



Homeland
Security

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MEMORANDUM FOR: Troy A. Miller
Senior Official Performing the
Duties of the Commissioner
U.S. Customs and Border Protection

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FROM: Katherine Culliton-González
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SUBJECT: Alleged Nationality and Place of Birth Discrimination
at the Blaine Port of Entry¹

Purpose

In this memorandum, the Office for Civil Rights and Civil Liberties (CRCL) provides analysis and recommendations resulting from CRCL's investigation into the above-referenced complaints. CRCL opened seven investigations stemming from a well-publicized incident at the Blaine Port of Entry (POE), on January 3-5, 2020. CRCL received correspondence from a non-governmental organization (NGO) alleging that as many as 150 individuals were held for questioning due to their nationality or place (country) of birth. CRCL opened five investigations based on correspondence received directly from individuals who alleged that they were discriminated against during CBP screening during the timeframe. A seventh complaint was opened based upon an anonymous whistleblower complaint. Generally, the allegations claimed that the CBP Office of Field Operations (OFO) in the Seattle Field Office (SFO) referred USCs and non-USCs to secondary inspection due solely to their Iranian national origin after a U.S. airstrike killed Iranian General Qasem Soleimani of the Islamic Revolutionary Guard Corps (IRGC).

¹ CRCL opened the following seven investigations: 20-04-CBP-0233, 20-04-CBP-0261, 20-04-CBP-0267, 20-04-CBP-0293, 20-04-CBP-0305, 20-04-CBP-0317, 20-04-CBP-0351.

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Background

On January 5, 2020, CRCL received an email from an NGO stating they were receiving, “disturbing reports that Iranian American citizens and green card holders are being detained at various border crossings. We have been told that these detentions have occurred as a result of a national directive from DHS to detain those of Iranian heritage who seem “adversarial,” regardless of citizenship status.” CRCL opened an additional six investigations alleging similar concerns. Included was one from a whistleblower alleging that he (the whistleblower) detained travelers due solely to their national origin, and that “this thing that happened was Seattle Field Office wide.” The week of January 13, 2020, CRCL traveled to Seattle, Washington and met with CBP, NGOs, and individuals who had been at the Blaine POE January 3-5, 2020. CRCL opened seven investigations between January-February 2020. CRCL and CBP Office of Professional Responsibility (CBP OPR) collaborated on the CBP OPR investigation to the greatest extent possible. CRCL provided CBP OPR with a short form information request with general issues CRCL was investigating. CRCL provided CBP OPR with a list of detailed questions regarding the incident from January 3-5. CRCL had numerous conversations with CBP OPR agents and CBP OPR leadership about the two investigations to ensure collaboration and deconfliction. CBP OPR briefed CRCL of the results of their investigation. CRCL was briefed by CBP OFO leadership on the preliminary results of their inquiries in January 2020, and CRCL shared its concerns with CBP OFO.

CBP OPR provided its Report of Investigation (ROI) to CRCL. CBP OPR’s ROI is attached to this memorandum, however, relevant portions that relate to the allegations of national origin discrimination are summarized or copied verbatim throughout this report.

Pertinent Underlying Information from CBP OPR’s Record of Investigation

Screening Criteria Used by SFO January 3-5, 2020

On January 3, 2020, at 10:20 AM EST, CBP Executive Assistant Commissioner (EAC) Todd Owen sent an email titled, “Heightened Vigilance” to all Directors of Field Operations (DFOs) requesting increased security awareness and notifying the DFOs of a conference call with Acting Commissioner (C1) Mark Morgan at 4 PM EST.² The email, “Heightened Vigilance,” stated:

As a result of last evening's events with the drone strike against Iranian leadership, it is prudent at this time to heighten our vigilance against any potential retaliation in the homeland. There is no specific intelligence at this time indicating any such threat here, but none the less [sic], please increase your security awareness at our facilities to better safeguard our employees. I ask that you engage your local LE and IC partners through your TFOs or liaison officers to ensure awareness of any local concerns. We should continue our standard focus on arriving travelers via NTC threshold targeting rules, to include Canadian flagpoles, utilizing TTRT resources. NTC targeting rules will be immediately modified if warranted by

² ROI page 7, referencing exhibit 6.

