated countries from NSEERS compliance."<sup>33</sup> A press release on the DHS website stated:

Since NSEERS was created, DHS has implemented several automated systems that capture arrival and/or exit information, making the manual entry of this data via the NSEERS registration process redundant, inefficient and unnecessary. The improved and expanded DHS and Department of State systems capture the same information for visitors, regardless of nationality. As a result of these advances and input from community groups and advocacy organizations, we are pleased to announce that the Department is officially ending the NSEERS registration process. This step will streamline the collection of data for individuals entering or exiting the United States, regardless of nationality.<sup>34</sup>

Although DHS framed this policy shift as having “ended” NSEERS, the delisting of the specific countries through the April 2011 Rule did not eliminate the program’s underlying infrastructure, and we do not regard this as a true end to the program.<sup>35</sup> This policy shift meant only that from April 28, 2011 onwards, individuals who would have been targeted previously by the program were no longer obligated to register. Notably, the April 2011 Rule failed to address the ongoing negative impacts felt by individuals who had previously registered, failed to register, or improperly registered. While a variety of advocacy organizations opposed to the program applauded DHS for the “long-overdue”<sup>36</sup> suspension of NSEERS,<sup>37</sup> they also pointed out “that the program is dormant, not abolished, and there’s still been no accountability.”<sup>38</sup> Many of these advocacy groups contend that DHS, through the April 2011 rule, did not address residual effects of the program, as “there remains much damage to rectify from NSEERS’ discriminatory immigration enforcement.”<sup>39</sup>

As a candidate, President Barack Obama’s campaign released a “Blueprint for Change” which stated that, if elected, “Obama and Biden will ban racial profiling . . .”.<sup>40</sup> Attorney General Eric Holder has also stated that ending racial profiling was a “priority” for the Obama Administration and that profiling was “simply not good law enforcement.”<sup>41</sup> DHS maintains that NSEERS did not profile based on religion because every eligible male from an NSEERS country was required to register regardless of religious affiliation. We maintain that NSEERS did profile based on religion because the program disproportionately impacted Muslims. A more detailed discussion of this issue appears in the Racial Profiling section of this report. By keeping the structures of a program (NSEERS) that targeted people based on their gender, religion, age, and nationality in place, the federal government can be seen as condoning and promoting similar discriminatory policies at the state and local level. A prominent example is that of the New York City Police Department’s (NYPD)

surveillance of Muslim communities and individuals. A series of Pulitzer Prize winning Associated Press articles revealed that the NYPD has subjected Muslims to surveillance. Undercover officers infiltrated minority neighborhoods and hundreds of mosques and Muslim student groups, without any reliable indication of suspect behavior. Many of the NYPD operations were built with help from the CIA, which is prohibited from domestic spying but which was critical to the transformation of the NYPD's intelligence unit after 9/11.<sup>42</sup> The fact that DHS has kept the NSEERS regulatory framework intact belies the Obama Administration's statements of opposition to racial profiling and indicates the Administration's support of similar practices at the state and local level.

This report builds on a 2009 white paper prepared by the Center for Immigrants' Rights at Penn State's Dickinson School of Law on behalf of the American-Arab Anti-Discrimination Committee.<sup>43</sup> The purpose of this report is to analyze the impact of NSEERS in its current form and make recommendations for meaningful reform. The groundwork for this analysis is laid out in Section 1: *The NSEERS Framework*, which describes the legal foundation and the development of NSEERS since its inception. The ensuing policy analysis in Section 2: *Policy Impact: NSEERS is Still in Effect* identifies the current issues with the program. In particular, this section looks at the effects NSEERS has on those individuals who continue to be negatively impacted by the program. Based on this examination, the *Policy Recommendations* section provides recommendations for government policymakers. The report also aims to educate individuals, policymakers, and advocates about NSEERS.

The methodology of this report consists of two pillars. First, it is based on the analysis of statutes, regulations, policies, reports, and statistics relating to NSEERS. Second, the analysis is complemented by interviews with policymakers involved in the creation and oversight of NSEERS, analysts who have studied the program, and immigration attorneys and advocacy groups who have represented impacted individuals.



## PROFILE



**DENYSE SABAGH,**

**HEAD OF IMMIGRATION LAW GROUP, DUANE MORRIS LLC**

*I was involved with NSEERS from the beginning. Right from the start, when they published the first set of countries, it was very chaotic. The regulation was published in the Federal Register. It was not disseminated to the community very effectively. Many people in the community and those who would be affected by the regulation did not know about it.*

*I represented many individuals subject to NSEERS since its inception in 2002. The program was sloppy in its original set-up due to the rapid execution, no additional funding for implementation, no additional staff and a general lack of clear guidance. Initially, the regulations of the program were unclear to all parties involved (affected immigrants, immigration lawyers, and even government staff) and resulted in mistakes and misinformation. For many affected individuals it was difficult to register because of long lines in front of registration offices, people being turned away, unclear, contradicting, or missing information, and procedural mistakes made by the staff of the government agencies.*

*For a lot of people, it affected their lives adversely. I represented a student from Johns Hopkins. He was from Pakistan. He had gone in to register. He had applied and had been admitted to Johns Hopkins for his Master's Degree. Johns Hopkins knew his situation. However, somewhere along the way, Hopkins failed to advise him properly about the timing of filing his application to change status from H-1B to a student. He ended up in jail and in deportation proceedings. He also was the President of the student body. They and the professors provided tremendous support. Thirty-plus people came to his deportation hearing. The Judge was impressed. We conducted an all-out campaign to get him reinstated. We were finally able to get him reinstated so that he could stay in the U.S. The fallout from NSEERS for him and many others created unnecessary problems and psychological and emotional scars.*

*I also observed that as a result of NSEERS, the Muslim communities felt very much under siege. It seemed that the legal standard changed and they were guilty until they were proven innocent. They were placed in a state of constant anxiety and fear. NSEERS sure looked like racial profiling. It targeted individuals based on nationality, age, gender, and religion. If the government wanted to create an effective counterterrorism tool, it could have developed a list of criteria that would be related to the actual focus of identifying terrorists, rather than profiling against whole classes of people based on their nationality. <sup>44</sup>*



## NSEERS LEGAL FRAMEWORK

*NSEERS was badly-conceived, poorly executed, arbitrarily administered, and it had disastrous results.*

— **James Zogby**, *President and Founder of the Arab American Institute*

The framework of NSEERS is linked to Section 110 of the U.S. Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996,<sup>45</sup> which mandated an automated entry-exit data system that would “collect a record of every alien departing the United States and match the records of departure with the record of the alien’s arrival in the United States.”<sup>46</sup> According to DHS, the initial purpose of the entry-exit data system was to address the extensive problem the United States was facing with nonimmigrants<sup>47</sup> overstaying their visas.<sup>48</sup>

In response to the September 11 attacks, former President George W. Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001<sup>49</sup> and the Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVERA).<sup>50</sup> Under Section 414 of the USA PATRIOT Act,<sup>51</sup> Congress called for the integration of the entry and exit data system in Section 110 of the IIRAIRA amongst airports, seaports, and land border ports of entry. The section further emphasized the utilization of biometric technology and the development of tamper-resistant documents readable at ports of entry.<sup>52</sup>

As a means of implementing these changes, Congress placed the responsibility of developing an entry and exit registration system on the Department of Justice (DOJ). NSEERS was created under the guidance of Kris W. Kobach,<sup>53</sup> a DOJ advisor at that time. While NSEERS was showcased as a component of the entry and exit system, the program also found its statutory foundation in section 263 of the Immigration and Nationality Act (INA).<sup>54</sup> Under this section,

The Attorney General is authorized to prescribe special regulations and forms for the registration and fingerprinting of (1) alien crewmen, (2) holders of border-crossing identification cards, (3) aliens confined in institutions within the US, (4) aliens under order of removal, (5) aliens who are or have been on criminal prohibition or criminal parole within the United States, and (6) aliens of any other class not lawfully admitted to the US for permanent residence.<sup>55</sup>

The NSEERS program had three main components. The first component of NSEERS was known as “port-of-entry” registration and consisted of fingerprinting and photographing certain nonimmigrants or visitors at all ports of entry, such as border crossings, seaports, and airports. Those initially required to register included: visitors from Iran, Iraq, Libya, Sudan, and Syria, and select foreign visitors determined to present an elevated national security risk.<sup>56</sup> Under NSEERS, fingerprint scans were to be run on all entering nonimmigrants against a database of thousands of known terrorists.<sup>57</sup> All individuals registered under NSEERS were also required to re-register after thirty days if initially registered at a port-of-entry and annually if they were remaining in the United States longer than one year.<sup>58</sup>

The NSEERS program was expanded to include a “call-in” feature that required certain male foreign visitors who were 16 years of age and older from specified countries and already present in the United States to register at designated immigration offices. The registration requirement was first applied to nonimmigrant males from Iran, Iraq, Libya, Sudan, and Syria. These individuals were required to register with INS between November 15, 2002<sup>59</sup> and December 16, 2002. The second group required to register were from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. Their registration occurred between December 2, 2002 and January 10, 2003.<sup>60</sup> The third group included individuals from Pakistan and Saudi Arabia who were to register between January 13, 2003 and March 21, 2003.<sup>61</sup> The last group of visitors required to register were from Bangladesh, Egypt, Indonesia, and Kuwait and were to register between February 24, 2003 and April 25, 2003.<sup>62</sup> The government’s execution of the “call in” registration was sharply criticized. Requiring males of a certain age from predominantly Muslim countries to register constituted profiling based on gender, age, religion,<sup>63</sup> and nationality. Moreover, inadequate notice and misinformation prevented many individuals who would have complied from doing so. The federal government relied principally on notices in the Federal Register to inform the public of registration requirements and, like the majority of the American population, most individuals subject to NSEERS were not familiar with the Federal Register or the requirements contained therein.<sup>64</sup>

