

By Howard Hom

The Immigration Landscape in the Aftermath of September 11

New laws, policies, and regulations present challenges to immigrants and their counsel

With the arrival of the one-year anniversary of the September 11 terrorist attacks, Americans will collectively pause and contemplate the many changes to our nation in the past year. The tragic loss of life and the turmoil and devastation experienced by the families who lost loved ones obviously overshadow all other thoughts and considerations.

The fact that the attacks were perpetrated by persons who were nationals of other countries has caused and will cause many changes to U.S. immigration policies. In the days immediately after September 11, immigration regulations were amended, visa categories were modified, new immigration laws were passed, immigration detention policies were modified, immigration and customs inspections became more rigorous, and bills with immigration components were introduced in Congress to combat terrorism.¹

Nine days after the terrorist attacks, one of the first acts of the Immigration and Naturalization Service was to amend a

regulation in order to permit the INS to detain aliens longer than previously allowed.² Under the prior regulation, the INS was required to make a determination within 24 hours of an arrest whether to release the arrested alien on bond or the alien's own recognizance and to institute removal proceedings. For reasons of national security, the amendment extended the time to 48 hours after the arrest, except in the event of "emergency or other extraordinary circumstances."³

Congress also cited national security as the basis for its post-September 11 legislative endeavors. One bill passed by Congress and enacted into law amended Section 214(k) of the Immigration and Nationality Act (INA) to provide for a permanent S visa classification. The S visa will be granted to aliens who possess critical information regarding criminal or terrorist organizations and will supply or have supplied it to law enforcement agencies.⁴

Congress also passed, and the president signed, the Enhanced Border Security and Visa Entry Reform Act of 2002,⁵ which requires a closer review of all visa applicants, including students. The new law would strengthen the monitoring of foreign students in the United States and provide for a more frequent review of schools to ensure compliance with all laws.⁶

The most significant and

talked-about measure, however, is the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, which has become known as the USA PATRIOT Act.⁷ President George Bush signed this bill on October 26, 2001, after little more than a month's debate in Congress. The USA PATRIOT Act grants law enforcement sweeping authorization in its conduct of searches, its use of electronic surveillance, and its ability to detain persons suspected to be terrorists. The USA PATRIOT Act expands the definition of "terrorism" for purposes of inadmissibility and removal of aliens,⁸ requires mandatory detention of aliens certified by the U.S. attorney general to have engaged in terrorist activities, and limits judicial review.⁹

On the other hand, the new law also recognizes that noncitizens were among the victims of the terrorist acts of September 11. Thus the act generously preserves some immigration benefits for noncitizens that would otherwise have been extinguished by death or loss of employment.¹⁰ For example, if a U.S. citizen had filed a relative visa petition (INS form I-130) or fiancé petition on behalf of a spouse, child, or fiancé on or before September 11, 2001, that petition would have been nullified by the death of the petitioner. Section 421 of the USA PATRIOT Act preserves the ability of a surviving spouse, child, or fiancé of a U.S. citizen killed in the attacks of September 11 to file his or her own petition for special immigrant status using INS form I-360. If the U.S. citi-

zen had not filed a visa petition for a spouse or a child, under Section 423 of the act surviving spouses or children may file I-130 visa petitions on their own behalf within two years of the death of their U.S. citizen spouse or parent. For a surviving spouse to qualify, he or she cannot have been legally separated from the deceased U.S. citizen at the time of the citizen's death, and the surviving spouse cannot remarry and continue to seek this benefit under the new law.

For surviving spouses and children of deceased lawful permanent resident aliens, the new law provides two options. Under Section 421 of the USA PATRIOT Act, the surviving spouse or children may self-petition for special immigrant status. Under Section 423(b), petitions for a spouse, child, or unmarried adult son or daughter by a permanent resident alien killed in the September 11 attacks will not be considered nullified by the death of the petitioner and will continue to be processed as if the petitioner had not been killed. The complete list of survivors' benefits are described in Sections 421 through 423 of the USA PATRIOT Act.

