

As published in The Texas Lawyer, May 26, 2003.

Changes in the Practice of Immigration Law under the Department of Homeland Security

Robert F. Loughran and Delisa J. Futch

In the past two years, we have experienced a dramatic shift in our approach to immigration issues which would formerly have been considered routine. The fallout from the tragic events of 9/11 has left us with laws which serve to complicate and confuse an already complex body of laws regulating the entry and stay of foreign nationals in the United States. We have witnessed the implementation of new security measures and the strengthening of old ones. On a daily basis we encounter changes in visa application processes and procedures as U.S. Consulates abroad continually work to ensure greater security and integrity of the visa issuance process at each post. We have also noticed a distinct trend toward stricter enforcement of existing laws in an effort to disrupt activities which may indirectly assist terrorists in gaining access to the United States, remaining in the United States, or departing the United States with valuable technology which could be used by suspect governments or organizations abroad. The trend toward stricter enforcement of existing laws and the implementation of new ones led to passage of the PATRIOT Act, the Enhanced Border Security & Visa Entry Reform Act, and the Homeland Security Act.

I. The PATRIOT Act of 2001

The PATRIOT Act of 2001 provided for an increase in various federal powers to be exercised for enhanced surveillance and tracking of international money laundering and terrorist financing as well as increased funding and provisions for border security and protection. Additionally, PATRIOT mandated increased information sharing among government agencies and required the development and implementation of a system for tracking entries, exits, and whereabouts of nonimmigrants in the United States.

NSEERS & Special Registration

Bolstered by the authority of PATRIOT's mandate for an entry and exit tracking system, the Department of Justice set to work on developing the National Security Entry-Exit Registration System (NSEERS), a special program requiring certain foreign nationals to be interviewed, fingerprinted, and photographed upon entry into the United States. The program commenced on September 11, 2002 and initially required the registration at the Port of Entry of nationals of certain countries deemed to be state sponsors of terrorism, including Iran, Iraq, Syria, Libya, and Sudan. Nationals of other countries such as Saudi Arabia, Pakistan, and Yemen soon also reported being required to register upon entry. Additionally, Ports of Entry were authorized to register individuals who meet pre-existing criteria determined by the Attorney General. Such criteria reportedly include

unexplained travel to certain trouble spots, visa overstays, designation by intelligence agencies for monitoring, and suspicious behavior or demeanor on the part of the traveler.

In addition to NSEERS registration, the Department of Justice published regulations requiring “call-in” Special Registration of certain individuals already in the United States prior to the implementation of NSEERS at Ports of Entry. Much like NSEERS registration, Special Registration requires certain individuals to be fingerprinted, photographed, and interviewed under oath and to report periodically to the BCIS for ongoing compliance. To date, regulations have been published requiring the Special Registration of certain male citizens and nationals, age 16 or older, of the following countries: 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. A willful failure to comply with all Special Registration requirements in a timely manner constitutes a failure to maintain nonimmigrant status.

II. The Enhanced Border Security & Visa Entry Reform Act of 2002

In May 2002, Congress passed the Enhanced Border Security & Visa Entry Reform Act, which provided for a new information sharing system dubbed CHIMERA. CHIMERA is designed to be an “interoperable interagency system” integrating the existing systems of the State Department and the Department of Homeland Security data bases. This system calls for electronic sharing of visa files, an integrated entry and exit database, machine-readable and tamper-resistant visas and other travel documents, and the establishment of a standard biometric identifier for use in identifying aliens seeking admission into the United States. CHIRNERA will build on and possibly replace the Interagency Border Inspection System which currently tracks visas.

Advance Submission of Passenger Data

Pursuant to the EBSVERA, the INS implemented a program whereby passenger data necessary for identifying individuals is submitted in advance of arrival. As a result, commercial carriers must now transmit the following passenger data in advance of arrival in the United States: complete name, date of birth, country of citizenship, sex, passport number and country of issuance, country of residence, U.S. visa number and date and place of issuance, alien registration number, and the individual's address while in the United States. Other data may be required in the future upon consultation with the Secretary of State and the Treasury Secretary. This change in procedure is intended to allow for more vigorous background checks of international travelers before they arrive in the U.S., additional electronic inquiries as necessary, and perhaps the resultant enforcement preparations that may be necessary in some situations.