Finally, the NSEERS program established a system of exit controls, which required individuals subject to NSEERS to register each time they departed from the United States.<sup>65</sup>

Then-Attorney General John Ashcroft believed a critical aspect of the NSEERS program was to arrest those individuals who attempted to escape the registration requirements or to stay in the country beyond their permitted time. <sup>66</sup>

Failure to comply with NSEERS could result in significant penalties. <sup>67</sup> Any nonimmigrant subject to special registration who failed without good cause to be examined by an inspecting officer at the time of his departure and to have his departure recorded by the inspecting officer is presumed to be inadmissible upon future entry under but not limited to 212(a)(3)(A)(ii) of the Immigration and Nationality Act (INA) as an “alien who seeks to enter the United States to engage in unlawful activity.” <sup>68</sup> If one failed to comply with NSEERS after admission into the United States, he is considered to have failed to maintain status under section 237(a)(1)(C)(i) of the INA. <sup>69</sup> However, an exception to this rule applies if the individual is able to demonstrate that the failure to register was “reasonably excusable or not willful.” <sup>70</sup> A related penalty kicked in for a number of individuals who were in the process of applying for an immigration benefit or relief, who were told during this process that they must comply with NSEERS through “late” registration. In these situations, the agency’s adjudication of “willful” was often controversial to the extent that officers capriciously stamped the passports of late registrants as “willful” even in cases where they were unaware of the program, limited in English, and/or of high school age at the time they were required to register. <sup>71</sup>

Another potential consequence for failure to comply with NSEERS is the initiation of criminal proceedings. Pursuant to the statute and related notices issued by the government, anyone required to register who “willfully fails or refuses” to do so “shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1000 or be imprisoned, not more than six months, or both.” <sup>72</sup>

In December 2003, DHS amended NSEERS by suspending the thirty-day and annual re-registration requirements, among other changes. <sup>73</sup> In place of the previous requirement, the new rule allowed DHS, as a matter of discretion, to notify individual nonimmigrants subject to NSEERS to appear for one or more additional continuing registration interviews to determine whether the individual was complying with the conditions of his or her visa status and admission. <sup>74</sup> The 2003 rule left the regulatory framework of NSEERS, related penalties, and entry and exit registration requirements intact.

DHS subsequently issued a handful of memos discussing how immigration cases involving NSEERS should be handled. One memorandum issued by former ICE Principal Legal Advisor William Howard in October of 2005 addressed the use of prosecutorial discretion and its relation to NSEERS (Howard Memo).<sup>75</sup> Prosecutorial discretion is law enforcement's authority to decide whether or not to enforce particular laws against a party.<sup>76</sup> The Howard Memo urges ICE attorneys to use prosecutorial discretion before or in lieu of issuing a Notice to Appear (NTA) for immigration action<sup>77</sup> in certain sympathetic circumstances in which an individual has failed to register with NSEERS. Specifically, the Howard Memo states:

When an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien's hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements.<sup>78</sup>

Interestingly, the Howard Memo did not include "compliance with NSEERS" as a positive factor in considering whether to exercise prosecutorial discretion favorably. Reverend Seth Kaper-Dale of the Reformed Church, profiled later in this report, has criticized the absence of such language in the Howard Memo and lamented that several Indonesian men in his community complied with NSEERS but were nonetheless placed in removal proceedings. After months of advocacy with the local ICE office, Kaper-Dale was able to move ICE to grant orders of supervision (a form of prosecutorial discretion) for about eighty-three Indonesian immigrants, nine of whom were incarcerated by ICE but were later released as a result of the arrangement.<sup>79</sup>



*Photo Courtesy of Reverend Seth Kaper-Dale*

On April 28, 2011, DHS announced the delisting of all 25 specified countries from the program.<sup>80</sup> The Department stated that, as a result of improved intelligence programs and better methods of tracking immigrant visa overstays, NSEERS is no longer needed to protect national security. In addition, DHS stated that it will “seek to identify individuals and actions that pose specific threats, rather than focusing on more general designations of groups of individuals, such as country of origin.”<sup>81</sup> This language supports the idea that the profiling of individuals based on gender, age, religion, or nationality is wrong and ineffective and that NSEERS represents a failed policy. This April 2011 rule thus temporarily suspends the program requirements for nationals and citizens from these 25 countries. Key to note, however, is that the regulations that gave rise to the NSEERS program and the penalties faced by the vast majority of noncitizens who did not comply or improperly complied with the program remained in place.

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued two significant memos on the use of prosecutorial discretion in immigration matters.<sup>82</sup> The memo called on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the United States, and instead to spend the agency’s limited resources on persons who pose a serious threat to public safety or national security. The Morton Memo elucidates 19 factors that ICE should consider in deciding whether prosecutorial discretion should be favorably exercised.<sup>83</sup> The Morton memo is the most comprehensive memo on prosecutorial discretion since the creation of DHS. Yet, as of this writing, it has, at best, been implemented inconsistently.<sup>84</sup> Moreover, the Morton Memo lacks any details about how individuals impacted by NSEERS should be treated.

United States Citizenship and Immigration Services (USCIS) also issued a memo related to prosecutorial discretion on November 7, 2011. This memo established new guidelines for referring cases and issuing Notices to Appear (NTAs) in a manner that promotes the effective use of DOJ and DHS resources. It states that USCIS will refer all cases in which immigration benefits are denied based on NSEERS violations to ICE for possible NTA issuance.<sup>85</sup> This memo reveals that immigration benefits can still be denied because of NSEERS and that those whose cases were previously denied could continue to face negative consequences. In addition, referring cases to ICE for possible NTA issuance means that individuals are still subject to removal from the United States because of NSEERS. This referral policy contradicts the agency’s stated desire to “end” NSEERS.<sup>86</sup>

In February 2012, DHS's independent watchdog, the Office of the Inspector General (OIG), released a report entitled, "Information Sharing on Foreign Nationals: Border Security."<sup>87</sup> In this report, the OIG concludes that the NSEERS database was unreliable and finds that the requirements of the program proved to be burdensome upon registrants, as they imposed lengthy questioning and multiple data checks. The OIG also characterizes the program as an inefficient use of government resources that prevented DHS agents from conducting more targeted homeland security efforts.<sup>88</sup> DHS has estimated that the program cost American taxpayers more than \$10 million annually, and the OIG finds that leaving the regulatory structure of the program intact provides no discernible public benefit. Most importantly, the OIG recommends fully terminating NSEERS and states there is "no longer a value to the program."<sup>89</sup>

### **POLICY IMPACT: NSEERS IS STILL IN EFFECT**

Of course it could come back because the infrastructure is still there and they [the government] still do not get the fact that they screwed it up. They did not get it right and they wasted resources and did not accomplish anything. They will do it again and they will do it again in exactly the same way because they still do not get it.<sup>90</sup>

— **James Zogby**, *President and Founder of the Arab American Institute*

Despite DHS' indefinite suspension of NSEERS under the April 2011 Rule, no relief or policy has been suggested that addresses foreign nationals and citizens who were placed in removal proceedings after complying with NSEERS, those who had never registered because they were afraid to register or were unaware of the program, among others.<sup>91</sup> This section also highlights a number of policy concerns with NSEERS including the program's lack of transparency, misuse of the data collected through NSEERS, the negative impact of preserving the underlying regulatory structure, and the program's ineffectiveness as a counterterrorism tool.



## PROFILE

**HADI SYED ZAIDI,**

**INDIVIDUAL AFFECTED BY NSEERS**

*Hadi Syed Zaidi is a Pakistani citizen who came to the United States at the age of 4. After being an honors student in high school, he attended West Los Angeles Community College with the hope of ultimately being able to transfer to a four-year university and enroll in a degree program in industrial design or applied mathematics.<sup>92</sup> His parents are both green card holders. Having registered under NSEERS when he was 16, he was taken into custody by ICE in December of 2011, after the purported "end" of NSEERS as announced in April of that year. He was detained because he overstayed his visa and consequently faced deportation to Pakistan. Hadi was eventually released and granted a temporary stay of removal in January of 2012. Despite this temporary stay, he can still be taken into custody and must check in with immigration officials on a regular basis.<sup>93</sup>*

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## RACIAL PROFILING

*Racial profiling undermines the rule of law and strikes at the core of our nation's commitment to equal protection for all.<sup>94</sup>*

**— Senator Dick Durbin (D-Illinois)**

Since the 9/11 attacks, the United States has seen an increase in racial profiling practices and policies at the federal, state, and local level, particularly the targeting of individuals of Arab, Middle Eastern, Muslim, and South Asian descent or those perceived to be members of those groups.<sup>95</sup> This increase is tied to counter-terrorism measures such as NSEERS implemented by the federal government which permitted and even encouraged authorities to target these communities.<sup>96</sup> As mentioned previously in this report, the call-in portion of NSEERS targeted male visitors of certain ages from 25 specified countries, 24 of which have predominantly Muslim populations. The program was discriminatory, arbitrary and failed to meet its purported goals. Government officials have argued that NSEERS did not constitute profiling in part because it was intended to expand to all countries, but this did not occur, as the NSEERS list was never expanded past the 25

countries—and individuals continue to be negatively affected by the program despite its suspension.<sup>97</sup> Preeminent scholar on racial profiling, David Harris from the University of Pittsburgh School of Law stated in a 2012 congressional hearing on racial profiling that under NSEERS, “Muslims were targeted by using a convenient proxy characteristic: national origin.”<sup>98</sup> The agency maintained that NSEERS did not profile based on religion because every eligible male from the NSEERS countries was required to register regardless of religious affiliation. We disagree. In addition, while some members of the immigration agency have argued that distinctions based on nationality and national origin in immigration are not only legitimate and consistent with other immigration designs, the context matters. In her paper “Business as Usual: Immigration and the National Security Exception,” Professor Shoba Sivaprasad Wadhia writes:

