

PUBLIC INTERNATIONAL LAW

Immigration and Nationality Law

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I. Introduction

The September 11, 2001 terrorist attacks continued to have a dramatic impact on U.S. immigration policy and processing throughout 2002, with new repercussions being felt on a regular basis. Of all the changes occurring in 2002, perhaps the most significant took place in November 2002, when President George W. Bush signed into law legislation dismantling the Immigration and Naturalization Service (INS) and establishing a new Department of Homeland Security (DHS). Prior to the enactment of the DHS legislation, the Department of Justice, the INS, and the Department of State (DOS) had already increased scrutiny in the visa application and issuance process, and implemented unprecedented registration and departure control requirements for certain foreign nationals.

During this period the economic slowdown also presented vexing challenges for U.S. immigration policy. Layoffs in technology and other sectors led to an increase in enforcement actions by the Department of Labor and more comprehensive scrutiny of applications for permanent labor certifications.

Yet, despite this backdrop, several less restrictive immigration proposals became law in 2002, including provisions for spousal employment, “age-out” protection for immigrant children, and extended employment authorization for certain nonimmigrant professionals. On a broader perspective, immigrant communities in many states enjoyed increasing political power in 2002 and government studies showed that nearly half of all new workers in the United States were immigrants.¹ Nevertheless, the overwhelming direction of U.S. immigration policy in 2002 was restrictive, due largely to security-related concerns and a depressed economy, as is chronicled below.

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1. United States General Accounting Office, *Border Security: Implications of Eliminating the Visa Waiver Program*, GAO-03-38 (Nov. 2002), available at www.gao.gov (last visited May 14, 2003) [hereinafter GAO].

II. Legislative Developments

In November 2002, President Bush signed into law the Homeland Security Act of 2002, the largest U.S. federal government reorganization in fifty years.² The legislation established the new DHS, which oversees the myriad functions relating to border and homeland security that had been scattered among several dozen disparate agencies and departments. Under this new legislation, all functions of what is now the INS, including enforcement and services, will be transferred to the new DHS, along with authority for the visa issuance function, which is currently under the DOS.³ Key congressional leaders, buttressed by a "sense of the Congress" statement included in the legislation, vowed to maintain and improve immigration services. However, it is foreseeable that visa adjudications at service centers and district offices will not receive the funding, staffing, and policy attention required to prevent further delays and backlogs.⁴

Implementation of the new DHS will begin in early 2003 and may take years to be fully realized. In fact, the Bush administration has indicated that the new DHS will likely suffer through a period of "growing pains" and will not be fully operational for at least a year.⁵ Thus, beyond the ongoing delays and unpredictability experienced since September 11, 2001, any near-term impact on visa processing or procedures should be minimal.

The INS, as it currently exists, will be dismantled and its functions transferred to two new bureaus within the DHS: the Bureau of Citizenship and Immigration Services and the Bureau of Border Security. Both bureaus will be under the Directorate of Border and Transportation Security, a department of DHS.⁶ The Bureau of Citizenship and Immigration Services will include the INS Service Centers and those sections of the INS District Offices related to adjudications.⁷ The Bureau will be headed by a director, who will report directly to the Deputy Secretary for Homeland Security.⁸ Of particular note, the director is authorized to institute new pilot programs to eliminate backlogs in the processing of applications for immigration benefits.⁹ The Bureau of Border Security will include the sections of the INS involved with enforcement, including the Border Patrol, detention and removal, intelligence, investigations, and inspections.¹⁰ The Bureau will be under the authority of a new Assistant Secretary of the Bureau of Border Security, who will report to the Under Secretary for Border and Transportation Security.¹¹

The Secretary of Homeland Security, acting through the Secretary of State, is vested exclusively, under the DHS legislation, with all authority to administer and enforce visa-related laws.¹² This section of the Homeland Security Act will take effect on the earlier of

2. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

3. *Id.*

4. American Immigration Lawyers Association, *Frequently Asked Question Re: American Competitiveness in the Twenty-First Century Act & Related Legislation*, available at <http://www.isn.org/new/20001018152752.html> (last visited Feb. 12, 2003).