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intelligence. Lastly, should a domestic incident occur, I would expect you to immediately implement increased outbound enforcement actions on departing flights to European gateway airports (we have no direct flights to Iran), as well as land border crossings into Canada.³

According to DFO Adele Fasano, Seattle Field Office (SFO), during the conference call with C1, verbal guidance was provided to OFO management in Seattle to be vigilant in light of a targeted military action by the United States against Iran.⁴ DFO Fasano sent an email to SFO management on January 3, 2020, at 9:48 PM EST, which summarized her conference call:

“The message is increased vigilance and situation [sic] awareness of our front line, on and off duty. This should be messaged in musters. The emails [sic] further stated, "All facilities should have enhanced security measures in place and continuous sharing of information with our stakeholders and other law enforcement agencies is critical.” The email did not provide any specific guidance regarding enhanced screening procedures.⁵

On January 3, 2020, at 2:27 PM EST, (A) Program Manager, Border Security and Facilitation, (b)(6), (b)(7)(C) in Seattle, sent an email entitled, “Iran Threat.”⁶ The email stated:

In light of the US airstrike against Iranian IRGC-QF General Qassem Soleimani, it is prudent at this time to heighten our vigilance against any potential retaliation. All encounters with individuals from areas of national concern must be referred into secondary for additional layers of vetting. Additionally, CBP will continue to process Iranian flagpoles as they have been e.g. (capturing fingerprints, cell phone inspection, generating events etc.). It is imperative that DHS remains proactive and be alert in the interactions with individuals or commodities arriving from or departing to areas of national concern. When an Iranian, Lebanese or any other individual whom DHS or partnering Intelligence communities have possibly deemed to be of national interest are encountered at the port of entry, notifications will be funneled through the Seattle Field Office Tactical Analytical Unit (TAU). The Seattle Field Office TAU will assist in streamlining various vetting stages to ensure information is delivered timely. The Seattle Field Office TAU will notify the Border Security Coordinator (BSC), Assistant Director of Field Operations (ADFO) and the Director of Field Operations (DFO) simultaneously to obtain ADFO and DFO approval prior to releasing the subject.⁷

³ ROI, exhibit 6.

⁴ ROI, exhibit 7.

⁵ ROI page 7, referencing exhibit 7.

⁶ ROI, exhibit 2.

⁷ ROI, exhibit 2.

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On January 3, 2020, at 4:09 PM EST, a document titled “HIGH THREAT ALERT,” which had been prepared by the Seattle Field Office Tactical Analysis Unit (SFO TAU), was sent to SFO management.⁸ The alert, which was an attachment, stated:

TAU is issuing this high alert to the frontline. Effective immediately, TAU will be operating 24x7 working with TTRT and frontline officers to conduct vetting on all individuals that meet the following criteria:

- **All persons (males and females) born after 1961 and born before 2001 with links (POB, travel, Citizenship) any Nexus to the following countries:**
 - o **Palestinians and Lebanese**
 - **May have traveled to/from Israel and Jordan**
 - o **Iranian and Lebanese Nationals**
 - **From Middle East, Africa, and Latin America⁹**

The procedure for processing these individuals was outlined:

- o **Contact TTRT (where available) if not, contact TAU**
- o **TTRT and TAU will collaborate on research and analysis, if there is a connection to military, government, or terrorism, a UPAX event will be created at the port to send to NTC for further determination. Once the event returns TAU will be notified and will continue with notifications for final determination by DFO.**
- o **Seattle Field Office will be notified**
- o **DFO will make final determination based on TAU, TTRT, JTTF recommendations¹⁰**

The HIGH THREAT ALERT attachment also outlined questions that individuals were to be asked, as well as provided background on the Iranian Republic National Guard (IRNG) and Hizballah.¹¹

On January 3, 2020, at 5:15 PM EST, Supervisory CBP Officer (SCBPO) (b)(6), (b) (7)(C), an officer assigned to the SFO TAU wrote an email entitled, “Proposed TAU Procedure for Iranian Vetting.”¹² The email outlined a proposed vetting procedure in response to the directive to be vigilant. The email, stated in part:

The Frontline will be sending individuals below to TTRT or Secondary
-All persons (males and females) born after 1961 and born before 2001 with links (POB [Place of Birth], travel, Citizenship) any nexus to the following countries:

⁸ ROI, exhibit 9.

⁹ ROI, exhibit 9.

¹⁰ ROI, exhibit 9.

¹¹ ROI, exhibit 9.

¹² ROI, page 8, referencing exhibit 8.

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- Palestinian and Lebanese
 - May have traveled to/from Israel and Jordan
- Iranian and Lebanese Nationals
 - From Middle East, Africa, and Latin America
- Please use SPO_20X to log all secondary inspections

All these will be referred in. Secondary questioning will determine the following with TTRT and TAU guidance

- Links to IRGC or served in military
- Occupation is in a STEM – sensitive technology or associated with the regime
- They show signs of deception
- Have links to Hizbollah or terrorist organizations
- Or have derog linked to criminal activity.¹³

DFO (b)(6), (b)(7)(C) responded to SCPO (b)(6), (b)(7)(C) email with, “ok” at 9:51 PM EST.¹⁴

On Saturday, January 4, 2020 at 12:28 AM EST, SCBPO (b)(6), (b)(7)(C) sent an email entitled, “Clarification on Iranian Threat.”¹⁵ The email stated:

TAU would like to clarify the vetting threat. TAU is prioritizing the following targets:

- **persons (males and females) born after 1961 and born before 2001 with links (POB, travel, Citizenship) any Nexus to the following countries:**
 - o **Palestinians and Lebanese**
 - **May have traveled to/from Israel and Jordan**
 - o **Iranian and Lebanese Nationals**
 - **From Middle East, Africa, and Latin America**

If there are targets from Special Interest Countries AND nexus to Iran, please continue to send those referrals for TAU vetting.