While profiling based on nationality or national origin may not be inherently wrong, there are at least five reasons why it is offensive and in many cases no different from profiling based on race, ethnicity or religion: 1) in practice many policies based on nationality disproportionately impact particular religions and ethnicities; 2) this disproportionate impact creates the perception that a particular policy is premised on anti-Arab or anti-Muslim sentiment; 3) most of the countries identified by the government as harboring terrorists have been Arab or Muslim; 4) in practice “nationality” based profiling is often conflated with “national origin” profiling; 5) profiling based on country of birth has extended to naturalized United States [citizens] from particular countries, leading to the presumption that citizens from particular places are somehow less reliable or loyal in their allegiances to the United States.<sup>99</sup>

The Obama Administration’s refusal to fully terminate NSEERS suggests that the Administration condones, supports, and intends to continue policies that rely on discriminatory racial profiling, such as those of the New York City Police Department (NYPD) at the local level and the Federal Bureau of Investigation (FBI) at the federal level. With strong parallels to NSEERS, it was reported in 2011 that the NYPD has a secret squad, known as the Demographics Unit, that spies on Muslim businesses, mosques, and Muslim students on campuses in New York City and beyond. This squad wears



*Photo Courtesy of Monami Maulik, Desis Rising Up and Moving (DRUM)*



plainclothes and goes into Muslim neighborhoods to photograph and monitor mosques and locations where Muslims congregate including restaurants, grocery stores, and travel agencies. The NYPD further monitors Muslims who have changed their names to sound more traditionally American. At mosques, police record license plates and take photos and videos of worshippers as they arrive for services. In 2004, New York City adopted a law to prohibit racial profiling, which is defined as “the use of race, color, ethnicity, religion, or national origin as the factor for initiating police action.” Surveillance such as that conducted by the NYPD contradicts this law and clearly constitutes racial profiling, as did NSEERS.<sup>100</sup> Policies that rely on profiling persist at the national level as well, as evidenced, for example, by the FBI’s mapping program. Based on crude stereotypes and assumptions about which groups commit crimes, the FBI is collecting racial and ethnic information and “mapping” communities around the United States. Across the country, the FBI is gathering reports on the so-called “suspicious activity” of innocent Americans and sharing it across federal, state and local government agencies.<sup>101</sup>

## IMPACT ON FAMILIES AND COMMUNITIES

*[NSEERS] is a family-breaking policy.*<sup>102</sup>

— **Seth Kaper-Dale**, Reverend at the Reformed Church in Highland Park, New Jersey

### PROFILE



**SETH KAPER-DALE,**  
REVEREND AT THE REFORMED CHURCH IN HIGHLAND  
PARK, NEW JERSEY

*My wife and I became co-pastors of the Reformed Church in Highland Park in September of 2001. Our first Sunday was two days before 9/11. The Reformed Church served as a sanctuary for the Indonesian community to worship quietly on Sunday afternoons. Almost all of individuals from this community fled religious persecution in Indonesia and arrived in the United States on tourist visas. However, many had failed to file for asylum. After the start of the NSEERS Program,<sup>103</sup> I urged the Indonesian community to register and many took my advice and did register. Melinda Basaran, a New Jersey immigration lawyer who worked with the Indonesians, believes that a "good portion" of the community was deported due to compliance with NSEERS.<sup>104</sup> In May 2006 at 5 a.m., at an apartment complex where many Indonesians lived, armed federal agents rounded up 37 men with expired visas and deportation orders—terrifying their wives and children as they, along with others, witnessed the men being taken away. Many believe that this raid was a result of the information provided when registering with NSEERS. NSEERS did nothing more than instill fear amongst these individuals, break family unity, and destroy the Indonesian community.<sup>105</sup>*

*Augus Alex Asa and his wife Grace arrived in the United States on tourist visas from Indonesia. They complied with the NSEERS registration process in fear of being considered terrorist fugitives. I urged the Indonesian community to register, but could have never predicted such detrimental consequences. During the raid in May 2006, Mr. Asa, his wife, and daughter hid in the closet as the immigration agents arrived at their door. For two weeks after, the family slept at the church. After lengthy stays in immigration jails, 37 men from this Indonesian community were deported. Their wives were forced to find work, financially support their families, and raise their children alone.<sup>106</sup>*

*On a Sunday night in 2006, I saw a lot of fathers playing with their kids in the sandbox. In the wee hours of Monday morning they were picked up in that raid. Within thirty days, every single male was sent away. We had people fearing everyday that another raid would happen. So for the next month, we had about forty people sleeping in our church, eating at our kitchens.* <sup>107</sup>

NSEERS has had a wide range of negative social and economic consequences for families of targeted individuals. NSEERS requirements often resulted in immigration detention or deportation, tearing families apart. Many of these families feared not only loss or separation from a loved one, but loss of their primary source of income and resulting homelessness. To this day, many families are separated geographically because a male family member was deported to his country of origin after attempting to comply with NSEERS, even if he did not have any relatives or contacts in that country. <sup>108</sup>

## POFILE



MIRWAN HARAHAHAP,  
INDIVIDUAL AFFECTED BY NSEERS

*I fled harassment and discrimination of Christians like myself in Indonesia in 1997 and arrived in the United States on a tourist visa. I began working at a car service center in Metuchen, New Jersey. After the start of NSEERS, I registered under the program and was questioned by DHS regarding my overstay in the United States. In February 2009, I was deported to Indonesia and it destroyed my family. I was forced to leave behind my wife and U.S. born child, and return to a country to live without my loved ones. Complying with the registration procedures and abiding by NSEERS, my life has been destroyed, whereas others who did not register under NSEERS continued to live and work in the United States. Despite my valid working permit issued by DHS and my attorney's demand for my release back to my family in Metuchen, ICE has refused to reopen my case. I constantly question why the U.S. government rushes to deport family-oriented men with no criminal records who have continued to live in the United States as law-abiding citizens for numerous years.* <sup>109</sup>

NSEERS continues to have real, negative impacts on families and communities.

Prosecutorial discretion “authorizes immigration officers and attorneys to channel their limited enforcement resources towards the most dangerous, while placing sympathetic cases involving individuals with favorable qualities like full-time fathers, those with serious medical conditions, long-time employees, and students with strong ties to the U.S. on hold.” <sup>110</sup> Prosecutorial discretion could thus potentially apply to many individuals who are affected by NSEERS and present other positive equities.

The October 2005 Memo by former ICE Principal Legal Advisor William Howard and the June 2011 Memo by ICE Director John Morton <sup>111</sup> advise the use of prosecutorial discretion in ICE enforcement, clarifying that the enforcement focus should be on high-priority cases. However, the memos lack clear instructions about when and how to use prosecutorial discretion in NSEERS cases. Arguably many of the positive equities that should be considered in the granting of relief, as described in the Morton Memo, are demonstrated by several members of the Indonesian community in New Jersey in which Reverend Kaper-Dale is so heavily engaged. <sup>112</sup> These individuals, many of whom had registered under NSEERS and none of whom have criminal histories, had overstayed their visas. At least 37 were deported. In 2009 and 2010, most of these Indonesians who had not been forced to leave were able to strike a temporary deal with the local ICE office but now face deportation. They had received orders of supervision, allowing them to live and work in the United States lawfully as long as they tried to obtain legal immigration status. In 2011, when the Morton Memo on prosecutorial discretion was issued, the community assumed that the memo would aid their cases. Instead, ICE seems to have stepped up their enforcement, requiring 72 Indonesians, who had previously been given orders of supervision and who should qualify for the favorable exercise of prosecutorial discretion, to report to



*Photo Courtesy of Reverend Seth Kaper-Dale*

the local DHS office for possible immigration action. <sup>113</sup>

Prosecutorial discretion is critical to addressing the residual effects of NSEERS. The mere existence of prosecutorial discretion guidelines, unfortunately, has not guaranteed their appropriate implementation.

*There are 19 bullet points [listing factors to consider when exercising prosecutorial discretion] in Morton's June 17th memo...and even if you have 17 on there, and if you don't have the one or two that your field office wants to give, they do not care. Everybody in our community has a large number of those bullet points. Fifty-percent of our people have been granted 1 year stays by using that criteria and fifty-percent [have] not. That's how capricious this program is. <sup>114</sup>*

--- **Reverend Seth Kaper-Dale**, Reformed Church of Highland Park, New Jersey

## LACK OF TRANSPARENCY

Clear, publicly available information on NSEERS procedures and goals was unavailable from its inception <sup>115</sup> and the program continues to lack transparency. Even today, the agencies involved in the program share little data and other information regarding its effectiveness. The few statistics that are available, such as the frequently quoted numbers from a 2003 ICE factsheet on NSEERS, <sup>116</sup> are outdated. This factsheet states that, out of a total of 83,519 individuals who registered with NSEERS, 13,799 individuals were placed into removal proceedings and 2,870 were detained. <sup>117</sup> The most recently available information from the 2012 DHS OIG report states that the number of entry and exit registrations decreased from over 250,000 per year in 2002 to approximately 60,000 in 2010. The report further notes that "NSEERS remains a significant part of the CBP caseload" and that "at several ports of entry, NSEERS registrants were the largest caseload handled in secondary inspections." <sup>118</sup>

There are various reports about the lack of information or even misinformation, particularly in the beginning of NSEERS implementation. Voicing the perspectives of many immigration lawyers, <sup>119</sup> Denyse Sabagh points out that very little information was available about NSEERS in its initial stages. Even many immigration lawyers were unaware of the exact nature of the program and requirements for compliance. <sup>120</sup> The lack of transparency had grave effects on community leaders and affected individuals, as further described by Dr. James Zogby.