5. Paul Lowe, *Bizav groups optimistic about TSA/DHS interface*, AIN Online (Jan. 2003), available at http://ainonline.com/issues/01_03/01_03_bizavgroupspg8.html (last visited Feb. 12, 2003).

6. Homeland Security Act, 116 Stat. 2135.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

either the date on which President Bush publishes a regulatory notice in the Federal Register announcing that Congress has received a Memorandum of Understanding (MOU) between the Secretary of Homeland Security and the Secretary of State governing implementation of this section, or one year after the enactment of the act.

Before creating the DHS, Congress and the Administration supplemented existing anti-terrorism provisions in May 2002 with a wide-ranging border security bill, the Enhanced Border Security and Visa Entry Reform Act of 2002.¹³ Key elements of the border security legislation include: (1) recruiting at least one thousand new INS inspection and investigation officials over the next five years; (2) employing provisions to reiterate and clarify previous directives for the INS's prompt implementation of an entry-exit system; (3) implementing provisions to reiterate the need for new foreign student and exchange visitor tracking; and (4) creating requirements for the use of biometric machine-readable, tamper resistant documents.¹⁴ By the end of 2002, these border security provisions relating to terrorism, detention, and removal were just beginning to have a direct impact on most foreign nationals.

Other significant legislation signed into law in 2002 included H.R. 2277 and H.R. 2278; allowing spouses of E and L nonimmigrant business visa holders to obtain employment authorization.¹⁵ The legislation benefits dual-career families coming to the United States and may have a beneficial reciprocal impact as other countries allow U.S. spouses to work while accompanying a spouse on an international assignment. H.R. 2278 provides for work authorization for nonimmigrant spouses of L-1 intracompany transferees, and H.R. 2277 similarly provides work authorization for spouses of E-1/E-2 nonimmigrants (treaty traders/investors). Prior to enactment, spouses of Ls and Es were prohibited from working unless accorded a separate nonimmigrant classification that included employment authorization.

H.R. 2278 also includes a provision reducing the one-year employment requirement for L-1 nonimmigrants entering the United States via the "Blanket" petition process to six months.¹⁶ Previously, L-1 nonimmigrants were required to have been employed continuously by a parent, subsidiary, or other affiliate of the petitioning company for one of the three years preceding admission to the United States. Under the terms of the legislation, L-1s not coming in pursuant to a blanket petition must continue to meet the one-year requirement.¹⁷

In August 2002, President Bush signed into law the Child Status Protection Act,¹⁸ which addresses the problem of children "aging out" and losing eligibility for immigrant status because the child turned twenty-one while an application for an immigration benefit is pending. Prior to enactment, children of immigrant visa applicants had to derive their immigrant status prior to the age of twenty-one or they would be ineligible to immigrate with the rest of their family, regardless of when the application process began. Generally, the new legislation provides that the age of the child at the time of filing will be dispositive as to eligibility for immigration benefits. However, a relatively complex formula for

13. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

14. *Id.*

15. Work Authorization for Spouses of Intracompany Transferees, Pub. L. No. 107-125, 115 Stat. 2403 (2002); Immigration and Nationality Act—Amendment, Pub. L. No. 107-124, 115 Stat. 2402 (2002).

16. Work Authorization for Spouses of Intracompany Transferees, 115 Stat. 2403.

17. *Id.*

18. Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002).

assessing various age-out scenarios, agency interpretation, and changes brought about by per country backlogs may eventually limit the applicability of this provision.¹⁹

In November 2002, President Bush signed legislation allowing H-1B nonimmigrants reaching the end of their permitted six-year period of authorized stay (frequently referred to as "maxing out") to extend their stay beyond the six-year limit, if a labor certification had been pending for at least 365 days, without the need to have an immigrant visa petition filed.²⁰ The provision expanded section 106(a) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC-21).²¹ Section 106(a) previously permitted extensions beyond six years, in one-year increments, for persons for whom a form I-140, Immigrant Petition for Alien Worker, had been filed, and whose labor certification or I-140 had been filed at least 365 days before the extension was requested. The original AC-21 provision required the I-140 be filed before an H-1B extension of stay could be filed, and because processing delays for labor certification applications have substantially exceeded a year in many jurisdictions, many individuals in the green card process for more than 365 days could not benefit from this provision because their labor certification process had not been completed and the I-140 petition had not been filed. The new provision ameliorates this inequity by allowing for an extension of stay if the labor certification has been filed and remains pending for 365 days.²²

