

Immigration Law

Legally Entering and Staying in the U.S.A.

BY CHARLES FOSTER

This article reports on legislative and regulatory developments that impacted the bases upon which foreign nationals may qualify to legally enter and work in the United States, as well as those developments impacting undocumented foreign nationals. Developments in immigration law and policy were overwhelmingly shaped in the aftermath of the Sept. 11, 2001, attack, both through congressional reaction and administrative initiatives. Given the fact that the terrorists were foreign nationals who entered as visitors and students, Congress reacted—some would say overreacted—by imposing significant new requirements with respect to the admission of foreign nationals. Under the U.S.A. Patriot Act, Congress mandated the development of the Student and Exchange Visitors Information System (SEVIS), designed to monitor students (F-1 visa holders), vocational students (M-1 visa holders), and exchange visitors (J-1 visa holders) at each and every “milestone” during their stay in the United States.

The legislation also mandated that the various U.S. security agencies share information with the State Department in conjunction with the visa issuing process abroad as well as with the U.S. Immigration and Naturalization Service (INS) in conjunction with their granting benefits under the Immigration and Nationality Act. Male applicants from 26 predominantly Muslim nations throughout the Middle East, Central Asia, and Southeast Asia were designated for special treatment. Those applicants require an affirmative response from U.S. security agencies that there is no adverse information. This has resulted in significant backlogs in visa applications to the detriment of many, including foreign students and medical patients from these countries. Further, nonimmigrant nationals of 18 of those countries (Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Qatar, Somalia, Sudan, Syria, Tunisian, United Arab Emirates, and Yemen) are required under a new National Security Entry-Exit Registration System (NSEERS) to register and be fingerprinted upon entry

and to report to the INS each year (by Dec. 15 in 2002) during their stay in the United States.

In the aftermath of Sept. 11, approximately 1,000 foreign nationals were detained for investigation. Given the difficulty of holding them on criminal charges, they were often detained on highly technical immigration violations, often for extended periods of time with no access to counsel. One of the common alleged violations of status was a little known requirement that all foreign nationals file a change of address Form AR-11 within 10 days of such change.

Perhaps the most significant development was the passage of the Homeland Security Act of 2002. Even before Sept. 11, the impetus within Congress to reorganize the INS appeared to be unstoppable, but immigration advocates had hoped that both the service and the enforcement side of the INS would be either kept together under one high level administrator in a new stand-alone agency or would be elevated within the Department of Justice. Instead, all immigration functions have now been swept

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into the new Department of Homeland Security. While the related regulations and important details are yet to be decided, it is clear that the INS as an agency, for good or bad, will not only be renamed, but significantly transformed as it is reshaped within the new Department of Homeland Security. Undoubtedly, security issues will trump ease of travel as well as business and family concerns.

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and beyond of H-1B status, but only if a labor certification had been approved and an immigrant visa petition had been filed for the nonimmigrant before the end of the sixth year. Another welcome piece of legislation was an amendment to the Immigration and Nationality Act created by the Child Status Protection Act, signed by President Bush on Aug. 6, 2002, which seeks to address the so-called "age-out" problem by which children of foreign nationals lost benefits due to the lengthy process by no longer being eligible to qualify as a dependent child of the primary applicant once they turned 21. The new law creates a fairly complex formula, but basically allows the age of the child to be fixed on the date on which the visa petition for the parent is filed.

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Most immigration law practitioners are divided between those who affirmatively represent foreign nationals in qualifying to legally enter and be employed in the United States and for some to gain Lawful Permanent Residency, versus those attorneys who represent foreign nationals who are detained and are subject to deportation/removal due to their unauthorized status within the United States. In the area of legal immigration, despite the inevitable backlash from Sept. 11, there were a remarkable series of positive developments. In the recently-enacted 21st Century Department of Justice Appropriation and Authorization Act, Section 11030A allows an H-1B non-immigrant to file for extensions after the normal six-year limitation, provided that a labor certification for an immigrant visa petition has been filed on behalf of the nonimmigrant for more than 365 days. This provision expands upon a benefit created by the American Competitiveness in the 21st Century Act of 2000, which intended to protect foreign nationals and employers from the iniquities of the government bureaucracies' delays and inefficiency, by allowing for a seventh year extension

Finally, Sept. 11 at least temporarily sidetracked any discussion of major immigration reform with respect to an estimated eight to 10 million undocumented foreign nationals in the United States, a majority of whom are from Mexico. However, based upon recent statements made by Tony Garza, the new U.S. Ambassador to Mexico, and others within the Administration, it is likely that President Bush's initiative with President Vicente Fox of Mexico to provide for both a legal mechanism to "regularize" the status of otherwise law abiding and tax-paying unauthorized aliens, as well as a workable temporary visa program for those who seek to work in the United States, will again be a point of focus for the Administration and in all likelihood there will be a series of bills that will be introduced to accomplish same.

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