## PROFILE



**DR. JAMES ZOGBY,**  
PRESIDENT AND FOUNDER OF THE ARAB AMERICAN  
INSTITUTE

*The Arab immigrant communities we serve at the Arab American Institute have been confronted with the effects of NSEERS from the beginning of the program and continue to feel its consequences. Right in the beginning, we called the Dallas office of the INS [in charge of NSEERS before the creation of DHS] and asked, "Are you sending out notices of information to people?" and they said, "Yeah it's all taken care of." We said that we have talked to our people in Dallas, but they have not heard anything from you. INS responded and said "Oh no, that's not true, we have talked to the Arab community." INS stated that they had a group of women in, and they had veils on so they knew they were Arab. We then asked them what about the name of the group. It turned out that it was some Pakistani medical association, so obviously the INS officer did not know that Pakistanis are not Arabs and that not all Arabs are Muslims and just by [talking to someone] wearing a head scarf does not mean that you talked to the Arab community.*

*We found much the same in other cities, where they did not know who the Arab groups were, they did not know how to reach the groups, and they were counting on us. It was then that I began using the framework that it was badly conceived, poorly executed, arbitrarily administered and it had disastrous results. It was arbitrarily administered, which was what we discovered when they began calling the dates because what we found was that if you were from the Clinton era and applied for change of status and got married, whatever, changed schools, and got a letter saying okay, if you showed up in one office, they said that you didn't even need to show up and you were fine. But if you showed up in another office you were told that it was not acceptable and you could be held for deportation. We got a number of those.*

*Now, ten years after NSEERS was created, the lack of transparency is one of the major issues that remain. My policy recommendation would be to request full transparency. I strongly believe that without establishing transparency and accountability, the issues of the program will never be addressed appropriately. That being said, I don't see any willingness on the part of the government to do that. When I asked a senior officer in DHS during the Bush administration to give us an accounting of how many were ordered deported and why, he said that he couldn't find such records. That's a hell of a way to run a government. You have people who came and registered at INS offices, somebody must have a printout of that, someone must have some documentation of that. They say*

*that they don't. I would like to see how many people went in to register, and how many people were deported and why. Until I see that, this entire process is a mystery and it's a mystery because it is so badly done and that is a huge embarrassment and the government does not want anyone to know how badly it was done.*

*Even if NSEERS would actually be terminated at some point in the future, the issue of transparency would have to be addressed. In fact, the Administration needs to re-examine the effects of the program on individuals on a case-by-case basis. Practically no numbers are known or made available. The decision makers responsible for the creation and enforcement of the program need to be held accountable, particularly with the program's infrastructure still being intact. We need to get to the bottom of it. If the instinct is there and the culture is there, then this will happen again. NSEERS has sowed fear and confusion in the Arab and Muslim communities instead of promoting an atmosphere of cooperation with law enforcement authorities. <sup>121</sup>*



## MISUSE OF DATA

The issue of transparency is closely related to concerns about data use. Even after the discontinuation of the NSEERS requirements, it is not completely clear how the data collected through the registration process has been and potentially still is being used. The “Operation Frontline” program is one example of how data gathered through NSEERS was used for discriminatory law enforcement activities that went far beyond the boundaries of NSEERS. Operation Frontline was started in 2004 with the stated purpose of preventing a terrorist attack during the presidential elections. To reach this goal, ICE targeted alleged violators of immigration law who had been identified as potential national security concerns. While the government denied profiling based on ethnicity or religion, more than 80 percent of the individuals approached through Operation Frontline were from predominantly Muslim countries.<sup>122</sup> Data from NSEERS and two other immigration programs, the Student and Exchange Information System (SEVIS) and the United States Visitor and Immigrant Status Indicator Technology program (US-VISIT), were mined by ICE in order to identify individuals to target for Operation Frontline.<sup>123</sup> Advocacy organizations such as the American-Arab Anti-Discrimination Committee were quick to detect this misuse of the data.<sup>124</sup>

While NSEERS has been suspended, the data collected through the program is still available to DHS and potentially other government agencies. Much of the data gathered is very private and includes sensitive information, such that related to individuals’ private financial situations. Despite the government’s claim that the data is being used for NSEERS purposes, those who registered have to live with the constant fear that this data could be used against them in the future. This is all the more troubling given the DHS Office of Inspector General’s acknowledgment that “the NSEERS database is unreliable and it is difficult for NSEERS registrants to adhere to the registration requirements.”<sup>125</sup> The DHS OIG has further confirmed that “[D]ata captured in the NSEERS database are transferred automatically to other DHS systems or captured initially in other systems, including US-VISIT and Enforcement Case Tracking System (ENFORCE).”<sup>126</sup>



## NSEERS IS EASY TO RESURRECT

As mentioned previously, what was framed by DHS as the “end” of NSEERS was simply a delisting of the 25 countries through the April 2011 Rule. The legal foundation for the program remains. Subsequent to the April 2011 delisting, DHS itself admitted that the NSEERS program was not dismantled because the government wished to keep the regulations intact:

*Because the Secretary of Homeland Security’s authority under the NSEERS regulations is broader than the manual information flow based on country designation that has now ended, the underlying NSEERS regulation will remain in place in the event a special registration program is again needed.*<sup>127</sup>

The decision by DHS to preserve the underlying NSEERS regulations is inconsistent with their sentiment that NSEERS “has become redundant as we have strengthened security across the board, while at the same time improving and expanding existing systems to automatically and more effectively capture the same information that was being manually collected via NSEERS.”<sup>128</sup> Moreover, preserving the NSEERS framework perpetuates the anxiety and fear felt in AMEMSA communities. It also suggests that the federal government condones discriminatory profiling practices and intends to engage in them again in the future. A significant step towards establishing trust and eliminating profiling based on religion, nationality, and gender would thus be for the U.S. government to terminate NSEERS completely. This would require the full dismantling of the underlying regulations and the provision of meaningful relief for all individuals negatively impacted by the program.



Photo Courtesy of Monami Maulik, Desis Rising Up and Moving (DRUM)

## FAILURE TO MEET PROGRAM OBJECTIVES

NSEERS was inefficient and failed to meet the purpose the government claimed it served. The program was purportedly designed as a counterterrorism tool. The exact number of individuals arrested on the basis of terrorism-related charges through NSEERS has never been made publicly available. In fact, there seems to be no evidence that NSEERS helped convict any individuals in connection with any terrorism-related crimes, although the Bush Administration reported that the program identified 11 “terrorism suspects.”<sup>129</sup> Government officials have not corrected those who have pointed out that “[NSEERS] was ineffective in producing terrorism-related convictions,”<sup>130</sup> or that “the NSEERS program did not result in a single terrorism conviction.”<sup>131</sup> Rather than refuting these criticisms, DHS responded to a related congressional inquiry by stating that information about the program’s success in convicting terrorists is classified and unavailable to the public.<sup>132</sup>

Another fundamental criticism of NSEERS is that the program is “unnecessary” because the data collected through the program is already captured through other means.<sup>133</sup> DHS even adopted this view in its recent descriptions of the program, most notably in the April 2011 Rule.<sup>134</sup> Moreover, the 2012 report by the DHS OIG clearly stated that CBP itself has pointed to the low value of the information collected through the NSEERS interviews.<sup>135</sup> Given these failures and all the program’s collateral consequences on families and communities, no argument can be made for DHS to keep the program in its back pocket.

*I think that it was an ill-advised program and the ultimate goal was not achieved because the program was defective from the start... I would abolish NSEERS. There are plenty of laws and regulations already in effect. If you are looking to come up with a program that is trying to identify terrorists and prospective terrorists, then I would try to come up with a list of characteristics that would be related to the actual focus of the search.*<sup>136</sup>

--- **Denyse Sabagh**, Head of Immigration Practice Group, Duane Morris LLP

## *POSTSCRIPT*

Following the completion of this report, DHS released a long-awaited memo addressing the treatment of individuals who previously failed to comply with NSEERS (April 2012 Memo).<sup>137</sup>

The April 2012 Memo offers the agency's first definition for "willful" noncompliance with NSEERS and protects individuals who are able to prove that their noncompliance with NSEERS was not willful. It defines "willful" noncompliance as "that which was deliberate, voluntary, or intentional, as distinguished from that which was involuntary, unintentional, or otherwise reasonably excusable." The April 2012 Memo further notes that individuals who are found to have "willfully" failed to register can be considered for prosecutorial discretion as appropriate.

Importantly, the April 2012 memo is "binding" on all DHS personnel and requires each component of DHS to implement guidance within 60 days and implement training in line with the contents therein. Moreover, it retracts from the controversial language contained in the November 2011 USCIS NTA Memo by ceasing referrals of cases with suspected NSEERS violations from USCIS to ICE unless the case is denied for "willful" noncompliance.

Despite the significant step DHS has made after years of documentation about the individuals and families stained by NSEERS, the limitations of the April 2012 Memo are striking and illustrate the importance of the recommendations contained in *The NSEERS Effect*. First and foremost, it maintains the regulatory framework of the NSEERS program. Moreover, the April 2012 Memo fails to articulate a clear policy for those who complied with NSEERS and now face immigration consequences. Additionally, it creates room for ambiguity about what constitutes "willful" by leading with a rather broad definition (see above) and later elucidating rather extreme examples (e.g., exceptional circumstances beyond the alien's control, incapacitation of the alien). Also troubling is the conclusion that people who failed to register out of 'fear' or 'inconvenience' could be found to be in 'willful' noncompliance. The April 2012 Memo further imposes the burden of proving that noncompliance with NSEERS was not 'willful' on the individual while at the same time allowing the DHS to continue using information that was obtained through or in connection with the NSEERS program.