III. Regulatory and Policy Developments at INS

In 2002, the INS announced that it would more vigorously enforce a long-standing requirement that foreign nationals residing in the United States advise the INS when they change addresses.²³ For many years, all foreign nationals, including lawful permanent residents, have been required to notify the INS of each personal change of address within ten days of such change. Only diplomats and employees of international operations have been exempt from this requirement. The change of address notification is made on INS Form AR-11.²⁴ Failure to comply may adversely affect the ability of foreign nationals to live and work in the United States as each violation of this requirement is punishable by a fine of up to \$200 and imprisonment for thirty days.²⁵ In addition, a violation may constitute a ground for removal unless the foreign national establishes that the failure was reasonable, excusable, or was not willful.²⁶

The processing of visa applications and petitions slowed in almost all INS offices and jurisdictions during the past year as a result of newly instituted security measures. In April 2002, the INS began conducting enhanced background checks on all applications and petitions pending at its service centers and district offices.²⁷ Among other procedures, INS

19. *Id.*

20. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

21. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

22. 21st Century Department of Justice Appropriations Authorization Act, 116 Stat. 1758.

23. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40,581 (proposed June 13, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

24. 8 U.S.C.A § 1305 (West 1999).

25. *Id.*

26. *Id.*

27. *INS Issues Guidance on Immigration Benefits for Sept. 11 Terrorism Victims under USA Patriot Act*, 79 No. 14 INTERPRETER RELEASES 482 (2002).

employees checked the names of foreign nationals seeking immigration benefits through its Interagency Border Inspection System (IBIS), a multi-agency database of lookout information started in 1989 to improve border enforcement and facilitate inspection of individuals applying for admission to the United States.²⁸ Almost immediately, inadequate resources and insufficient training of INS staff in the use of IBIS directly resulted in extending the INS's already lengthy processing times for visa petitions and applications by several weeks.

In 2002, the Department of Justice implemented a registration and departure control process for foreign nationals of unprecedented scope. Beginning in September 2002, certain foreign nationals were required to register with the INS's National Security Entry Exit Registration System (NSEERS), so that they could be tracked and monitored throughout their stay in the United States.²⁹ The registration requirement is triggered in one of two ways: (1) the foreign national may be required to register by an immigration official at the port of entry upon arrival into the United States; or (2) after entry into the United States, the foreign national may be among a group of citizens or nationals of designated countries who are called in to appear at an INS office for registration.³⁰

As of January 2003, nonimmigrants who are citizens or nationals of Iran, Iraq, Libya, Sudan, or Syria are required to be registered, along with males between the ages of sixteen and forty-five who are citizens or nationals of Pakistan, Saudi Arabia, or Yemen.³¹ In addition, nationals or citizens of the following countries may be registered: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, and United Arab Emirates.³² However, registration at the port of entry is not limited to citizens or nationals of these countries; INS and consular officials have wide authority to designate any foreign national for special registration when an officer believes that the individual warrants further monitoring for national security reasons.³³

In 2002, certain groups of foreign nationals, including those legally in the country on valid visas, who entered the United States on or before September 30, 2002, were among those required to appear at designated INS offices for special registration ("call-in registration").³⁴ These groups include the following:

- Male nonimmigrants who were born on or before November 15, 1986, who entered the United States on or before September 10, 2002, who are citizens or nationals of Iran, Iraq, Libya, Sudan, or Syria, and who remained in the United States at least until December 16, 2002, must have registered with the INS by December 16, 2002. An additional registration period of January 27 to February 7, 2003 was added by the INS.
- Male nonimmigrants who were born on or before December 2, 1986, who entered the United States on or before September 30, 2002, who are citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen, and who remained in the United

28. *Id.*

29. Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

States until at least January 10, 2003, must have registered with the INS by January 10, 2003. An additional registration period of January 27 to February 7, 2003 was added by the INS.