If they are from Special Interest Countries like Pakistan, Afghanistan, Egypt and **no nexus** to Iran/Hizbollah, please follow local procedures for vetting those threats (TTRT, CTR, etc). However, if officers feel there is a threat from those as well and would like TAU assistance, we will assist, but they may have to wait as the Iranian and Lebanese Hizbollah threat takes precedence.¹⁶

On Saturday, January 4, 2020, at 1:54 PM EST, SCBPO (b)(6), (b)(7)(C) sent an email entitled, “CTR form for Iran Threat and UPDATED GUIDANCE On BEST PRACTICES,” with an attachment

¹³ *Id.*

¹⁴ *Id.*

¹⁵ ROI, exhibit 55.

¹⁶ *Id.*

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containing updated procedures and “Best Practices Learned in last 24 Hours.”¹⁷ The email stated:

Thank you for your patience the last 24 hours, we have had some lessons learned and best practices and have updated the guide for secondary vetting for the field {please see attached).

We kindly ask that all targets are emailed to TAU using the attached CTR form at the conclusion of the inspection.

If TAU has further questions, we will respond back to the inspecting officer and determine if high side checks are further warranted if not done already.

Once this is done, we send the CTR sheet, inspection results and our joint TTRT/Port/TAU recommendation for approval by the Field Office and then notify the port of the decision¹⁸

On Sunday, January 5, 2020, at 1:39 PM EST, ADFO (b)(6), (b)(7)(C) wrote an email to Seattle Area Port Directors, providing additional guidance to streamline the vetting and approval process.¹⁹ The guidance provided:

1. All United States Citizens (USCs), United States (US) Legal Permanent Residents (LPRs) meeting the parameters of Operation Support:

- a. If the port does not find any derogatory information, a Port Manager GS-14 or above may approve their release.
- b. If the port finds derogatory information, the person will be sent to the Tactical Terrorism Response Team (TTRT), conduct a media inspection, and will refer a completed package to include the National Targeting Center (NTC) high side check disposition (when applicable) to the Tactical Analytical Unit (TAU) for approval by the Assistant Director of Field Operations (ADFO) of Border Security and Facilitation (BSF) or the Director of Field Operations (DFO).

2. All Canadian Citizens (CANCITs) without Iranian military service after 1979 and without any other derogatory information, a Port Manager GS-14 or above may approve their release.

- a. If the port finds derogatory information, or the individual served in the military after 1979, the person will be sent to the Tactical Terrorism Response Team (TTRT), conduct a media inspection, and will refer a completed package to include the National Targeting Center (NTC) high side check disposition (when applicable) to the Tactical Analytical Unit (TAU) for approval by the Assistant Director of

¹⁷ ROI, Exhibit 45.

¹⁸ ROI, exhibit 11.

¹⁹ ROI, exhibit 11.

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Field Operations (ADFO) of Border Security and Facilitation (BSF) or the Director of Field Operations (DFO).

3. Any Non-Immigrant Visa (NIV) holder, Visa Waiver Program (VWP) holder, or Canadian Legal Permanent Resident (CANLPR) Iranian, Lebanese, or Palestinian nationality that meets the parameters of the Special Operation Support will be sent to TTRT for a full Counter Terrorism Inspection (CTR) and media inspection.

a. If derogatory information is found, NTC high side vetting is required. Upon completion all information will be forwarded with TTRT recommendation to TAU for approval by the Assistant Director of Field Operations (ADFO) of Border Security and Facilitation (BSF) or the Director of Field Operations (DFO).

b. If no derogatory information is found, the completed CTR worksheet and a summary of where the person is coming from, where they are going, all checks completed on the person will be forwarded to TAU for release approval by the ADFO of BSF. The Field Office TAU is mandated to support all Area Ports within the Seattle Field Office for the final vetting prior to approval by the Assistant Director of Field Operations (ADFO) of Border Security Facilitation (BSF) or the Director of Field Operations (DFO).