The USA PATRIOT Act also amended Section 110 of the Illegal Immigration and Immigrant Responsibility Act of 1996.¹¹ Section 110 had sought to establish an exit departure control system, but opposition from various border and business interests scuttled implementation of that system. However, the events of September 11 changed the political climate, and Congress ordered the INS to fully and expeditiously implement the "integrated

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entry and exit data system.”¹²

On June 5, 2002, the Department of Justice announced the creation of a new National Security Entry-Exit Registration System, which is to be deployed as quickly as possible. The new system requires that certain individuals be fingerprinted, photographed, and registered. These individuals include all nationals of Iran, Iraq, Libya, Sudan, and Syria; certain other nationals of other countries whom the State Department and the INS determine to be heightened national security or law enforcement risks; and other aliens identified by INS inspectors based upon specific criteria to be established by the Department of Justice.

Under this new system, aliens who fall into these categories must report to the INS and register if they will be staying in the United States for at least 30 days. The aliens must visit the offices of the INS at the 30-day point of their stay in the United States and thereafter every 12 months until they depart. The aliens must also report to the INS at the time of departure. If an alien fails to register, he or she will be reported to law enforcement agencies. The alien will be subject to a \$1,000 fine and the prospect of removal from the United States.¹³

New Rules

In the aftermath of September 11, there were dozens of other immigration-related bills introduced in Congress. The fate of these bills has not yet been decided, but many other significant changes in immigration policy were wrought by agency fiat.

Several of the changes will have an impact in the areas of custody, deportation, and removal. For example, the INS and the Executive Office for Immigration Review, which is composed of the immigration courts and the Board of Immigration Appeals, promulgated an interim rule on October 31, 2001, that established a temporary automatic stay of an immigration judge's decision to order an alien released from INS custody in cases in which the INS had ordered the alien held without bond or had set a bond amount of \$10,000 or more.¹⁴ This rule, which amends 8 CFR Section 3.19(i), delays an alien's release from custody for 10 days to allow the INS to decide if it wishes to appeal the custody determination to the Board of Immigration Appeals.

Another rule that will affect aliens in custody emerged on October 31, 2001. This rule, published by the Bureau of Prisons, amended 28 CFR Parts 500 and 501 to permit the monitoring of attorney-client mail or communications of inmates and detainees in federal custody if the attorney general has certified that reasonable suspicions exist that an inmate may be involved in terrorism.

A more problematic policy change was the announcement by the INS that it had begun sending to the FBI the names of more than 300,000 aliens who have failed to depart from the United States after having been ordered deported or removed. Those names will now be included in the FBI's National Crime Information Center database, which is accessible by local police agencies. Thus any alien who has overstayed an order of deportation or removal may now be located and deported as a result of contact with local law enforcement, whether or not the alien is suspected to be in any way involved in terrorism.¹⁵

Even more significant is the Absconder Apprehension Initiative, which sets up apprehension teams of INS agents to locate aliens ordered deported or removed who have failed to surrender for deportation.¹⁶ This dragnet covers all aliens—whether criminals, terrorists, or nonimmigrant visitors who merely overstayed their period of authorized stay—who are under a deportation order but have not departed the United States.

There is a new requirement that any alien under a final order of removal who fails to surrender for removal within 30 days of the final order will forfeit all rights to discretionary relief.¹⁷ Thus, for example, an alien client who is granted the privilege of voluntary departure under INA Section 240B¹⁸ for a period of 60 days may now have to surrender within 30 days and be in custody for the balance of the voluntary departure period.

Aside from the new rules affecting the monitoring and deportation of absconders and suspected terrorists, immigration practitioners face many more mundane challenges in this new world of post-September 11 immigration law. The INS recently announced that arriving visitors will no longer be routinely authorized to stay for six months. The new policy is to grant only a 30-day stay unless an immigration inspector processing the arrival of an alien is convinced that a longer period is “fair and reasonable for the completion of the purpose of the visit.”¹⁹ This new policy, although well intended, will only add to the delays experienced by arriving passengers during immigration and customs inspections and may do little to deter a terrorist who is bent on carrying out his or her evil deeds within 30 days or is unconcerned about staying longer than permitted.