- Male nonimmigrants who were born on or before January 13, 1987, who entered the United States on or before September 30, 2002, who are citizens or nationals of Pakistan or Saudi Arabia, and who remained in the United States beyond February 21, 2003, must have registered with the INS by February 21, 2003.
- Male nonimmigrants who were born on or before February 24, 1987, who entered the United States on or before September 30, 2002, who are citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, or Kuwait, and who remained in the United States after March 28, 2003, must have registered by March 28, 2003.³⁵

Individuals otherwise subject to these requirements who are either lawful permanent residents of the United States, U.S. citizens, nonimmigrants in the A (foreign diplomats) or G (employees of international organizations) nonimmigrant visa categories, parolees, grantees of asylum, or asylum applicants are not required to register.³⁶

Individuals who have already been entered as special registrants in NSEERS and who are planning to travel outside the United States must also comply with new and unprecedented departure control rules. Before departing the United States, all special registrants must report to a special departure control officer at a designated port of entry, who will verify the individual's departure against airline flight manifests and close the registration. Failure to comply with departure control rules may render a foreign national inadmissible to the United States. Willful failure to comply with the special registration requirements could result in a fine of \$1,000 or imprisonment for up to six months, and the individual could be placed in removal proceedings.

Another enhanced security procedure initiated in 2002, the INS's Student and Exchange Visitor Information System (SEVIS) implementation rule, establishes the regulatory framework for implementation of the internet-based INS system that will track F, M, and J visa participants from the time they receive their documentation until they graduate/leave school or conclude/leave a program.³⁷ SEVIS became mandatory for all schools as of January 30, 2003. All INS-approved schools are required to use SEVIS for the admission of new students and the issuance of new forms for existing students. SEVIS is an internet-based application accessible by INS, DOS, certified schools, and certified J-1 program sponsors.³⁸ The SEVIS database collects and makes accessible to authorized users data pertaining to the major events associated with international students' and exchange visitors' status, including the issuance of certificates of eligibility to participate in the program (Forms I-20 or DS-2019), visa application and issuance, and graduation/departure from the country.³⁹ Data obtained via SEVIS will also allow consular officers to confirm validity of Forms I-20 and DS-2019.⁴⁰

35. *Id.*

36. *Id.*

37. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 34,862 (proposed May 16, 2002) (to be codified at 8 C.F.R. pts. 103, 214).

38. *Id.*

39. *Id.*

40. *Id.*

Finally, in April 2002, the INS announced the publication of two new regulations governing foreign visitors and students designed to gain some measure of control over the millions of foreign nationals who enter the United States each year as visitors.⁴¹ The first rule, a proposed rule, would reduce the admission period granted to holders of B-1 and B-2 nonimmigrant visitor's visas.⁴² The rule would eliminate the minimum six-month admission period for B-2 visitors and instead base the length of admission for both B-1s and B-2s on the amount of time needed to accomplish the purpose of the visit.⁴³ The second rule, an interim rule effective upon publication, requires B-1 and B-2 nonimmigrants to wait for INS approval of a change to F academic or M vocational student status before beginning their studies.⁴⁴

IV. Regulatory and Policy Developments at the Department of Labor

Severe backlogs in many regional offices of the Department of Labor (DOL) and an economy that was more sluggish than expected made obtaining an approved labor certification in 2002 more difficult than at any time in recent memory. In response to the increasing frequency and scope of layoffs nationwide, the DOL published two memoranda, in March and May 2002, that provided guidance to DOL offices on determining the availability of U.S. workers when processing "Reduction in Recruitment" (RIR) labor certification applications.⁴⁵ The memoranda confirm DOL policy that, for labor certification cases, the DOL must examine the availability of U.S. workers, at the time that a case is filed, in the occupation and geographic location in which an employer is seeking the certification. The memoranda then clarify that a Notice of Findings (such as a Notice of Intent to Deny) must be sent to an employer if the DOL believes that a company has engaged in layoffs in the occupation and geographic area within the six months preceding consideration of the case. Finally, the memoranda state that the DOL should also look at industry-wide layoffs that may have occurred (again, in the occupation and geographic area) during the six months prior to the time that a case is considered to determine if additional recruitment is necessary. While the March memorandum focused on layoffs within occupation, the May memorandum apparently broadened the DOL's inquiry to include the issue of U.S. worker availability in the geographic area in question. This action further blurred the distinction between the layoff analysis and the analysis of whether the application was appropriate for RIR processing.