4. If there are any significant delays at the ports in response to Operation Support, **ALL USCs and US LPRs will take priority.**

Lastly as long as you don't have a credible threat at a specific port you are no longer required to staff your non 24-hour ports after hours or enhanced security patrols. Please ensure you have adequate staffing in the CASC to monitor the ports of entry²⁰

CBP Executive Director (XD) (b)(6) informed CBP OPR that SFO “misconstrued verbal guidance to be vigilant.”²¹ In an email sent to CBP Deputy Commissioner Perez on January 9, 2020, titled, “Blaine,” XD Hoffman stated, “the Seattle Field Office (SFO) appears to have taken an overzealous approach to the guidance by referring all individuals from areas of national concern to secondary for additional vetting.”²² In his interview with CBP OPR, CBP OPR stated, “he (b)(6) believed the plan by SFO to address the Iranian threat was “grossly mismanaged” by SFO management, both in terms of “the scope” and “level of detail” in which they referred travelers, and the lack of resources they had to handle the volume of travelers.”²³

Source of the screening criteria

According to the ROI, SCBPO (b)(6), (b)(7)(C) of the SFO TAU prepared the “High Threat Alert” document, which created the vetting procedures used in the SFO.²⁴ The SFO TAU was asked to

²⁰ ROI, exhibit 11.

²¹ ROI, page 2.

²² ROI, exhibit 11.

²³ ROI, page 9, referencing exhibit 10.

²⁴ ROI, page 21.

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develop a plan to have all Special Interest Aliens (SIAs) vetted by the TAU, and once vetted, they would be referred to the DFO for release approval.²⁵ SCBPO reviewed the email entitled “Iran Threat,” referenced above, in part to establish the vetting criteria.²⁶ She coordinated with members of the Tactical Terrorism Response Team (TTRT) in SFO to narrow the criteria used to refer travelers to secondary inspection.²⁷ She also called the National Targeting Center (NTC), Counter Network Division, “in an effort to obtain more information regarding the nature of this Iranian threat.”²⁸ SCBPO (b)(6), (b)(7)(C) stated she was “referred to the normal intake center at the NTC and there was no one available to speak with her regarding her request (EXHIBIT 50 timestamp 18:56:20).²⁹ At 11:45 AM EST, (b)(6), (A) Branch Chief (BC), Counter Terrorism Division – National Targeting Center, stated in an email that “In light of the US airstrike against Iranian IRGC-QF General Qassem Soleimani CTD has compiled a compendium of threat reporting related to Iran and Lebanese Hizballah, along with some recent field success stories associated to the same.”³⁰ The threat reporting included reports written by Valens Global on Hizballah operations and activities and submitted to CBP on October 15, 2019, an overview of the IRGC submitted to CBP on October 24, 2019, a report on Iranian assassination attempts abroad submitted to CBP on October 11, 2018, Hizballah activities report submitted to CBP on August 20, 2018, and Hizballah cross border activities submitted to CBP on May 14, 2018.³¹ In addition, Mr. (b)(6) included an intelligence assessment from July 2, 2019, entitled “Worldwide Terrorist Operations Linked to Lebanese Hizballah or Iran: Observed Behaviors and Key Indicators of Suspicious Activities.”³²

Each of the criteria specified in the “High Threat Alert” and the source of that information, according to CBP OPR interviews with SCBPO Reynoso and documentation she provided to CBP OPR, is outlined below:

All persons (males and females) –

*SCBPO (b)(6), (b)(7)(C) stated the SFO TAU didn’t want to specifically exclude females in the alert.*³³

Born after 1961 and born before 2001 –

*SCBPO (b)(6), (b)(7)(C) stated she was attempting to identify males who may have served in the IRGC, hence, referring males born between 1961 and 2001.*³⁴

with links (POB, travel, Citizenship) –

²⁵ ROI, page 20.

²⁶ ROI, page 23.

²⁷ ROI, page 23.

²⁸ ROI, page 22.

²⁹ ROI, page 24.

³⁰ ROI, exhibit 51.

³¹ ROI, exhibit 51.

³² ROI, exhibit 51.

³³ ROI, exhibit 47 (TIMESTAMP 11:00)

³⁴ ROI, page 23.

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SCBPO (b)(6), (b)(7)(C) referenced a previous case, whereby an individual was sent by Hizballah to obtain U.S. and Canadian citizenship for the purposes of conducting terrorist attacks. SCBPO (b)(6), (b)(7)(C), therefore, did not want to exclude USCs, and she included place of birth, travel and citizenship as part of the criteria. SCBPO (b)(6), (b)(7)(C) also referenced incidents in the Seattle area, whereby standard vetting was not identifying individuals of concern. SCBPO (b)(6), (b)(7)(C) cited high-side inquiries conducted on ten individuals by the NTC, which returned negative results. CBPO (b)(6), (b)(7)(C) explained those same ten names were sent to the Northern Border Coordination Center for additional vetting and five of the ten individuals were determined to be significant national security threats. SCBPO Reynoso stated, "We were already aware of things we were missing in our AOR."³⁵

any Nexus to the following countries:

Palestinians and Lebanese (May have traveled to/from Israel and Jordan)

SCBPO (b)(6), (b)(7)(C) stated she included the referral of Lebanese and Palestinian individuals because Iran was a state sponsor of terrorism and proxy actors were often used in the execution of terrorist acts. SCBPO (b)(6), (b)(7)(C) explained she was not privy to the specific nature of the threat information received by DFO (b)(6), (b)(7)(C) during the call with EAC (b)(6); however, she surmised the threat would likely come from some type of proxy actor based on her understanding of the threat as described by (A)BSC (b)(6).³⁶

Iranian and Lebanese Nationals (From Middle East, Africa, and Latin America).