RWG is disappointed by the limited reach of the April 2012 Memo and hopes that this report and its recommendations result in the full dismantling of the NSEERS program, redress for all individuals impacted by the program, as well as a discontinuation of use of data collected through the program.

## POLICY RECOMMENDATIONS

*Refugees came to this country seeking safety from violence. They ended up having their families ripped apart. Those that did not have their families ripped apart are going through 10 years of immigration hell because of NSEERS and the way it played out. You created anger and fear that we have never gotten over. It still is doing damage.* <sup>138</sup>

--- **Reverend Seth Kaper-Dale**, Reformed Church of Highland Park, New Jersey

- Dismantle the Regulatory Framework of NSEERS: NSEERS has failed as a counterterrorism policy. National security needs can be addressed more effectively and efficiently through other existing programs and/or through programs targeting individuals based on suspect behavior, not identity-based criteria such as race, religion, gender or nationality. <sup>139</sup>
- Remove Residual NSEERS Penalties: DHS should, by regulation, remove the residual penalties associated with NSEERS, and apply such regulations retroactively. DHS should additionally set aside immigration or criminal penalties against individuals who complied with, did not comply with, or are otherwise affected by the NSEERS program. DHS should also exercise prosecutorial discretion favorably in cases where an individual has positive equities but faces immigration consequences because he or she was targeted by NSEERS.
- Information Collected through NSEERS Should No Longer be Used for Any Purposes: DHS should discontinue the use of data collected through NSEERS.
- Increase Oversight and Transparency: NSEERS should be fully audited by DHS through the Office of Inspector General, as well as by the Government Accountability Office, to determine the program's effectiveness and to examine the continuing impact of NSEERS on individuals and the potential misuse of data. DHS should also make statistics available on the number of individuals who were identified through the program and subsequently convicted of terrorism-related offenses. DHS also should provide complete statistics about the total number of individuals who registered with the

program, as well as details about the enforcement actions that were taken against them.

- Support the End Racial Profiling Act: To show his commitment to ending racial profiling, President Obama should make a clear statement in support of the End Racial Profiling Act (ERPA) of 2011. <sup>140</sup> This bill was introduced in both Houses of Congress in 2011. If ERPA were passed, it “would prohibit racial profiling by law enforcement at the local, state and federal levels on the basis of race, ethnicity, national origin, religion, and gender.” <sup>141</sup>
- Fix the DOJ Racial Profiling Guidance: To effectively combat racial profiling, the 2003 Department of Justice Guidance on the Use of Race by Federal Law Enforcement Agencies must be reformed to cover profiling based on religion and national origin; remove the large loopholes that allow for profiling in the name of national security and border security; cover law enforcement surveillance activities; apply anywhere federal agents act in partnership with state or local law enforcement agents and to any agency that receives federal funds; and make the guidance enforceable.

## GLOSSARY

ADC	American-Arab Anti-Discrimination Committee
AIC	American Immigration Council (formerly American Immigration Law Foundation)
AILA	American Immigration Lawyers Association
AMEMSA	Arab, Middle Eastern, Muslim, and South Asian
CBP	Customs and Border Protection
DHS	Department of Homeland Security
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review
ICE	Immigration and Customs Enforcement
IIRAIRA	Illegal Immigration Reform and Immigrant Responsibility Act
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
NSEERS	National Security Entry-Exit Registration System
NTA	Notice to Appear
OIG	Officer of Inspector General
RWG	Rights Working Group
SEVIS	Student and Exchange Information System
USCIS	U.S. Citizenship and Immigration Services
US-VISIT	United States Visitor and Immigrant Status Indicator Technology Program



## ENDNOTES

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<sup>1</sup> Telephone Interview with Seth Kaper-Dale, Reverend, The Reformed Church of Highland Park, NJ (Feb. 23, 2012).

<sup>2</sup> Email Interview with Mirwan Harahap, individual affected by NSEERS (Mar. 23, 2012).

<sup>3</sup> Denyse Sabagh, <http://www.duanemorris.com/attorneys/denysesabagh.html> (last visited Apr. 5, 2012).

<sup>4</sup> About James Zogby, <http://www.aaiusa.org/pages/about-dr-zogby> (last visited Apr. 5, 2012).

<sup>5</sup> The 25 countries are: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen. North Korea was the anomalous addition to the list of NSEERS countries and was seen as a fig leaf by many advocates opposed to the program who believed that it was added to the list to provide political cover for a policy that would obviously be criticized as discriminatory. The U.S. hosts almost no North Korean visitors and would not be necessitated to include North Korea in a list of NSEERS countries due to an actual national security threat that could be identified through special registration.

<sup>6</sup> Rights Working Group, *The Policy Impact Ten Years Since 9/11: NSEERS* (2011), <http://www.rightsworking-group.org/content/policy-impact-ten-years-911-nseers> (last visited Feb. 26, 2012); American-Arab Anti-Discrimination Committee, *End of the Shame of NSEERS* (Apr. 28, 2011), <http://www.adc.org/legal/end-the-shame-of-nseers/> (last visited Feb. 22, 2012); Desis Rising Up and Moving, *DRUM Welcomes Victory in Endings NSEERS and Calls for Accountability for Thousands of Muslim Families Already Torn Apart* (Apr. 28, 2011) [http://drumnyc.org/DRUM/Media/Pages/NSEERS\\_Release\\_April11.html](http://drumnyc.org/DRUM/Media/Pages/NSEERS_Release_April11.html) (last visited Mar. 7, 2012); National Immigration Forum, *Advocacy Organizations Welcome DHS Policy Change Regarding NSEERS* (Apr. 27, 2011), <http://immigrationforum.org/media/advocacy-organizations-welcome-dhs-policy-change-regarding-nseers> (last visited Feb. 3, 2012); South Asian Americans Leading Together (SAALT), *Wrong Then, Still Wrong Now* (Dec. 4, 2009), <http://blog.saalt.org/?p=706> (last visited Jan. 30, 2012).

<sup>7</sup> See, e.g., AILA, *AILA Welcomes End of NSEERS Country Listings, Call for Program's Complete Termination* (April 27, 2012), <http://www.aila.org/content/default.aspx?docid=35230>.

<sup>8</sup> See, e.g., Muzaffar A. Chisti et al., *America's Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* (2003), [http://www.migrationpolicy.org/pubs/Americas\\_Challenges.pdf](http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf); Muzaffar Chishti and Claire Bergeron, *DHS Announces End to Controversial Post -9/11 Immigration Registration and Tracking Program* (May 17, 2011), <http://www.migrationinformation.org/usfocus/display.cfm?ID=840> (last visited Feb. 20, 2012).

<sup>9</sup> See, e.g., Letter from Senator Feingold and Senator Kennedy, and Representative Conyers, Jr. to John Ashcroft, Attorney General, U.S. Dep't of Justice (Dec. 23, 2002), available at [www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/](http://www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/).

<sup>10</sup> See, e.g., Letter from Senator Feingold and Senator Kennedy, and Representative Conyers, Jr. to John Ashcroft, Attorney General, U.S. Dep't of Justice (Dec. 23, 2002), available at [www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/](http://www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/).

<sup>11</sup> Desis Rising Up and Moving, *supra* note 6.

<sup>12</sup> Department of Homeland Security – Office of Inspector General, *Information Sharing on Foreign Nationals:*



*Border Security (Redacted)*, at 15, available at [http://www.oig.dhs.gov/assets/Mgmt/2012/OIGr\\_12-39\\_Feb12.pdf](http://www.oig.dhs.gov/assets/Mgmt/2012/OIGr_12-39_Feb12.pdf).

<sup>13</sup> See *Id.*

<sup>14</sup> End Racial Profiling Act of 2011 S.1670, 112th Cong. (2011).

<sup>15</sup> Keith Rushing, *Coalition of Rights Groups Applaud Introduction of Bill to End Racial Profiling* (Dec. 12, 2011), <http://www.rightsworkinggroup.org/content/coalition-rights-groups-applaud-introduction-bill-end-racial-profiling> (last visited Apr. 10, 2012).

<sup>16</sup> *Senator Dick Durbin: Opening Statement at the Hearing on Ending Racial Profiling in America*, Subcommittee on the Constitution, Civil Rights, and Human Rights (Apr. 2012), <http://www.judiciary.senate.gov/pdf/12-4-17DurbinStatement.pdf>.

<sup>17</sup> See Rights Working Group, *Racial Profiling in the Name of National Security*, <http://www.rightsworkinggroup.org/sites/default/files/FactSheetNationalSecurityFinal.pdf>.

<sup>18</sup> Rights Working Group, *supra* note 6; American-Arab Anti-Discrimination Committee, *supra* note 6; Desis Rising Up and Moving, *supra* note 6; National Immigration Forum, *supra* note 6; South Asian Americans Leading Together (SAALT), *supra* note 6.

<sup>19</sup> See, e.g., AILA, *supra* note 7.

<sup>20</sup> See, e.g., Muzaffar A. Chisti et al., *supra* note 8, at 13; Muzaffar Chishti and Claire Bergeron, *supra* note 8.

<sup>21</sup> See, e.g., Letter from Senator Feingold and Senator Kennedy, and Representative Conyers, Jr. to John Ashcroft, Attorney General, U.S. Dep't of Justice (Dec. 23, 2002), available at [www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/](http://www.adc.org/media/press-releases/2002/december-2002/senators-and-congressman-demand-ashcroft-suspend-ins-special-registration/).