At the same time, the INS also announced new requirements for changing visitor status to student status. The rule would require that as a condition precedent for applying for a change of status to study, the alien visitor must have advised the immigration inspector at the time of arrival of his or her intent to study rather than merely visit.²⁰ This presents an interesting dilemma for the prospec-

tive student, because in the past the INS has taken the position that an alien who has the preconceived intent to study is not admissible as a visitor for pleasure.²¹

Assuming that an inspector allows an alien to enter as a prospective student visitor, the alien will encounter an additional roadblock to studying. The new rule prohibits an alien student from commencing study until after the INS has approved an application to change the alien's visitor status to student status.²² If a B-1 or B-2 visitor commences studies prior to the approval of the change of status, the visitor will be considered to be in violation of the conditions of his or her visitor status and become subject to removal from the United States.²³

For immigration practitioners who assist their clients in obtaining visas abroad, the time-honored practice of consular-shopping at U.S. consular posts at the Mexican or Canadian border may no longer be feasible. In the post-September 11 immigration scheme there are additional security clearances that will delay the scheduling of a visa appointment, clearances that may delay the issuance of the visa, and a regulatory change that makes a visa trip to a border post much more risky.

In the past, many aliens who were already legally in the United States chose to apply for a visa at one of the border posts after they had already received their visa petition approval notice, because they understood that a denial of their visa application would not preclude their reentry into the United States. For example, an alien in possession of a valid, unexpired INS document called the I-94 and accompanying documentation verifying current lawful status could travel to a contiguous country and reenter the United States notwithstanding the expiration of the underlying visa. However, in a change announced on March 7, 2002, 22 CFR Section 41.112(d) has been amended to eliminate automatic revalidation of an expired visa. The new rule eliminates this benefit to persons who apply for and are denied a visa at the border. Future restrictions in this area are expected in the form of new legislation, because Congress has instructed the Department of State to review the process in which consular officers issue visas.

Some post-September 11 changes will have an impact on the immigration practitioners engaged in routine family- or employment-based petitions and applications. In mid-April 2002, the INS instituted a new security clearance procedure called the Interagency Border Inspection System (IBIS). Prior to the approval of an application or petition for any immigration benefit, the names of the applicant and the petitioner must be checked with the IBIS. In mid-May, the INS extended the IBIS clearance to encompass applicants for naturalization, of which there has been a flood since

September 11. This new clearance requirement created a new delay for many applicants—including those for adjustment of status as well as naturalization—because some INS offices only had limited access to the IBIS and not enough officers had been trained on the new system. Surprisingly, notwithstanding this additional delay, the Los Angeles and San Diego INS offices have actually accelerated their scheduling of interviews. Applicants for adjustment of status are being called in for interviews approximately eight months after they file their applications, down from the 30 months that applicants in Los Angeles had experienced as recently as just prior to September 11, 2001.

Reorganizing the System

In addition to the myriad changes in immigration policy, the very structure of the immigration court system and the INS is about to be revamped. The U.S. attorney general announced in February 2002 a proposed rule that will reorganize the Board of Immigration Appeals by reducing the number of board members in order to speed up the appellate process.²⁴ The board will shrink to 11 persons from its current 21. The plan is to have appeals heard by a single board member in most cases rather than the current method of hearings by three-member panels. The proposed rule will have a 180-day transitional period during which the board is expected to clear up its backlog of appeals expeditiously. At the end of the 180-day period, members of the 21-member board will be asked to leave until only 11 remain.²⁵ The attorney general will designate which board members will be allowed to stay on the job. This scenario brings to mind a 1954 case in which there was an allegation that the attorney general had impermissibly influenced the decision-making process of the Board of Immigration Appeals. The U.S. Supreme Court agreed.²⁶