SCBPO (b)(6), (b)(7)(C) provided an email from (A) Branch Chief (BC) (b)(6), NTC, dated January 3, 2020, which included Iranian threat reports from the NTC (EXHIBIT 51), and stated that she used this information when developing referral criteria related to travel.³⁷ The threat reports were sent via email, written by the Acting Branch Chief of the Counter Terrorism Division – National Targeting Center (NTC), which stated, "the threat is global and not just specific to Iran and Lebanon."³⁸ Included among the reports was a report written by Valens Global for CBP OFO that outlined potential travel connections between the Middle East, Africa and Latin American travel and Hizballah terrorist activities.³⁹

SCBPO (b)(6), (b)(7)(C) referred to the instruction to refer all SIAs as "marching orders" from the DFO.⁴⁰

³⁵ ROI, exhibit 50.

³⁶ ROI, page 23.

³⁷ ROI, page 23.

³⁸ ROI, exhibit 51.

³⁹ ROI, exhibit 50.

⁴⁰ ROI, exhibit 50.

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As noted above, DFO Fasano approved the vetting criteria created by the SFO TAU.⁴¹ On January 3, 2020, DFO Fasano held a conference call with SFO senior leadership to discuss the heightened security measures.⁴² The DFO stated “she did not believe the specific threat information was discussed during the conference call. DFO Fasano explained she presumed that threat information would be obtained by the TAU and TTRT, through the NTC (EXHIBIT 72 timestamp 18:33:40).”⁴³

Relevant Law and Policy

On April 26, 2013, DHS issued a policy entitled, “The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities” along with implementation guidance. The policy states in pertinent part:

It is the policy of DHS to prohibit the consideration of race or ethnicity in our daily law enforcement and screening activities in all but the most exceptional instances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest. Of course, race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance.

Except as noted below, it is DHS policy, although not required by the Constitution, that tools, policies, directives, and rules in law enforcement and security settings that consider, as an investigative or screening criterion, an individual's simple connection to a particular country, by birth or citizenship, should be reserved for situations in which such consideration is based on an assessment of intelligence and risk, and in which alternatives do not meet security needs, and such consideration should remain in place only as long as necessary. These self-imposed limits, however, do not apply to antiterrorism, immigration, or customs activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order, or in individualized discretionary use of nationality as a screening, investigation, or enforcement factor) [sic].⁴⁴

The Implementation Guidance provided additional guardrails to Components for the development of Component-specific policies and procedures. The Implementation Guidance distinguished between the use of “race, ethnicity or country of birth” and “nationality” as a criterion. Per the Implementation Guidance, “‘country of birth’ means the political entity where the individual was born; and ‘nationality’ means a country to which an individual has a

⁴¹ ROI, page 8.

⁴² ROI, page 50.

⁴³ ROI, page 50.

⁴⁴ Memorandum from Secretary Napolitano for Component Heads, “The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities,” dated April 26, 2013.

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relationship along the lines of citizenship.”⁴⁵ For DHS programs that use country of birth as a security screening, enforcement, or investigative criterion, the Implementation Guidance states:

1. Race- or ethnicity-based screening, whether based on appearance, name, or country of birth, should be limited to situations in which there is a compelling interest and the screening protocol is narrowly tailored to meet that interest. National security is *per se* a compelling interest, but use of race and ethnicity must nonetheless be narrowly tailored to the particular national security concern involved in a proposed use.
2. All tools, policies, directives, and rules utilizing ethnic or country of birth factors should remain in effect no longer than necessary. To ensure that this is so, any such tools, policies, directives, and rules should be subject to periodic review by the relevant Component's leadership, intelligence office, and counsel, which should include particular focus on timeliness and validity. Each Component should develop a review process to implement this requirement.
3. Racial, ethnic, or country of birth criteria should be coupled with other characteristics, if practicable, to better focus law enforcement or screening attention. Approaches that respond to actual travel itineraries, or combine race, ethnicity, or country of birth with additional limiting characteristics (age, sex, travel history, known affiliations), are preferable to those that draw distinctions among individuals on the basis of ethnicity or country of birth alone.
4. Reasonably available alternatives are preferred over protocols that depend on DHS enforcement, investigation, and screening personnel's subjective estimation of individuals' likely race, or ethnicity. If such protocols cannot be avoided, they too should be reviewed periodically. In addition, DHS officers and agents who conduct security screening, enforcement and investigative functions should receive necessary instruction or training to make sensible identifications of relevant characteristics, rather than relying on their general expectations about ethnic groups, and officer or agent perceptions should be supported, where possible, by computerized name analysis.⁴⁶