<sup>22</sup> *Id.*

<sup>23</sup> Press Release, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (Jun. 6, 2002), available at <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>; See also Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002).

<sup>24</sup> Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants' Rights, *NSEERS: The Consequences of America's Efforts to Secure its Borders* (2009), available at <http://www.adc.org/PDF/nseerspaper.pdf>.

<sup>25</sup> Department of Homeland Security, *DHS Removes Designated Countries from NSEERS Registration*, <http://www.dhs.gov/files/publications/crcl-201105-nseers-registration-removal.shtm> (last visited Mar. 7, 2012).

<sup>26</sup> The United States has a long history of profiling based on citizenship and nationality, such as the Visa Waiver Program. Under the INA § 217, the Visa Waiver Program allows citizens of participating countries to stay in the United States for 90 days or less without obtaining a visa. NSEERS is different from the Visa Waiver Program in many ways. NSEERS created fear and alienation within the AMEMSA communities. Moreover, the program has been detrimental for many individuals, resulting in removal proceedings and the separation of families. Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 Penn St. L. Rev. 1485, available at <http://www.pennstatelawreview.org/articles/114/114%20Penn%20St.%20L.%20Rev.%201485.pdf>.

<sup>27</sup> Press Release, Attorney General, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, (Jun. 6, 2002) available at <http://www.justice.gov/archive/ag/speeches/2002/060502agpr>

eparedremarks.htm. See also Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 2002); See Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants' Rights, *supra* note 24.

<sup>28</sup> Telephone Interview with Denyse Sabagh, Partner, Duane Morris, LLP (Feb. 24, 2012); See also Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants' Rights, *supra* note 24.

<sup>29</sup> See, e.g., Chris Rickerd, *Homeland Security Suspends Ineffective, Discriminatory Immigration Program* (May 6, 2011), available at <http://www.aclu.org/blog/immigrants-rights-racial-justice/homeland-security-suspends-ineffective-discriminatory> (AILA's Comments on the Interim Rule Suspending NSEERS' Re-Registration Requirements).

<sup>30</sup> End Racial Profiling Act of 2011, H.R. 3618, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3618ih/pdf/BILLS-112hr3618ih.pdf>; End Racial Profiling Act of 2011, S.1670, 112th Cong.(2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1670is/pdf/BILLS-112s1670is.pdf>. Versions of the bill have been introduced in previous Congresses.

<sup>31</sup> *Id.*

<sup>32</sup> Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 82, 23830-23831 (Apr. 28, 2011), available at <https://www.federalregister.gov/articles/2011/04/28/2011-10305/removing-designated-countries-from-the-national-security-entry-exit-registration-system-nseers> (last visited May 9, 2012).

<sup>33</sup> *Id.*

<sup>34</sup> Department of Homeland Security, *supra* note 25.

<sup>35</sup> This delisting was achieved through a Federal Register notice and did not eliminate the program's legal foundation. Rather, it removed the registration requirement for males from certain countries by removing the list of countries from the program. The delisting or Federal Register notice will be referred to as "April 2011 Rule" throughout this report. For the full Federal Register notice, see *Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS)*, 76 Fed. Reg. at 23830-23831 (Apr. 28, 2011).

<sup>36</sup> *Id.*; See American Civil Liberties Union, *DHS Announces Indefinite Suspension Of Controversial And Ineffective Immigrant Registration And Tracking System* (April 27, 2011), <http://www.aclu.org/immigrants-rights/dhs-announces-indefinite-suspension-controversial-and-ineffective-immigrant-regist> (last visited Mar. 7, 2012).

<sup>37</sup> Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. at 23830-23831 (Apr. 28, 2011); See AILA, *supra* note 7; Colorlines, *Channing Kennedy, After 9 Years of Pressure, DHS Finally Drops 'SB 1070 for Muslims'* (Apr. 29, 2011) [http://colorlines.com/archives/2011/04/after\\_nine\\_years\\_of\\_pressure\\_dhs\\_finally\\_drops\\_its\\_sb1070\\_for\\_muslims.html](http://colorlines.com/archives/2011/04/after_nine_years_of_pressure_dhs_finally_drops_its_sb1070_for_muslims.html) (last visited Feb. 20, 2012); Muzaffar Chishti and Claire Bergeron, *supra* note 8; American-Arab Anti-Discrimination Committee, *Advocacy Organizations Welcome DHS Policy Change Regarding NSEERS*, <http://www.adc.org/media/press-releases/2011/april-2011/advocacy-organizations-welcome-dhs-policy-change-regarding-nseers/> (last visited Mar. 4, 2012); American Civil Liberties Union, *supra* note 36; Muslim Public Affairs Council, *MPAC Welcomes DHS' Suspension of National Entry-Exit Registration System*, <http://www.mpac.org/programs/government-relations/mpac-welcomes-dhs-suspension-of-national-entry-exit-registration-system.php>, (last visited Mar. 4); South Asian Network, *SAN Welcomes Suspension of "Special Registration"*, <http://southasiannetwork.org/2011/05/02/special-registration-requirements-suspended-san-welcomes-this-partial-victory/> (last visited Mar. 4, 2012); America's Voice, *DHS Announces End to National Security Entry-Exit Registration System (NSEERS)*, [http://americasvoiceonline.org/blog/entry/dhs\\_announces\\_end\\_to\\_national\\_security\\_entry-exit\\_registration\\_system\\_nseer/](http://americasvoiceonline.org/blog/entry/dhs_announces_end_to_national_security_entry-exit_registration_system_nseer/) (last visited Mar. 4, 2012); Penn State Law Center for Immigrants' Rights Plays

*Role in Key Post 9/11 Policy Shift*, [http://law.psu.edu/news/policy\\_shift](http://law.psu.edu/news/policy_shift), (last visited Mar. 4, 2012); American Immigration Council, *DHS Removes Countries from Special Registration List, But Leaves Door Open for Future Placements*, <http://immigrationimpact.com/2011/04/28/dhs-removes-countries-from-special-registration-list-but-leaves-doors-open-for-future-placements/> (last visited Mar. 4, 2012); Council on American-Islamic Relations, *CAIR Welcomes DHS Decision to Drop NSEERS Program*, [http://www.facebook.com/note.php?note\\_id=10150175544539442&comments](http://www.facebook.com/note.php?note_id=10150175544539442&comments) (last visited Mar. 4, 2012); Race Matters, *DHS Suspends NSEERS*, <http://endnseers.blogspot.com/2011/04/dhs-has-made-huge-step-in-right.html> (last visited Mar. 7, 2012).

<sup>38</sup> See, e.g., *Desis Rising Up and Moving*, *supra* note 6.

<sup>39</sup> American Civil Liberties Union, *supra* note 36.

<sup>40</sup> Obama '08, *Blueprint For Change: Obama and Biden's Plan for America* 65 (2008), available at <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf>.

<sup>41</sup> *Hearing to Review Funding and Oversight of the Dep't of Justice: Hearing Before the Senate Appropriations Subcomm. On Commerce, Justice and Science, and Related Agencies*, 111th Cong. (2009) (statement of Eric Holder, Att'y General).

<sup>42</sup> *Highlights of AP's Pulitzer-Prize Winning Probe into NYPD Intelligence Operations*, <http://www.ap.org/media-center/nypd/investigation>.

<sup>43</sup> See Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants' Rights, *supra* note 24. This paper provided the first comprehensive analysis of the NSEERS program. Through a legal and policy analysis of the program, it identified several issues with the program and provided recommendations for the new administration.

<sup>44</sup> Telephone Interview with Denyse Sabagh, *supra* note 28.

<sup>45</sup> See Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009.

<sup>46</sup> *Id.* at § 110.a.1, "Automated Entry-Exit Control System," US Congressional Record – House (September 28, 1996): H11787.

<sup>47</sup> The terms alien, immigrant, and nonimmigrant, are used in this report as specified in the INA. Generally, "nonimmigrants" refer to individuals who are seeking admission to the United States temporarily for purposes of education, employment, pleasure, etc. According to § 101(a)(15), "[t]he term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens." The term nonimmigrant is defined in the following sections of INA§101(a)(15).

<sup>48</sup> *Rey Koslowski, Real Challenges for Virtual Borders: The Implementation of US-VISIT* (2005), available at [http://www.migrationpolicy.org/pubs/Koslowski\\_Report.pdf](http://www.migrationpolicy.org/pubs/Koslowski_Report.pdf).

<sup>49</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT ACT) of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

<sup>50</sup> Enhanced Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543. The first provision seen in EBSVERA required the United States Citizenship and Immigration Services (USCIS) to integrate all of its data systems into one interoperable interagency system, employing the technology standard developed under §201 of the Act. See Enhanced Border Security and Visa Reform Act § 202. Section 201 of the Act further required law enforcement and intelligence agencies to share information relevant to admissibility and deportability of "aliens" within the State and the USCIS. Lastly, the Act required that USCIS issue machine

readable, tamper-resistant visas, and other travel and entry documents that used biometric identifiers. See Enhanced Border Security and Visa Reform Act § 201.

<sup>51</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT ACT) of 2001 § 414, Pub. L. 107-56, 115 Stat. 272 (2001).

<sup>52</sup> *Id.*

<sup>53</sup> Alan Greenblatt, *Kris Kobach Tackles Illegal Immigration* (Mar. 2012), <http://www.governing.com/topics/politics/gov-kris-kobach-tackles-illegal-immigration.html> (last visited April 5, 2012) (“Kobach was elected Kansas secretary of state in 2010... Kobach helped draft the 2010 Arizona law that, among other things, requires state and local enforcement officials to check the immigration status of individuals they have stopped and have “reasonable suspicion” to believe are in the country illegally... Among the policies Kobach helped devise was the creation of the National Security Entry-Exit Registration System, or NSEERS – a controversial program that limited access to the country by individuals, primarily from certain Middle Eastern and North African countries, and requires that they be fingerprinted, photographed, and interrogated.”).