III. SECURITY CHECKS AND THE VISA ISSUANCE PROCESS

Visas Condor

The visa application process at U.S. Consulates abroad now represents a larger and more critical part of the practice of immigration law, as the introduction of additional security measures at U.S. Consulates abroad has contributed significantly to delays in visa issuance and anecdotal evidence of more visa denials. In January 2002, the Department of State implemented the new Condor security name check system. Male applicants aged 16 to 45 must complete a supplemental visa application which requires provision of more detailed information which can be used to determine whether an applicant is potentially a threat to the United States. Questions seek to elicit such information as the countries visited by the applicant and whether the applicant is a member or participant in suspect or terrorist organizations. While no one believes an applicant will disclose on his visa application that he is a member of a terrorist organization, applicants who are later deemed to have misrepresented material facts (i.e., failure to disclose past ties to or membership in a terrorist or suspect organization) are subject to inadmissibility or removal for visa fraud. Condor checks can result in significant delays in the visa issuance process, particularly when there is a "hit" on the name check requiring additional levels of scrutiny and additional security checks and possibly even advisory opinions.

Visas Eagle Mantis and Donkey Mantis

Other security name checks and advisory opinions such as Eagle Mantis and Donkey Mantis involve the investigation of matters related to controlled technology subject to U.S. Export Control Laws. The Visas Eagle Mantis is a name check that can be initiated when it appears an individual visa applicant will be exposed to sensitive technology listed on the Technology Alert List (TAL), usually but not always through their employment in the United States. If no response is received from the various Washington agencies in response to this name check within a predetermined amount of time, a consular officer will be permitted to issue the visa. These name checks can and often do lead to delays in visa issuance of several weeks. An alternative security check related to sensitive technology is the Visas Donkey Mantis, which involves a Washington advisory opinion. Because no visa can issue until a favorable advisory opinion issues, this form of security check may delay the visa issuance process for months. Applicants from China, Russia, and countries said to be state sponsors of terrorism are particularly subject to security checks based on exposure to sensitive technology.

In addition to the introduction of Visas Condor and the greater use of Visas Mantis security checks, visa applicants must be prepared for changing visa requirements and visa application procedures. The passport and visa waiver provisions with respect to certain Canadian Landed Immigrants who are nationals of British Commonwealth countries have been revoked. Canadian Landed Immigrants must now present valid passports and visas for entry into the United States. Applicants should also be aware that more and more U.S. Consulates, and eventually, perhaps all, require personal interviews prior to visa issuance. Should an applicant be denied a visa, the denial must now be recorded and the reasons set forth in detail in an electronic database accessible by the Department of State and the Department of Homeland Security. For this reason, applicants who are denied visas must be careful to disclose any denials whenever such

information is required on future visa applications in order to avoid the potential commission of visa fraud.

Student & Exchange Visitor Information System (SEVIS)

On December 11, 2002, the U.S. Department of Justice published a final rule for the implementation of the Student & Exchange Visitor Information System (SEVIS). Upon full implementation and participation by schools authorized to host foreign students, SEVIS will mandate the collection and reporting of additional information on foreign students and exchange visitors, including information related to ongoing maintenance of student status or failure to maintain student status. These additional information collection and reporting requirements are aimed at better tracking of individuals entering the United States for the stated purpose of attending school. SEVIS, it is hoped, will enable immigration and law enforcement officers to better track the entry, whereabouts, and departure of foreign students and exchange visitors. It is anticipated that the system will provide periodic tracking and confirmation to immigration authorities that students are, in fact, pursuing their stated goals rather than taking advantage of student and exchange visitor programs for entry into the United States for other purposes contrary to law. With this program in place, students are well-advised to take all necessary measures to maintain nonimmigrant status and depart promptly from the United States upon completion of their program participation. Employers are cautioned that students failing to maintain their status are ineligible to change their status to H-1B or other employment-authorized nonimmigrant classification. SEVIS will make such violations of status more readily available to those responsible for adjudicating nonimmigrant visa petitions. Status violators may find themselves forced to apply for a visa at the U.S. Consulate in their home countries, a process which may take several weeks or months depending on completion of security checks. Applicants who have violated their nonimmigrant status in the past should also be prepared for the additional scrutiny they will likely face at the U.S. Consulate when applying for future visas.