For DHS programs that use nationality as a security screening, enforcement or investigative criterion, the Implementation Guidance states:

1. Many of the statutes DHS implements or enforces draw explicit nationality distinctions. For example, under the customs laws, the nationality of a person can affect duty exemptions; under the immigration laws, nationality affects an alien's eligibility for admission under the visa waiver program or for temporary protected status; and under the embargo laws, nationality can affect the ability of a person to import or export merchandise. Other examples include the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.*; the International Economic Emergency Powers

⁴⁵ The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance, fn 1.

⁴⁶ The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance.

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Act, 50 U.S.C. §§ 1701- 1707; the Cuban Adjustment Act of 1966; and the Nicaraguan Adjustment and Central American Relief Act of 1997. Using nationality for antiterrorism, customs, or immigration activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order to, for example, trigger screening, inspection, or investigative steps is entirely appropriate and needs no further justification; it is excluded from sections B.3 and B.4, below. If nationality is not expressly relevant to the administration or enforcement of a statute, regulation, or executive order, a proposed use of nationality may still be permissible but must comply with the requirements in sections B.3 and B.4, below.

2. In addition, individualized discretionary use of nationality as a screening, enforcement, or investigative factor—for example by an officer or agent using his or her training and experience to conduct an inspection at or near the border—is not limited by the requirements of sections B.3 and B.4, below, which are directed at more general tools, policies, directives, and rules.
3. In other settings, in which nationality is used for security screening, enforcement, or investigative decisions, rules or policies establishing nationality-based criteria are preferable, from a civil rights perspective, to those establishing ethnicity-based criteria. However, unless use of nationality-based rules is part of an operation to protect particular at-risk populations, such use should be limited if limits are consistent with security objectives. In the other settings covered by this paragraph, rules or policies that require consideration of nationality should be reserved for situations in which that consideration is based on an assessment of intelligence and risk, should not remain in effect longer than necessary, and should be subject to periodic review to further that outcome. Each Component should develop a review process to implement this requirement.
4. Use of nationality criteria (when not connected to a nationality-specific legal requirement or where nationality is not expressly relevant to the administration and enforcement of a statute, regulation, or executive order) should be coupled with other characteristics, if relevant and practicable, to better focus law enforcement or screening efforts. Approaches that respond to actual travel itineraries, or combine nationality with additional limiting characteristics (for example, age, sex, travel history, known affiliations), are preferable, when relevant and appropriate, to those that draw distinctions among individuals on the basis of nationality alone.⁴⁷

On February 6, 2014, Acting Commissioner Thomas Winkowski issued a memorandum entitled, “Nondiscriminatory Law Enforcement and Screening Activities.” The memorandum states in pertinent part:

CBP personnel may use race or ethnicity only when a compelling government interest is present, and only in a way narrowly tailored to meet that compelling interest. National security is per se a compelling interest, but use of race and ethnicity must nonetheless be narrowly tailored to the particular national security concern involved in a proposed use. Of course, race- or ethnicity-based information

⁴⁷ *Id.*

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that is specific to particular suspects or incidents or ongoing criminal activities, schemes, or enterprises may be considered.

We note this prohibition relates to the consideration of race or ethnicity, which is distinguished from the consideration of nationality. Using nationality for antiterrorism, customs, or immigration activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order to, for example, trigger screening, inspection, or investigative steps is entirely appropriate and needs no further justification. Therefore, the use of nationality as a screening, enforcement, or investigative criterion is appropriate for the vast majority of CBP functions and operations.⁴⁸

CBP OFO Executive Assistant Commissioner Todd Owen reissued information contained in CBP's 2014 memorandum via an email on January 27, 2020, excerpted below.⁴⁹

CBP has adopted the DHS policy, along with DOJ Guidance. The DHS policy prohibits the consideration of race, religion, or ethnicity in the agency's daily law enforcement and screening activities in all but the most exceptional circumstances. CBP personnel may use race, religion, or ethnicity only when a compelling government interest is present, and only in a way narrowly tailored to meet that compelling interest. National security is *per se* a compelling interest, but use of race, religion, and ethnicity must nonetheless be narrowly tailored to the particular national security concern involved in a proposed use. Of course, race-, religion-, or ethnicity-based information that is specific to particular suspects or incidents or ongoing criminal activities, schemes, or enterprises may be considered.