<sup>54</sup> INA § 263, 8 U.S.C. §1303 (2008).

<sup>55</sup> *Id.*

<sup>56</sup> Press Release, Attorney General, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (Jun. 6, 2002), available at <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>. See also Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 2002); See Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants’ Rights, *supra* note 24.

<sup>57</sup> Press Release, Attorney General, *supra* note 56. See also Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002).

<sup>58</sup> See Department of Homeland Security, *Fact Sheet: Changes to National Security Entry-Exit Registration System* (Dec. 1, 2003) (on file with author), available at <http://www2.gtlaw.com/practices/immigration/news/2003/12/01a.pdf>.

<sup>59</sup> 67 Fed. Reg. 66765-68 (Nov. 6, 2002); 68 Fed. Reg. 2366-67 (Jan. 16, 2003).

<sup>60</sup> 67 Fed. Reg. 70525-28 (Nov. 22, 2002); 68 Fed. Reg. 2366-67 (Jan. 16, 2003).

<sup>61</sup> 67 Fed. Reg. 77642-44 (Dec. 18, 2002); 68 Fed. Reg. 8046-48 (Feb. 19, 2003).

<sup>62</sup> 68 Fed. Reg. 2363-65 (Jan. 16, 2003); 68 Fed. Reg. 8046-48 (Feb. 19, 2003).

<sup>63</sup> See *Hearing on Ending Racial Profiling in America, Subcommittee of the Constitution, Civil Rights and Human Rights* (Apr. 2012) (testimony of David A. Harris, Faculty Scholar and Associate Dean for Research, University of Pittsburgh School of Law), available at <http://www.judiciary.senate.gov/pdf/12-4-17HarrisTestimony.pdf>; see *Hearing on Ending Racial Profiling in America, Subcommittee of the Constitution, Civil Rights and Human Rights* (Apr. 2012) (testimony of the American Immigration Lawyers Association), available at <http://www.aila.org/content/default.aspx?docid=39267>.

<sup>64</sup> AILA, *AILA’s Comments on the Interim Rule Suspending NSEERS’ Re-Registration Requirements*, (Feb. 2, 2004), <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C8921%7C18602%7C10002>.

<sup>65</sup> Press Release, Attorney General, *supra* note 56. See also Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584 (Aug. 12, 2002).

<sup>66</sup> *Id.*

<sup>67</sup> 67 Fed. Reg. 67766 (Nov. 6, 2002).

<sup>68</sup> *Id.*; 8 C.F.R. § 264.1(f)(8)(ii).

<sup>69</sup> 67 Fed. Reg. 67766 (Nov. 6, 2002).

<sup>70</sup> 67 Fed. Reg. 67766 (Nov. 6, 2002).

<sup>71</sup> In describing the late registration one young man, attorney Denyse Sabagh recounted: “[I] explained again that this young man had no reason not to register, he was in valid status, had just turned 17, didn’t speak English, was trying to deal with a new high school in the US and had he known about Registration, he would have registered. The agents said it was no excuse. They said absent catastrophic illness or jail, there was not a valid excuse. I explained that is not a correct standard. They had to determine if it was “willful.” They said that no one would be a “willful” violator if all they had to say was they didn’t know. I explained that each person was judged on his own circumstances.” See Denyse Sabagh, *Commentary on Late NSEERS Registration from Shoba Sivaprasad Wadhia, Penn State Law’s Center for Immigrants’ Rights* (Nov. 19, 2009), <http://endnseers.blogspot.com/2009/11/commentary-on-late-nseers-registration.html>.

<sup>72</sup> INA § 266 (a); 8 U.S.C. § 1306(a)(2008); Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants’ Rights, *supra* note 24.

<sup>73</sup> 68 Fed. Reg. 67578 (Dec. 2, 2003).

<sup>74</sup> See Department of Homeland Security, *supra* note 58.

<sup>75</sup> See William J. Howard, *Exercising Prosecutorial Discretion to Dismiss Adjustment Cases* (Oct. 6, 2005), available at <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C8412%7C18465%7C17718>.

<sup>76</sup> Shoba Sivaprasad Wadhia, *Prosecutorial Discretion and Post 9/11, RACE MATTERS* (Dec. 8, 2011), <http://endnseers.blogspot.com/2011/12/prosecutorial-discretion-and-post-911.html> (last visited Mar. 8, 2012).

<sup>77</sup> The NTA contains the nature of the removal proceedings, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, as well as the immigration charges against the individual. See INA § 239(a).

<sup>78</sup> See William J. Howard, *supra* note 75.

<sup>79</sup> Telephone Interview with Seth Kaper-Dale, *supra* note 1.

<sup>80</sup> 76 Fed. Reg. 23830, 23831 (Apr. 28, 2011).

<sup>81</sup> Leslie Berestein Rojas, *The End of NSEERS, One of the Most Contentious Post-9/11 National Security Programs* (Jan. 30, 2012), <http://multiamerican.scpr.org/2011/05/the-end-of-nseers-one-of-the-most-contentious-post-911-national-security-programs/> (last visited Feb. 19, 2012).

<sup>82</sup> See John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, U.S. Immigration and Customs Enforcement* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; see John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*



(June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>; see Shoba Sivaprasad Wadhia, *Morton Memo and Prosecutorial Discretion* (2011), available at [http://www.immigrationpolicy.org/sites/default/files/docs/Shoba\\_-\\_Prosecutorial\\_Discretion\\_072011\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf).

<sup>83</sup> See John Morton, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, U.S. Immigration and Customs Enforcement, *supra* note 82 (“When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including but not limited to – the agency’s civil immigration enforcement priorities; the person’s length of presence in the United States, with particular consideration given to presence while in lawful status; the circumstances of the person’s arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States...The following positive factors should prompt particular care and consideration: veterans and members of the U.S. armed forces; long-time lawful permanent residents; minors and elderly individuals; individuals present in the United States since childhood; pregnant or nursing women; victims of domestic violence, trafficking, or other serious crimes; individuals who suffer from a serious mental or physical disability; individuals with serious health conditions. In exercising prosecutorial discretion in furtherance of ICE’s enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys: individuals who pose a clear risk to national security; serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind; known gang members or other individuals who pose a clear danger to public safety; and individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.”).

<sup>84</sup> See telephone interview with Reverend Seth Kaper-Dale, *supra* note 1.

<sup>85</sup> See USCIS, *USCIS Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 7, 2011), available at <http://cis.org/sites/default/files/new%20guidance.pdf>.

<sup>86</sup> Letter from Shoba Sivaprasad Wadhia to Margo Schlanger, DHS Officer for Civil Rights and Kelly Ryan, Acting Deputy Assistant Secretary for Policy (November 15, 2011), available at <http://www.aila.org/content/default.aspx?docid=37674>.

<sup>87</sup> Department of Homeland Security – Office of Inspector General, *supra* note 12.

<sup>88</sup> Rights Working Group, We Applaud the Department of Homeland Security (DHS) Office of Inspector General’s (OIG) recommendation to fully terminate controversial National Security Entry Exit Registration System (NSEERS) (Mar. 20, 2012), <http://www.rightsworkinggroup.org/content/we-applaud-department-homeland-security-dhs-office-inspector-general’s-oig-recommendation-fu> (last visited Apr. 24, 2012).

<sup>89</sup> Department of Homeland Security – Office of Inspector General, *supra* note 12,

<sup>90</sup> Telephone Interview with James Zogby, President, The Arab American Institute (Mar. 9, 2012).

<sup>91</sup> See Shoba Sivaprasad Wadhia, Letter to DHS Secretary Regarding Unfinished Work Around NSEERS (May 18, 2011), available at <http://endnseers.blogspot.com/2011/05/letter-to-dhs-secretary-regarding.html> (Last visited Mar. 8, 2012).

<sup>92</sup> Prena Lal, NSEERS Lands Pakistani-American Youth In Detention, Deportation Looming, SAALT (Jan. 1, 2012), <http://blog.saalt.org/?p=1949>.

<sup>93</sup> Leslie Berestein Rojas, *supra* note 81.

<sup>94</sup> Dick Durbin, *Senator Dick Durbin: Opening Statement at the Hearing on Ending Racial Profiling in America*, Subcommittee on the Constitution, Civil Rights, and Human Rights (Apr. 2012), available at <http://www.judiciary.senate.gov/pdf/12-4-17DurbinStatement.pdf>.

<sup>95</sup> See Rights Working Group, *Racial Profiling: Face the Truth*, <http://www.rightsworkinggroup.org/content/racial-profiling-face-truth-0> (last visited Feb. 26, 2012); Rights Working Group, *supra* note 17; Leadership Conference on Civil Rights and Education Fund, *Wrong Then, Wrong Now: Racial Profiling Before & After September 11, 2001*, available at [http://www.civilrights.org/publications/wrong-then/racial\\_profiling\\_report.pdf](http://www.civilrights.org/publications/wrong-then/racial_profiling_report.pdf).

<sup>96</sup> Asian Pacific Americans for Progress, *Racial Profiling: Degrading, Unconstitutional, and Ineffective*, <http://www.apaforprogress.org/racial-profiling-degrading-unconstitutional-and-ineffective> (last visited Feb. 27, 2012).

<sup>97</sup> American Civil Liberties Union and The Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States* (2009), available at [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf).

<sup>98</sup> Hearing on "Ending Racial Profiling in America" Before the Subcommittee of the Constitution, Civil Rights and Human Rights (2012) (testimony of David A. Harris, Faculty Scholar and Associate Dean for Research, University of Pittsburgh School of Law), available at <http://www.judiciary.senate.gov/pdf/12-4-17HarrisTestimony.pdf>.

