Keeping Pace with the Immigration Security Measures Implemented by the Departments of State and Homeland Security

Robert F. Loughran and Delisa J. Futch

In the past two years, we have experienced a historic re-writing of immigration law which includes dramatic changes in the practice of business and employment related immigration. The media and Congressional fallout from the tragic events of 9/11 has led to a torrent of new laws, regulations and procedures regulating the entry and stay of foreign nationals in the United States. New security measures have been implemented and previously existing but erratically observed requirements are now being strictly enforced. U.S. Consulates abroad change visa application processes and procedures on a regular basis in the government's effort to ensure greater security and integrity of the visa issuance process. The government is less responsive to business concerns in its focus on disrupting activities which may indirectly assist terrorists in gaining access to the United States, remaining in the United States, or gaining knowledge of valuable technology which could be used by suspect governments or organizations abroad. Coincidentally the same time period has seen a shockingly dramatic increase in the discovery of major cases of Citizenship & Immigration Service ("CIS," formerly the INS) and Department of State internal fraud which has embarrassed these departments and caused their employees to slow down, reassess the integrity of existing processes and rethink any exercise of favorable discretion.

Greater Information Gathering

In the Spring of 2002, the Student and Exchange Visitor Information System (SEVIS) program was created to collect ongoing information on student and exchange visitors coming to the United States to attend university or participate in training or cultural programs which were exploited by several of the 9/11 hijackers.

In September 2002, the Department of Justice initiated a special registration program called the National Security Entry-Exit Registration System (NSEERS), requiring foreign nationals of countries on an evolving secret list of between 30 and 50 "suspect" countries to provide their fingerprints, photos, and personal information to the immigration authorities upon arrival and to periodically report to the government their whereabouts and activities in the United States.

In December 2002, a call-in variation of NSEERS, referred to as "special registration" was implemented to require the registration of certain foreign nationals

already in the United States and therefore not previously subject to NSEERS registration. Failure to comply with registration is a violation of status, in and of itself, thus rendering potentially deportable a foreign national otherwise maintaining lawful status. While it seems no new additions will be made to the list of countries whose nationals are subject to registration, persons already registered, or who are already required to register upon future entry, must maintain compliance with ongoing personal appearance and information-gathering requirements on an annual basis in order to maintain lawful status.

In the Spring of 2003, immigration authorities began requiring the pre-flight electronic submission of detailed passenger data by international airlines to the immigration and customs inspectors. This allows the appropriate background checks to take place in flight before the aircraft lands in the U.S. and has already led to detentions and arrests upon arrival. This changes the status quo whereby foreign nationals manually filled out paper Form I-94 Arrival/Departure records upon arrival and were expected to turn them in upon departure. This data was then erratically and tardily data-entered into a database, rendering the system for tracking the entry and departure dates of a foreign national completely unreliable. The INS had, practically speaking, limited background information at the time of inspection and no knowledge of the whereabouts of foreign nationals once they were admitted to the United States.

This glaring gap in information has been exploited for decades not only by criminals and terrorists, but also by hurried businessmen and other non-threatening visitors. The relatively instantaneous provision of data by the airlines represents a radical shift from the pre-9/11 posture of the U.S. government and allows for a significant upgrade in the information available at the time of inspection. This new reality must be factored into any international assignment.

In April of 2003, the Department of Homeland Security (DHS) announced the launch of its newest entry-exit data collection system, the U.S. Visitor and Immigrant Status Indication Technology (U.S. VISIT) system. The DHS touts the system as a sophisticated data collection and archival system which will use biometric identifiers to make it easier for legitimate visitors to enter the United States while making it more difficult for terrorists, criminals, and visa abusers to enter. Ultimately, the U.S. VISIT system is designed to replace NSEERS and fully integrate the SEVIS program in order to comply with all congressionally-mandated requirements of a single unified tracking system. Initial phases of the program are scheduled for roll out by the end of 2003; however, already the General Accounting Office (GAO) has issued a Report identifying the program's shortcomings. The GAO Report questions the ability of DHS to maintain and manage a program of such broad scope, despite the additional $380 million appropriated for the new system.

In another effort to collect more biometric data on travelers entering the United States, the Department of State and DHS recently announced that Visa Waiver Program entrants must have a machine readable passport (which is capable of capturing biometric identifiers) for entry into the United States without a visa. While the new requirement has been postponed for most of the Visa Waiver Countries, the government's intention is

clearly to ensure the capture of biometric data, either by visa issuance or machine readable passport and the U.S. VISIT system, in order to better track persons entering and exiting the United States and ensure that the person entering and subsequently exiting are one and the same. This system will better enable enforcement activity against those remaining in the United States beyond their authorized period of stay and will provide the government with more reliable information on the identities of the individuals who overstay their welcome.

Greater Information Sharing Under The DHS

The combination of various customs, immigration, and visa issuance responsibilities into one department is designed to lead to greater information gathering in the form of special programs and initiatives aimed at data collection and analysis of information on all foreign nationals entering and remaining in the United States. In an effort to create more effective enforcement functions, measures are being introduced in an attempt to reacquaint previously disjointed branches of the U.S. government which collectively may possess significant amounts of information on a specific applicant which to date has not been reaching the "front lines". The DHS has explicitly stated its goal to increase the effectiveness of information sharing among agencies and functions within the department and with other agencies charged with various security functions. Further, the U.S. General Accounting Office recently recommended that all agencies and departments which maintain watch lists and lookout systems consolidate these data into one database accessible by all relevant parties.