We note that this prohibition relates to the consideration of *race, religion, or ethnicity*, which is distinguished from the consideration of *nationality*. Using nationality for antiterrorism, customs, or immigration activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order to, for example, trigger screening, inspection, or investigative steps is entirely appropriate and needs no further justification. Therefore, the use of nationality as a screening, enforcement, or investigative criterion is appropriate for the vast majority of CBP functions and operations.

OFO Policy includes the DHS Policy in all manuals, policies, directives, and guidelines regarding any activity in which the use of race, religion, ethnicity, or nationality may arise as a security screening, enforcement, or investigative criterion; to implement agency-specific policy and procedures for implementing the policy; and to ensure that all law enforcement personnel, including supervisors and managers, are trained to the standards set forth in the DOJ Guidance and the DHS Policy and are held accountable for meeting those standards. CBP fully supports DHS's efforts to remain vigilant not only in the protection of the country but in the

⁴⁸ ROI, page 62 and exhibit 11.

⁴⁹ ROI, Exhibit 85.

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prohibition against unlawful religious profiling in enforcement, investigation, screening, and inspection. OFO works closely with the Office of the Commissioner, Privacy and Diversity Office, in implementing this policy.⁵⁰

Analysis

Place (country) of Birth Criteria

The vetting criteria created by the SFO in response to guidance to maintain heightened vigilance directed that individuals be referred to secondary based upon their Place (country) of Birth, travel, and Citizenship (Nationality).⁵¹ The alert specified all persons born between 1961 and 2001, with links to Palestine, Lebanon and Iran, were to be vetted.⁵² According to the DHS Implementation Guidance, security screening criteria based upon country of birth “should be limited to situations in which there is a compelling interest and the screening protocol is narrowly tailored to meet that interest. National security is *per se* a compelling interest, but use of race and ethnicity must nonetheless be narrowly tailored to the *particular* national security concern involved in a proposed use. (emphasis added)”⁵³ It is DHS policy that connection to a country by birth or citizenship “should be reserved for situations in which such consideration is based on an assessment of intelligence and risk, and in which alternatives do not meet security needs.”⁵⁴

We find that the criteria created and approved by SFO were not sufficiently narrowly tailored to a compelling government interest. In this instance, DFO (b)(6), (b)(7)(C) was unaware of current intelligence supporting the decision to refer SIAs to secondary, instead she said she was relying upon the TAU to gather more information about the risk.⁵⁵ The TAU reached out to the NTC to gather information to conduct an assessment of intelligence and risk, however, the SFO TAU never received information in response to their request.⁵⁶ Instead, they created criteria that were intended to limit the operational impact of referring every SIA, but were developed based upon generalized information that was neither sufficiently particularized or clearly relevant in time to the threat they were responding to on January 3, 2020. From the record it appears that no one creating or approving the threat criteria was aware of any specific threat or risk underlying the directive to maintain heightened vigilance. Further, there is no indication in the record that SFO had or was aware of intelligence or information relevant to the threat that was different than that available to CBP HQ, which the same day directed a continuation of the “standard focus on arriving travelers via NTC threshold targeting rules” and indicated targeting rules would change “if warranted by intelligence.” No such changes were made by NTC. Since there was not intelligence relevant to the particular national security concern involved, it was impossible to

⁵⁰ ROI, Exhibit 85.

⁵¹ ROI, exhibit 9.

⁵² ROI, exhibit 9.

⁵³ The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance.

⁵⁴ Memorandum from Secretary Napolitano for Component Heads, “The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities,” dated April 26, 2013.

⁵⁵ ROI, page 50.

⁵⁶ ROI, page 24.

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create criteria narrowly tailored to that threat. Further, the record indicates no attempt to understand the population of persons (i.e., U.S. citizens, lawful permanent residents, foreign citizens) likely to be impacted by imposition of the vetting criteria and validate or adjust that impact to that which was merited by the threat.

Nationality criteria

The vetting criteria used by SFO also identified individuals for additional screening based upon their citizenship (or nationality, as the term is used in the Implementation Guidance). Although not required by the Constitution, DHS policy requires the use of nationality be reserved for situations in which that consideration is based on an assessment of intelligence and risk, should not remain in effect longer than is based necessary, and should be subject to periodic review to further that outcome when it is not expressly relevant to the administration or enforcement of a statute, regulation, or executive order (i.e., an explicit nationality distinction) or used in an individualized discretionary decision.⁵⁷