IV. GREATER ENFORCEMENT OF EXISTING LAWS AND CREATION OF NEW REQUIREMENTS

Export Controls

United States Export Control Laws forbid the export or re-export of controlled technology without first obtaining an export license. Exports include the actual shipment or transmission of items subject to control as well as the release of technology subject to control to a foreign national in the United States which is categorized as a "Deemed Export" even though no physical materials may leave the United States. Re-exports involve the actual shipment or transmission of controlled items from one foreign country to another foreign country as well as the release of technology to a foreign national in a third country. While export control laws have existed for a number of years, the various

branches of the U.S. government are announcing a renewed national security interest in enforcing control over the dissemination of military and potentially dual use technology.

Given the broad sweep of activity covered by the export control laws, and in particular the "Deemed Export" provision, it is important to consider the potential applicability of such laws to the following categories of people potentially exposed to controlled technology: Foreign national employees, foreign clients visiting your facilities in the U.S.; colleagues from overseas affiliates meeting with coworkers in the United States; vendors; subcontractors attending meetings or co-locating on site, joint venture partners and representatives visiting foreign national employees; etc. Exposure of any of these types of individuals to controlled technology¹ whether by in-person inspection, through paper documents or images or by exposure or access to electronic means, such as intranets or electronic databases, may be unlawful without a pre-screening from the U.S. government in the form of an Export License. Export controls do not apply to U.S. Citizens and Lawful Permanent Residents (green card holders), regardless of country of origin.

IRCA Violations

The Immigration Reform & Control Act of 1986 prohibited the hiring of employees without first verifying employment eligibility on Form I-9. This Act also prohibited the knowing hire of individuals unauthorized for employment. In an effort to further secure our critical infrastructure, enforcement measures have increased and have selectively concentrated on airports and other transportation and infrastructure targets. One well-publicized enforcement initiative is Operation Tarmac, which has resulted in the round-up of scores of foreign national employees at airports nationwide.

Visa Violations

In the aftermath of 09/11 and the realization that individuals involved in the attacks on New York and Washington, D.C. had entered the United States legally but subsequently violated their nonimmigrant statuses, there has been a continuous effort to increase enforcement against visa violators. Individuals who violate one or more of the terms and conditions of their nonimmigrant status are subject to removal (deportation) and are also ineligible for any extension or change of nonimmigrant status. Additionally, individuals who have violated their nonimmigrant status since their last entry are ineligible to adjust status to Lawful Permanent Resident (green card holder). With increased data entry and

¹ The following nonexclusive list is illustrative of the types of technology covered to varying degrees by U.S. Export Control Laws: conventional munitions; nuclear technology; rocket systems and unmanned air vehicle subsystems; navigation, avionics, and flight control technology; chemical, biotechnology, and biomedical engineering; remote sensing, imaging, and reconnaissance technology; materials technology; information security technology, including certain encryption technology & software; laser and directed energy systems technology; sensors and sensor technology; marine technology; urban planning technology; advanced computer and microelectronic technology; robotics; advanced ceramics; high performance metals and alloys.

data sharing mandated by law, enforcement authorities will have even greater capability to determine when status violations have occurred.

Immigration Benefits and Document Fraud

In an effort to eliminate document fraud and immigration benefit fraud as methods for terrorists and others in the United States unlawfully to obtain documents to facilitate their presence and activities in the United States, authorities appear to be as diligent as ever when investigating and seeking enforcement against those who obtain immigration benefits by fraud or who traffic in or utilize fraudulent documentation. As with other areas of enforcement, increased data sharing among the relevant government agencies can be expected to lead to stricter enforcement measures.