41. Limiting the Period of Admission for B Nonimmigrant Aliens, 67 Fed. Reg. 18,065 (proposed Apr. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 235, 248); Requiring Change of Status from B to F-1 or M-1 Nonimmigrant Prior to Pursuing a Course of Study, 67 Fed. Reg. 18,062 (Apr. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 248).

42. Limiting the Period of Admission for B Nonimmigrant Aliens, 67 Fed. Reg. 18,065.

43. *Id.*

44. Requiring Change of Status from B to F-1 or M-1 Nonimmigrant Prior to Pursuing a Course of Study, 67 Fed. Reg. 18,062.

45. Memorandum from Dale Ziegler, to Regional Certifying Officers, *Evaluating Reduction in Recruitment (RIR) Requests in an Environment of Increased Layoffs* (Mar. 20, 2002), available at <http://www.immigrationlinks.com/news/news1314.htm> (last visited May 14, 2003); Memorandum from Dale Ziegler, to Regional Certifying Officers, *Clarification of Reduction in Recruitment (RIR) Policy in an Environment of Increased Layoffs* (May 28, 2002), reprinted at 7 BENDER'S IMMIGR. BULL. 834 (July 1, 2002).

In May 2002, the DOL published a proposed rule to replace the current labor certification program with the Program Electronic Review Management (PERM) System, an attestation and audit based program.⁴⁶ The purpose of the proposal is to allow for the quick adjudication of labor certifications, in as little as three weeks, for permanent employment cases, which are experiencing unprecedented backlogs in many parts of the country. Under the proposed program, during the six-month period prior to filing the PERM labor certification application, an employer would conduct recruitment based on a list of mandatory and optional recruitment steps listed in the regulation, and obtain prevailing wage data from a state Labor Department office prior to the start of recruitment. Upon completion of the recruitment process, assuming insufficient qualified U.S. workers are found, the PERM application would be submitted electronically to the Labor Department and, unless selected for more thorough screening, would be approved in a matter of weeks.

Unfortunately, the proposed rule also changes certain substantive requirements that, if promulgated, may make obtaining an approved labor certification much less likely. Under current procedures, employers may list somewhat specific job requirements if they can demonstrate the legitimate business necessity of these requirements. Significantly, the proposed rule would eliminate this business necessity justification. The rule as originally drafted would also eliminate the ability of sponsoring employers to use experience gained by the employee during their employment with the company.

V. Regulatory and Policy Developments at the Department of State

In 2002, access to consular services developed into a significant issue as several U.S. Embassies and Consulates either ceased operation or significantly curtailed the scope of services provided.⁴⁷ Moreover, even when visa applications could be submitted, unprecedented scrutiny and processing delays often meant that vacations were cancelled, business meetings were postponed, or academic programs were delayed.⁴⁸

Throughout the year, the Department of State (DOS) required that certain nonimmigrant visa applicants, typically men between the ages of sixteen and forty-five from approximately twenty-six countries with large Arab and Muslim populations, be subject to a waiting period while their applications were checked against FBI databases.⁴⁹ Despite DOS indications that interagency process improvements would eventually reduce the waiting period to less than thirty days, the enhanced security procedures added, in some cases, up to six to eight weeks to the visa issuance process.⁵⁰ The new checks were mandatory for males ages sixteen to forty-five from the designated countries, and consulates and embassies had wide discretion to require the checks for any and all nonimmigrant visa applicants.⁵¹ Although the list of countries whose nationals were subject to these enhanced procedures was not formally published by the DOS, the list of twenty-six countries was believed to

46. Employment and Training Administration, 67 Fed. Reg. 30,466 (proposed May 6, 2002) (to be codified at 20 C.F.R. pts. 655, 656).

47. U.S. Embassy Islamabad, *U.S. Visa Applications are Subject to a Greater Degree of Scrutiny—Students and Other Travelers Should Plan Well in Advance* (Aug. 22, 2002), available at <http://usembassy.state.gov/islamabad/www02082205.html> (last visited May 14, 2003).