Subsequently, the DHS and Department of Justice announced the formation of the Terrorist Screening Center to consolidate watch lists and provide round-the-clock operational support for federal screeners throughout the United States and around the world. The Center is to be administered by the FBI but will be an interagency effort also involving the CIA and other agencies. The new Center is scheduled to be operational by December 2003. As technology now makes the realization of this and other information-sharing programs possible, we can expect greater information sharing by all relevant parties in the future.

Increased Enforcement

The immediate effect of the sharing of all this information is a dramatic increase in the number of non-specific "hits" or "flags" which, due to pre-existing technology and security clearance considerations, are often unexplained or un-annotated at the front-line computer terminal. Requiring further inquiry, theses hits effectively halt processing and lead to the blind enforcement of restrictions until they are unequivocally resolved. It is now more likely that any violation, once entered into the system, such as a DWI, "hot check" charge or previous visa overstay will generate a hit. Any hit, regardless of severity, can suspend the application for any immigration benefit for hours, days or months until the hit is clarified and the necessary security clearances or even governmental advisory opinions are obtained, often through fax and mail correspondence, as a predicate to secure a visa or gain admission into the United States.

The government's overall efforts at more effective information gathering and sharing have already born fruit. During the month of August, when students were returning by the thousands to universities in the United States, the DHS reported turning away 190 applicants for entry as students due to fraud. The DHS was able to determine from the SEVIS database that the students were not properly enrolled and confirm this information by contacting the schools they claimed to attend. While the DHS concedes these purported students had no apparent ties to terrorism, they were attempting to gain entry into the United States by providing false information. The fact that the DHS was able to prevent such entries demonstrates that data collection and sharing has become more successful.

Visa Application at U.S. Consulates

Due to the risk of significant delay or denial from surprise hits, the visa application process at U.S. Consulates abroad now represents a larger and more critical part of the practice of immigration law. 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 few believe an applicant will disclose on his visa application that he is a member, contributor to or sympathizer of a terrorist organization, applicants who are later deemed to have misrepresented material facts are subject to inadmissibility, detention and/or removal for visa fraud.

To further assist with visa application adjudication, fraud detection, and the applicant screening process for nonimmigrant visas, DHS personnel have already been assigned to "high-risk" consular posts abroad, including those in Saudi Arabia, Egypt, Indonesia, Morocco, Pakistan, and the United Arab Emirates. Since the dissolution of the INS and the establishment of the DHS, the DHS has been charged with authority over visa issuance policy, while the Department of State has retained the visa issuance function. It now seems that the DHS will take a more active advisory and, on occasion, a vetoing role in the visa issuance process. DHS officials will likely be placed with more and more consular posts in the future and the trend toward DHS involvement in the process is expected to continue. This could lead to more denials based on information garnered from the Terrorist Screening Center, profiling, the SEVIS program, and, once in effect, the U.S. VISIT program.

More Nonimmigrant Visa Interviews

New Department of State regulations have limited the authority of consular officers to issue nonimmigrant visas without an in-person interview with the applicant. While exceptions do exist and not all applicants must be interviewed, most applicants for a first-time visa will now face an in-person interview prior to receiving their visa stamps in their passports. Further, in spite of exceptions to the interview requirement, applicants

should understand that a consular officer is never required to waive the interview requirement despite the apparent application of an exception to the requirement. A consular officer always has the right to require an in-person interview in order to eliminate his or her doubts concerning potential fraud or security risks.

Visas Condor, Eagle Mantis and Donkey Mantis

In January 2002, the Department of State implemented the Condor security name check system which compares the applicants name and its variants against multiple watch lists. 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). 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.

An alternative security check related to sensitive technology is the Visas Donkey Mantis, which involves an advisory opinion from State Department headquarters. Because no visa can issue until a favorable advisory opinion issues, this form of security check may delay the visa issuance process for many months.

Conclusion

Going forward, the increased volume and reliability of information in the possession of the government, its increased accessibility at many more points in the system, and the government's pronounced enforcement posture, will lead to drastic and potentially severe immigration consequences in situations to which little thought may have been previously given. Due to the above examples as well as changing visa requirements and procedures, revocations of certain passport and visa waiver provisions, increasing movement toward greater use of in-person visa interviews, recording and sharing of immigration-related data and events, foreign nationals must modify their travel planning and behavior to adapt. There is rarely a past immigration or criminal infraction, no matter how minor, which does not merit review by an immigration attorney. The likelihood of these past infractions being detected by immigration and consular authorities has risen dramatically. Given the current governmental posture, these "hits" will most often suspend the process until all issues are resolved to the completed satisfaction of the government adjudicator. Related delays can be lengthy and tremendously inopportune. In-house Counsel and H.R. Representatives must be aware of these new requirements, support compliance and seek expert immigration advice when any potential past violations surface.