Criminal Grounds of Inadmissibility/Deportability

Many criminal activities, even seemingly minor violations, can result in inadmissibility and/or deportability for nonimmigrants and Lawful Permanent Residents in the United States. While in some circumstances the Immigration & Nationality Act provides relief from the harsh immigration consequences of criminal behavior, often such relief is discretionary and, if denied, not subject to appeal. At this point in the immigration history of the United States—post-9/11 and post Serial Sniper—individual officers charged with the exercise of discretion are very wary of exercising discretion in favor of a criminal alien, no matter how minor the criminal offense may seem. No one wants to be the one to lose his or her job and be vilified in the national media for exercising discretion on behalf of a criminal alien who may later commit much more serious criminal acts.

Social Security Numbers Only for Those with Employment Authorization

On March 26, 2003, the SSA published a proposed rule providing for issuance of Social Security Numbers to only the following individuals: (1) U.S. Citizens; (2) U.S. Lawful Permanent Residents; (3) other individuals authorized for employment in the United States; and individuals who can demonstrate "a valid non-work reason" for issuance of a Social Security Number. Valid non-work reasons, according to the proposed regulations, include the need to satisfy Federal or State law requirements for Federally-funded benefits or State public assistance where eligibility for such benefits have been established.

The verification of employment authorization has led to delays of up to weeks and sometimes months in obtaining Social Security Numbers for those who are authorized for employment. Such delays have caused inconvenience to employers who must deal with the increased complexity of adding an employee to the payroll without a Social Security Number. Nevertheless, the SSA believes this measure will enhance the U.S. national

security by reducing the degree to which individuals in the United States unlawfully or in violation of status are enabled by attaining Social Security Numbers.

Address Change Notification—Long-ignored, Now Enforced

Foreign nationals are required to advise the BCIS of any change of home address within 10 days. While in the past, the INS has not enforced this rule, efforts to better track foreign nationals in the United States since the events of September 11, 2001 have led to the enforcement of the address change notification requirement. A nonimmigrant's failure to file the address change notification in a timely fashion may be deemed a violation of status resulting in ineligibility for change or extension of nonimmigrant status or adjustment to lawful permanent resident status (green card holder).

V. THE DEPARTMENT OF HOMELAND SECURITY

Perhaps the most sweeping and dramatic change in the realm of immigration law since 09/11 is the establishment of the Department of Homeland Security and the abolishment of the Immigration & Naturalization Service pursuant to the Homeland Security Act, signed into law in November 2002. Within the Department of Homeland Security, the immigration enforcement and benefits adjudications functions are divided among three bureaus. The Bureau of Customs and Border Patrol is charged with immigration inspections, border patrol, and customs enforcement at the borders. The Bureau of Customs and Immigration Enforcement (BICE) is charged with the interior enforcement of immigration and customs laws, including investigations, detention and removal as well as immigration intelligence and implementation of SEVIS. Finally, the Bureau of Citizenship and Immigration Services (BCIS) is charged with the adjudication of benefits applications and the administration of the visa program.

While it is still too early to determine the precise ramifications of these sweeping changes on the immigration process, some general observations can be made with respect to the combination of various customs, immigration, and visa issuance functions under one department. First, it would seem that the trend toward greater information sharing among these functions will increase, rendering the enforcement functions more effective. Under the DHS, visa denials must be data entered with sufficient detail for others querying the database to determine the reason for the denial. These measures signify an attempt to acquaint the right hand with what the left hand is doing. Second, with immigration functions under the control of the department charged with our nation's security, we can expect the emphasis on security and enforcement measures to intensify and become better coordinated. Finally, we can expect the continued expansion of such programs as NSEERS and Special Registration, ultimately resulting in the gathering of information on all foreign nationals entering and remaining in the United States.