48. Murray Hiebert, *United States: The Cost of Security*, FAR E. ECON. REV., Nov. 28, 2002.

49. *Id.*

50. *Id.*

51. *Id.*

include: Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.⁵² These enhanced enforcement initiatives unequivocally demonstrated a profound and apparently long-term paradigm shift at the DOS from facilitating, in general, the admission of visitors, students, and business travelers to enforcing U.S. law so strictly that applicants to whom they issue visas are unlikely to pose a security threat.⁵³

The continued existence of the Visa Waiver Program (VWP), which allows nonimmigrants from a list of pre-certified countries⁵⁴ to enter the United States as B visitors without obtaining a visa for the United States, was also under review in 2002. Despite a government report concluding that elimination of the VWP would have potentially significant diplomatic and economic consequences, while having at best unclear national security implications, countries participating in the VWP experienced more thorough review of their eligibility.⁵⁵ For example, in February 2002, Argentina was removed from the list of eligible VWP participants.⁵⁶

VI. Litigation Related Developments

In an effort to address backlogs at the Board of Immigration Appeals (the Board), the U.S. Attorney General promulgated rules in August 2002 to reform the Board that have serious due process implications, including steps that: (1) make single-member review the norm; (2) eliminate de novo review of factual issues; (3) establish a series of time limits geared toward expediting the adjudication process; (4) reduce the Board from twenty-three to eleven members; and (5) implement a backlog elimination "transition period" of 180-days.⁵⁷ While the goal of timely and efficient adjudication of appeals is certainly laudable, the broad scope of these procedural changes raises concerns that the new rules would ultimately substitute efficiency for fairness.⁵⁸

On April 10, 2002, the Board also announced that, effective in ninety days, it would withdraw from its policy of granting reopening of motions *sua sponte* for asylum claims based solely on coercive population control policies.⁵⁹ As a result, these motions are now subject to the time and number limitations on motions set forth by 8 C.F.R. §§ 1003.2(c)(2) and (3).⁶⁰

52. *Id.*

53. *Id.*

54. "Currently there are 28 participating countries in the VWP: Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, The Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay," U.S. Dept. of State, *Visa Waiver Program (VWP)*, available at <http://travel.state.gov/vwp.html> (last visited Mar. 16, 2003).

55. GAO, *supra* note 1.

56. Termination of the Designation of Argentina as a Participant Under the Visa Waiver Program, 67 Fed. Reg. 7943 (Feb. 21, 2002) (to be codified at 8 C.F.R. pt. 217).

57. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309 (proposed Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280).

58. *The Immigration and Naturalization Service: How Should it be Restructured? Before the Senate Comm. On the Judiciary*, 107th Cong. (statement of Stephen Yale-Loehr, American Immigration Lawyers Association), available at <http://judiciary.senate.gov> (last visited May 14, 2003).

59. *In re G-C-L-*, 23 I. & N. Dec. 359 (BIA 2002).

60. 8 C.F.R. §§ 1003.2(c)(2) and (3).

In a May 2, 2002 opinion, the U.S. Attorney General reversed a decision by the Board, making clear that “[a]liens who have committed violent or dangerous crimes will not be granted a discretionary waiver to permit adjustment of status from refugee to lawful permanent resident” or granted asylum.⁶¹ Even when “technically eligible for such relief, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship.”⁶² In addition, the Attorney General stressed that “[d]epending on the gravity of the alien’s underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient.”⁶³

Lastly, in response to the recent Supreme Court decision in *INS v. St. Cyr*,⁶⁴ the INS issued a proposed rule in 2002 that would permit certain lawful permanent residents (LPRs) who have pleaded guilty or *nolo contendere* to crimes before April 1, 1997, to seek relief, pursuant to former section 212(c) of the Immigration and Nationality Act (INA), from being deported or removed based upon those pleas.⁶⁵ Under the proposed rule, eligible LPRs currently in immigration proceedings or former LPRs under a final order of deportation or removal can file a request to apply for relief under former section 212(c) of the INA effective on the date of their plea, regardless of the date the plea was entered by the court.