Lest anyone think that the attorney general is singling out the lawyers on the Board of Immigration Appeals for scrutiny, he has also commenced implementation of a major reorganization of the INS.²⁷ At the same time, Congress has weighed into the imbroglio with its own reorganization plan.²⁸ President Bush proposed the creation of the Department of Homeland Security, which would absorb the INS from the Department of Justice.²⁹ Recently the House of Representatives passed a bill creating the Department of Homeland Security that would transfer the enforcement functions of the INS to the new department while leaving the immigration benefits portion of the INS with the Department of Justice.³⁰

Notwithstanding all these changes, immigration attorneys generally report that busi-

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ness is at similar levels to the period prior to September 11, although attorneys who handle immigration litigation report an increase in business. Those attorneys who handle family and business immigration report that business is about the same as before the terrorist attacks. The decrease in certain applications appears to be attributable more to the general economic slowdown, in the high-tech sector in particular, than to the events of September 11. Although there may be a decrease in certain types of cases, such as visa processing in Canada or Mexico, immigration practitioners are certain to be counseling new clients who have concerns about being subject to heightened scrutiny and who wish to protect themselves, perhaps by applying to legalize their status. Now that the very existence of the INS is at issue and the agency is being buffeted by the political winds, the old adage among veterans in the immigration field is as true now as before—the INS needs immigrants as much as immigrants need the INS. ■

¹ 78 INTERPRETER RELEASES 1493 (Sept. 24, 2001).

² 66 Fed Reg. 48334-35 (Sept. 20, 2001).

³ 8 C.F.R. §287.3(d).

⁴ Pub. L. No. 107-45 (Oct. 1, 2001).

⁵ Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (May 14, 2002).

⁶ State Department cable, ADALC No 1.

⁷ United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁸ *Id.* §411 (a) (amending 8 U.S.C. §1182(a) (3), §1227(a) (4) (A) and (B)).

⁹ *Id.* §412(a) (adding §236A to the Immigration and Nationality Act, 8 U.S.C. §1226a (1994 ed.)).

¹⁰ *Id.* tit. IV, subtitle C.

¹¹ Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, as amended by Pub. L. No. 105-259, Pub. L. No. 105-277, and Pub. L. No. 106-215.

¹² The USA PATRIOT Act, *supra* note 7, §414.

¹³ 67 Fed. Reg. 40581 (June 13, 2002).

¹⁴ 66 Fed. Reg. 54909-12 (Oct. 31, 2001).

¹⁵ 78 INTERPRETER RELEASES 1899-00 (Dec. 17, 2001).

¹⁶ 79 INTERPRETER RELEASES 261-2 (Feb. 18, 2002).

¹⁷ 67 Fed. Reg. 31157 (May 9, 2002).

¹⁸ 8 U.S.C. §1229c.

¹⁹ 67 Fed. Reg. 18065-18069 (Apr. 12, 2002).

²⁰ 67 Fed. Reg. 18062-18064 (Apr. 12, 2002).

²¹ 9 FOREIGN AFFAIRS MANUAL §40.63 n.4.7-1.

²² 8 C.F.R. §248.1(c) (3) (Apr. 9, 2002).

²³ 67 Fed. Reg. 18062-18064 (Apr. 12, 2002); INA §237(a) (1), 8 U.S.C. §1227(a) (1).

²⁴ 67 Fed. Reg. 7310 (Feb. 19, 2002).

²⁵ *Id.* at 7312.

²⁶ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68, 74 S. Ct. 499, 503-04, 98 L. Ed. 681 (1954).

²⁷ 78 INTERPRETER RELEASES 1821 (Dec. 3, 2001).

²⁸ The Barbara Jordan Immigration Reform and Accountability Act, H.R. 3231, 79 INTERPRETER RELEASES 545 (Apr. 15, 2002); Immigration Reform, Accountability, and Security Enhancement Act of 2002, S. 2444, 79 INTERPRETER RELEASES 656 (May 6, 2002).

²⁹ LOS ANGELES TIMES, June 6, 2002, at A1.

³⁰ LOS ANGELES TIMES, July 27, 2002, at A1.