<sup>99</sup> Shoba Sivaprasad Wadhia, *Business As Usual: Immigration and the National Security Exception*, 114 *Penn St. L. Rev.* 1485 (2010). DHS denied that NSEERS was a program based on racial or religion profiling and to support this position, indicated that the POE registration was applied to visitors from 150 countries. DHS' rationale ignores the country-specific design of the "call in" registration program, the inevitable application of NSEERS to large groups of Muslim boys and men to future exits and entries, and the perception by affected individuals, advocates and foreign leaders around the world that NSEERS was discriminatory; Department of Homeland Security, *Fact Sheet: Changes to National Security Entry-Exit Registration System* (Dec. 1, 2003) (on file with author), available at <http://www2.gtlaw.com/practices/immigration/news/2003/12/01a.pdf>

<sup>100</sup> Matt Apuzzo, *NYPD Muslim Spying: The Legal and Policy Issues Raised by Widespread Surveillance*, *HUFFINGTON POST*, Mar. 12, 2012, [http://www.huffingtonpost.com/2012/03/12/nypd-muslim-spying-the-legal-and-policy-issues-raised-by-surveillance-qa\\_n\\_1338765.html](http://www.huffingtonpost.com/2012/03/12/nypd-muslim-spying-the-legal-and-policy-issues-raised-by-surveillance-qa_n_1338765.html) (last visited Apr. 5, 2012). See also Highlights of AP's Pulitzer-Prize Winning Probe into NYPD Intelligence Operations, <http://www.ap.org/media-center/nypd/investigation>.

<sup>101</sup> American Civil Liberties Union, *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, <http://www.aclu.org/mapping-fbi-uncovering-abusive-surveillance-and-racial-profiling>.

<sup>102</sup> Telephone Interview with Seth Kaper-Dale, *supra* note 1.

<sup>103</sup> Mary Snow, *New Jersey Church, 'Safe Haven' for Indonesian Immigrant*, CNN, <http://inamerica.blogs.cnn.com/2012/03/20/new-jersey-church-safe-haven-for-indonesian-immigrant/> (last visited Apr. 20, 2012).

<sup>104</sup> *Id.*

<sup>105</sup> Telephone Interview with Seth Kaper-Dale, *supra* note 1.

<sup>106</sup> See Nina Bernstein, *Church Works with U.S. to Spare Detention*, *N.Y. Times*, Dec. 13, 2009, at A1, available at <http://www.nytimes.com/2009/12/13/nyregion/13indonesians.html?pagewanted=all>.

<sup>107</sup> Telephone Interview with Seth Kaper-Dale, *supra* note 1.



<sup>108</sup> Desis Rising Up and Moving, *supra* note 6.

<sup>109</sup> Email Interview with Mirwan Harahap, *supra* note 2.

<sup>110</sup> Shoba Sivaprasad Wadhia, *9/11 Registration and the Morton Memo* (July 14, 2011), <http://lawprofessors.typepad.com/immigration/2011/07/911-registration-and-the-morton-memo-by-.html> (last visited Mar. 7, 2012).

<sup>111</sup> J. Howard, *supra* note 75 and John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement, *supra* note 82.

<sup>112</sup> See *Id* ("Impact on Communities").

<sup>113</sup> Nathan Pippenger, *Broken Promises: How Obama's Immigration Failures Have Put a New Jersey Community on Edge*, *THE NEW REPUBLIC*, Mar. 2, 2012, at <http://www.tnr.com/article/politics/101307/immigration-indonnesians-new-jersey>, (last visited Mar. 7, 2012) and Kirk Semple, *Canceling Stay, U.S. Orders 72 Indonesians in New Jersey to Leave*, *N.Y. TIMES*, Dec. 26, 2011, at A26, available at [http://www.nytimes.com/2011/12/07/nyregion/us-tells-72-indonesians-in-new-jersey-to-leave.html?\\_r=1](http://www.nytimes.com/2011/12/07/nyregion/us-tells-72-indonesians-in-new-jersey-to-leave.html?_r=1).

<sup>114</sup> Telephone Interview with Seth Kaper-Dale, *supra* note 1.

<sup>115</sup> See e.g., Sarah Stuteville, *Trouble in Little Pakistan* (May 26, 2004), available at [http://www.indypressny.org/nycma/voices/119/briefs/briefs\\_1/](http://www.indypressny.org/nycma/voices/119/briefs/briefs_1/) (last visited Feb. 27, 2012).

<sup>116</sup> See Department of Homeland Security, *supra* note 58.

<sup>117</sup> See *Id*.

<sup>118</sup> Department of Homeland Security – Office of Inspector General, *supra* note 12.

<sup>119</sup> Christopher J. Einolf and Luke Hall, *Inconsistency, Confusion, and Chaos: Experiences with Call-in Special Registration* (Apr. 15, 2003), available at [http://www.aifl.org/lac/chdocs/lac\\_sr\\_report\\_041503.pdf](http://www.aifl.org/lac/chdocs/lac_sr_report_041503.pdf).

<sup>120</sup> Telephone Interview with Denyse Sabagh, *supra* note 28.

<sup>121</sup> Telephone Interview with James Zogby, President, The Arab American Institute, *supra* note 90

<sup>122</sup> NYU School of Law Center for Human Rights and Global Justice and the Asian American Legal Defense and Education Fund, *Under the Radar: Muslims Deported, Detained, and Denied on Unsubstantiated Terrorism Allegations*, available at <http://www.chrgj.org/projects/docs/undertheradar.pdf> (last visited Mar. 8, 2012).

<sup>123</sup> Joint Press Release, American-Arab Anti- Discrimination Committee and Yale Law School, ICE Target Immigrants from Muslim Majority Countries Prior to 2004 Presidential Election (Oct. 20, 2008), available at <http://www.adc.org/PDF/frontline.pdf>.

<sup>124</sup> Letters from American-Arab Anti-Discrimination Committee, Letter/Complaint and Request for Investigation into Operation Frontline, to Timothy Keefer, Acting Officer, Office for Civ. Rights and Civ. Liberties (Feb. 26, 2009), available at <http://www.adc.org/PDF/frontlinecomplaint.pdf>.

<sup>125</sup> Department of Homeland Security – Office of Inspector General, *supra* note 12.

<sup>126</sup> Department of Homeland Security – Office of Inspector General, *supra* note 12.

<sup>127</sup> Letter from Margo Schlanger, DHS Officer, Civil Rights and Civil Liberties, addressing end of NSEERS (Apr. 27, 2011), available at [http://law.psu.edu/\\_file/Immigrants/NSEERS\\_Schlanger\\_Memo.pdf](http://law.psu.edu/_file/Immigrants/NSEERS_Schlanger_Memo.pdf).

<sup>128</sup> Customs and Border Protection, *Important NSEERS Information*, [http://www.cbp.gov/xp/cgov/travel/id\\_visa/nseers/imp\\_nseers\\_info.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/nseers/imp_nseers_info.xml) (last visited Mar. 8, 2012).

<sup>129</sup> The Constitution Project, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations* (2008), available at [http://www.constitutionproject.org/pdf/Immigration\\_Authority\\_As\\_A\\_Counterterrorism\\_Tool.pdf](http://www.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf).

<sup>130</sup> Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* (Feb. 2009), available at [www.migrationpolicy.org/pubs/DHS\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf).

<sup>131</sup> Penn St. Univ. Dickinson School of Law, Ctr. for Immigrants' Rights, *supra* note 24 and Letter from American-Arab Anti-Discrimination Committee, Letter and Request for Removal of new Security Devices, to Janet Napolitano, Secretary, Department of Homeland Security (January 8, 2010), available at <http://saalt.org/attachments/1/TSA%20Profiling%20Letter.pdf>.

<sup>132</sup> Response Letter from Donald H. Kent, Asst. Secretary for Leg. and Intergovernmental Affairs, to Senator Richard J. Durbin, (Apr. 25, 2007) (on file with the Director for the Center of Immigrants' Rights at Penn State University, The Dickinson School of Law) (requesting update on NSEERS program. Certain responses to questions are not contained within the letter due to law enforcement sensitivity).

<sup>133</sup> Muzaffar Chishti and Claire Bergeron, *supra* note 8.

<sup>134</sup> *Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS)*, 76 Fed. Reg. 82, 23830-23831 (Apr. 28, 2011); See American Civil Liberties Union, *supra* note 36.

<sup>135</sup> Department of Homeland Security – Office of Inspector General, *supra* note 12.

<sup>136</sup> Telephone Interview with Denyse Sabagh, *supra* note 28.

<sup>137</sup> Department of Homeland Security, *Guidance on Treatment of Individuals Previously Subject to the Reporting and Registration Requirements of the National Security Entry and Exist Registration System* (Apr. 16, 2012), available at [https://law.psu.edu/\\_file/NSEERSMemoPublic.pdf](https://law.psu.edu/_file/NSEERSMemoPublic.pdf).

<sup>138</sup> Telephone Interview with Seth Kaper-Dale, *supra* note 1.

<sup>139</sup> Beyond the scope of this report, but nonetheless important, is the efficacy of these other programs. As the DHS OIG points out in its 2012 report, the number one recommendation following its evaluation of the program is to “fully terminate the National Security Entry-Exit Registration System and reinstate the prior provisions.” Department of Homeland Security – Office of Inspector General, *supra* note 12.

<sup>140</sup> End Racial Profiling Act of 2011 H.R. 3618 (2011) and End Racial Profiling Act of 2011 S.1670 (2011).

<sup>141</sup> Keith Rushing, *supra* note 15.