

PUBLICATION

DHS to Follow DOS in Collecting Social Media Access for All Applicants for Immigration Benefits

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The Department of Homeland Security has published its plan to follow the State Department in collecting social media platforms and identifiers used in the preceding five years by applicants for immigration benefits, including USCIS filings and CBP's ESTA and EVUS programs. DHS's justification is to assess whether the applicant poses a law enforcement or national security risk to the U.S. and to carry out Executive Order (E.O.) 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States."

The State Department already collects this information in visa applications. The DHS notice seeks public comment, but it is highly unlikely that the comments sought in the public notice by DHS will dissuade DHS from implementing this change to immigration data collection forms.

Similar to visa applications already, DHS forms will include the following question with two parts:

Please enter information associated with your online presence over the past five years:

- Provider/Platform (dropdown bar will provide multiple choices, including "Other" and "None" for those who do not use the platforms listed)
- Social Media Identifier(s) over the past five years (free text field for applicant to enter information)

The notice states the intention to list the following most popular global social media platforms initially, with the option to change or expand the list over time:

- ASK FM
- DOUBAN
- FACEBOOK
- FLICKR
- INSTAGRAM
- LINKEDIN
- MYSPACE
- PINTEREST
- QZONE (QQ)
- REDDIT
- SINA WEIBO
- TENCENT WEIBO
- TUMBLER
- TWITTER
- TWOO
- VINE
- VKONTAKTE (VK)
- YOUKU

- YOUTUBE

It is not clear from the notice or the formulation of inquiry above whether an applicant who only uses social media platforms other than those listed, or who uses other platforms in addition to those listed, must provide the names of such platforms along with their identifiers in the text area or whether checking "other" is all that is required for those platforms.

The notice states, "Only that information which the account holder has allowed to be shared publicly will be viewable by DHS." The question does not request a user's password, and the collection form will confirm that the agency will not seek to log in to a private account or disclose non-publicly available social media information. Some people will mistakenly understand that the password is being requested and will provide it, and by the terms of this notice DHS is pledging not to use such information to access private information.

The notice states almost comically that providing the social media information is not required to obtain the immigration benefit, and DHS agencies "will continue to adjudicate a form where social media information is not answered," but "failure to provide the requested data may either delay or make it impossible for [CBP and USCIS] to determine an individual's eligibility for the requested benefit." In other words, as a practical matter, the information is required to obtain the benefit sought.

Applicants tempted to answer "none" or "other" when they actually have used one or more of the listed platforms can anticipate that DHS may sooner or later discover that the applicant had used undisclosed platforms and take the position that the applicant made a material misrepresentation in an immigration matter with the result that the applicant is found deportable and permanently inadmissible to the U.S., subject to certain waivers.

The most obvious legitimate purpose of this information collection is to identify people who have expressed interest or intent associated with terroristic or criminal activity. But in searching for hints of such interest, officers will become aware of information and attitude that might run counter to an officer's own opinions and beliefs that could influence their decisions on immigration benefits. The notice recites training of officers in nondiscrimination based on race, color, age, sexual orientation, religion, sex, national origin, or disability (all deemed to be characteristics that people cannot or should not be required to change), but social media discussions reveal all kinds of other characteristics that people could change but choose not to. People who have used social media platforms under pseudonyms for free expression on controversial topics will have serious objections to this information collection, and the notice does not explain how DHS will prevent officers from being affected by very complex considerations.

Reviewing social media could be very time consuming. USCIS processing times in key case types already have doubled or more since President Trump took office, and it would seem that this collection will unavoidably slow processing even more. DHS suggests that it already searches for applicants' online presence and this collection will reduce the time spent hunting for accounts used by applicants. One must imagine that DHS, like DOS, is prepared to use powerful technology tools to search electronically for key words and phrases in postings in accounts identified in applications.

We can expect that some commenters will demand that applicants be provided the social media access information of the officers who will adjudicate their cases. News reports have revealed social media platforms where retired and active immigration officers have shared extremely negative attitudes about foreign nationals and various characteristics.

Some important immigration benefits are sought through filings made only by employers on behalf of a worker. If DHS seeks to require social media identifiers in such filings, it would require employers to obtain the

information from their foreign workers, giving rise to a complex set of issues for the employers who may be tempted to review postings in the identified accounts. The DHS notice does not speak to this implication.

The DHS notice requests public comment identified by docket number DHS–2019–0044 at the Federal eRulemaking Portal: <http://www.regulations.gov>. Comments must be submitted by November 4, 2019 to be considered.