Regarding whether the criteria were “expressly relevant,” XD (b)(6), (b)(7)(C) stated that these criteria were part of a “overzealous approach” that “grossly mismanaged” the scope of travelers referred to secondary.⁵⁸ As with country of birth, SFO was responding to a general directive to maintain “heightened vigilance.” The record indicates no reliance on express statutory, regulatory, or executive order language to include any of the nationalities identified in the vetting criteria, which was implemented over and above the standard NTC targeting rules in place at the time with no intervening statutory, regulatory, or executive order. For the purposes of the creation of screening criteria consistent with DHS policy, a general directive to maintain vigilance is not sufficient to establish the use of nationality in a rule as *expressly*, or specifically, relevant for categorical referrals to secondary based upon nationality. The Implementation Guidance contemplated statutes where nationality could be considered expressly relevant to its enforcement and provided examples. These examples include, “Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.*; the International Economic Emergency Powers Act, 50 U.S.C. §§ 1701-1707; the Cuban Adjustment Act of 1966; and the Nicaraguan Adjustment and Central American Relief Act of 1997.”⁵⁹⁶⁰

Nor are vetting criteria of this nature an individualized discretionary use of nationality because they are *applied generally* regardless of the circumstances in which an officer or agent relies on his or her training and experience to conduct an inspection of a person. In other words, targeting criteria used here were screening criteria in a setting that required an assessment of intelligence and risk consistent with DHS policy and Section B.3 of the Implementation Guidance. A

⁵⁷ The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance.

⁵⁸ ROI, page 9 and exhibits 10 and 11.

⁵⁹ The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance.

⁶⁰ CRCL understands that OGC and OCC have a unified position on the nature and scope of express relevance. CRCL preserves its right to explore this issue further in relation to policy and procedure in future civil rights and liberties work.

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sufficient assessment is absent from the record for the same reasons determined above with country of birth.

Review Process

The DHS Implementation Guidance states that Components should develop a review process to implement the requirements of the Implementation Guidance.⁶¹ When DHS programs use country of birth as a criterion, A.2 of the Implementation Guidance states, “tools, policies, directives, and rules should be subject to periodic review by the relevant Component's leadership, intelligence office, and counsel, which should include particular focus on timeliness and validity. Each Component should develop a review process to implement this requirement.”⁶² When discussing DHS programs that use nationality as a criterion, Section B.3. of the Implementation Guidance states, “rules or policies that require consideration of nationality should be reserved for situations in which that consideration is based on an assessment of intelligence and risk, should not remain in effect longer than necessary, and should be subject to periodic review to further that outcome. Each Component should develop a review process to implement this requirement.”

The review process implemented by SFO for the “High Threat Alert” criteria appears to have been limited to SFO leadership. CRCL is aware that the NTC has implemented a robust review process for targeting rules of national applicability. CRCL is unaware of a similar program in place to review operations/vetting criteria, such as the “High Threat Alert” criteria, that are created and implemented locally. As noted above, the Implementation Guidance contemplates a robust review process for “tools, policies, directives, and rules” that use race, ethnicity, country of birth, and nationality as a security screening, enforcement, or investigative criterion. The Implementation Guidance is directed toward the use of the race, ethnicity, country of birth, and nationality as a screening or vetting criterion, regardless of terms of art used by different components to describe such a use or activity. The vetting criteria created during this local operation used nationality and country of origin as criteria for determining who should receive additional screening, an activity clearly contemplated by the Implementation Guidance. Therefore, in this instance, the review process used by SFO was not sufficient for the purpose of fully implementing the DHS policy on nondiscrimination.

Recommendations:

1. (b)(5)



⁶¹ The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance.

⁶² The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities, Implementation Guidance.

(b)(5)

2. CRCL recommends additional training on The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities and Implementation Guidance for all personnel within the Seattle Field Office.
3. CRCL recommends CBP amend its nondiscrimination policy statement to account for all DHS policy standards for use of nationality where not expressly relevant to a statute, regulation, or executive order or an individualized discretionary use. The 2014 CBP policy omits materially relevant standards applicable in this incident. CBP policy should be clear and complete to permit CBP officers and agents to know and comply with standards for the use of nationality in security screening, enforcement, investigative decisions, rules, operations, or policies.⁶³

It is CRCL's statutory role to advise department leadership and personnel about civil rights and civil liberties issues, ensuring respect for civil rights and civil liberties in policy decisions and implementation of those decisions. These recommendations are pursuant to that role; we believe they can assist you in making CBP the best agency possible. We look forward to continuing to work with CBP on these important issues. Please inform us within 60 days whether you concur or non-concur with these recommendations by emailing a response to Senior Policy Advisor (b)(6) at (b)(6). If you concur, please include an action plan.

Copy to:

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U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

William Ferrara
Executive Assistant Commissioner
Office of Field Operations
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

Diane J. Sabatino
Deputy Executive Assistant Commissioner
Office of Field Operations
U.S. Customs and Border Protection
(b)(6), (b) (7)(C)

⁶³ In addition to the recommendations made through this investigation, CRCL will be undertaking a thorough review of all DHS and Component racial profiling guidance to ensure compliance with the President's Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.

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