VII. Developments in Refugee and Asylum Law

For fiscal year 2002, President Bush authorized the admission of up to 70,000 refugees to the United States.⁶⁶ The Presidential directive set forth the following allocations: Africa: 22,000; East Asia: 4,000 (to include Amerasians and family members); Eastern Europe: 9,000; former Soviet Union: 17,000 (to include aliens admitted who were nationals of the Soviet Union or in the case of persons having no nationality, who were habitual residents of the former Soviet Union before September 2, 1991); Latin America/Caribbean: 3,000; and Near East/South Asia: 15,000.⁶⁷ Unused admissions numbers allocated to a particular region may be transferred to one or more other regions if there is an overriding need; however, the Secretary of State must consult with the Senate and House Judiciary Committees before such a reallocation.⁶⁸ An additional 10,000 refugee admissions numbers during fiscal year 2002 will be made available for adjustment of status to permanent residence for aliens who have been granted asylum under section 208 of the INA.⁶⁹

To ensure usage of all 10,000 asylum adjustment numbers, the INS developed a new

61. *In Re Jean*, 23 I. & N. Dec. 373, 373 (A.G. 2002).

62. *Id.*

63. *Id.*

64. *INS v. St. Cyr*, 533 U.S. 289 (2001).

65. Executive Office for Immigration Review; Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52,627 (proposed Aug. 13, 2002) (to be codified at 8 C.F.R. pts. 3, 212, 240).

66. CRS Report for Congress, *Refugee Admissions and Resettlement Policy* (Jan. 22, 2002), available at <http://fpc.state.gov/documents/organization/8047.pdf> (last visited May 14, 2003).

67. *Id.*

68. *Id.*

69. *Id.*

procedure for adjudicating these cases for fiscal year 2002.⁷⁰ Beginning in 2002, all asylum adjustment cases pending in district offices were to be centralized at the INS's Nebraska Service Center (NSC).⁷¹ Beginning on January 11, 2002, each field office was permitted to adjudicate any case with a priority date on or before June 9, 1998, although offices had to obtain authorization from the NSC and make an advance determination that the case is complete.⁷² Offices also were required to review cases to ensure that the alien is not eligible for adjustment under another classification.⁷³

On a related note, a federal court complaint requesting certification as a class action was filed in 2002 alleging that the Attorney General and the INS mismanaged the visa allocation system and the waiting list that determines when asylees can become permanent U.S. residents.⁷⁴ According to the complaint, since fiscal year 1994, the INS failed to distribute approximately 18,417 available asylee immigrant visas that the plaintiffs claim should have been allocated to them and class members.⁷⁵

Finally, on June 6, 2002, the American Bar Association (ABA) released recommendations on best practices for immigration proceedings in order to ensure the legal rights of detained alien children.⁷⁶ Highlighting the INS's inherent conflict of interest as the caretaker of vulnerable children it seeks to deport, ABA President, Robert E. Hirshon, noted that the approximately 5,000 unaccompanied foreign-born children who arrive in the United States each year are often denied adequate legal representation and held in juvenile jails where they are commingled with offenders, subject to strip searches, shackled, or handcuffed.⁷⁷ In the context of asylum proceedings, the recommendations encouraged immigration judges to consider using the INS's children's asylum guidelines and other child-friendly techniques for court proceedings.⁷⁸ The ABA recommendations also supported creation of an independent office of child welfare experts within the Department of Justice.⁷⁹

VIII. Conclusion

With the dismantling of the INS and the transition to the new DHS now underway, the rapid pace of change in U.S. law and immigration policy will likely continue unabated for the foreseeable future. Inasmuch as the catalyst for much of this change will be our enhanced security concerns, this country's unmistakable legal and societal challenge will involve establishing new immigration policies that balance our economic and national security interests while adhering to fundamental constitutional principles and our rich immigrant heritage.

70. Advisory, INS Issues Asylum Adjustment Processing Advisory for Fiscal Year 2002 (Jan. 11, 2002), available at http://www.immigration.gov/graphics/publicaffairs/advisories/Asylum_Memo.htm (last visited May 14, 2003).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Ngwanyia v. Ashcroft*, No. Civ. 02-502(RHK/AJB), 2003 WL 131733 (D. Minn. Jan. 14, 2003).

75. *Id.*

76. American Bar Association, *Best Practices for Immigration Proceedings Involving Alien Child Respondents Recommended by the American Bar Association*, June 6, 2002, available at www.abanet.org/poladv/new/bestpractices060602.pdf (last visited May 14, 2003).

77. *Id.*

78. *Id.*

79. *Id.*

