American Immigration Lawyers Association

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Via email: insregs@usdoj.gov

Director, Regulations & Forms Services Division
Immigration and Naturalization Service
425 I Street, N.W., Room 4034
Washington, D.C. 20536

Re: Comments to Proposed Rule "Limiting the Period of Admission for B Nonimmigrant Aliens" INS No. 2176-01; RIN 1115-AG43 (67 Fed. Reg. 18065 (Apr. 12, 2002))

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on proposed regulations published in the Federal Register on April 12, 2002, that would eliminate the minimum admission period of B-2 visitors for pleasure, reduce the maximum admission period of B-1 and B-2 visitors from one year to six months, and restrict a B visitor's ability to extend status or change to that of a nonimmigrant student.[1] AILA is a voluntary bar association of more than 7,800 attorneys and law professors practicing and teaching in the field of immigration and nationality law.

AILA takes a very broad view on immigration matters because our member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and foreign students.

While AILA strongly supports policies that foster the national security of the United States, we believe that the INS's proposal to change the admission period for B nonimmigrant visitors and restrict their eligibility to seek extensions of stay will provide

[1] Department of Justice, Proposed Rule, "Limiting the Period of Admission for B Nonimmigrant Aliens," INS No. 2176–01, RIN 1115–AG43, 67 Fed. Reg. 18065 (Apr. 12, 2002) (to be codified at 8 CFR Parts 214, 235 and 248).

no gain in national security. Rather, we believe that the proposed rule will have a severe negative impact on tourism, investment, and other commerce, and will lead to substantial delays at the ports of entry and increased backlogs in case processing. Moreover, the proposed changes could cause highly skilled foreign professionals recruited to work in the U.S. on a temporary basis to stay away, if their family members and loved ones are unable to accompany them for the duration of their employment in this country. Equally significant, the proposed rule could lead to reciprocal treatment for U.S. citizens traveling abroad.

For these reasons, as well as those set forth in our comments below, AILA believes the proposed rule should be set aside in its entirety. Should the Justice Department insist on finalizing the proposal, however, despite the overwhelming evidence presented in these comments as to the proposed rule's significant negative impact on the U.S. economy, AILA believes that a more reasonable alternative would be to establish a minimum admission period for B-1 and B-2 nonimmigrants at three months, or 90 days, and retain current regulatory language regarding applications for extensions of stay. The fixed time frame would allow travelers to plan their trips to the U.S. with a greater degree of certainty than that offered by the proposed rule. It would also prevent the extreme delays at the ports of entry that the proposed rule's "case by case" inquiry scheme would cause, while striking a better balance between the INS's mission to enforce our immigration laws and this country's desire to welcome legitimate visitors and business guests.

We direct your attention to the following specific comments on selected portions of the proposed rule.

The Changes Proposed in the Rule Would Provide No Gain in Security

As justification for reducing the admission period for B nonimmigrant visitors and restricting their ability to extend their stay, the INS, in its preamble to the proposed rule, states that the changes "will enhance the Service's ability to support the national security needs of the United States….[and] will help lessen the probability that alien visitors will establish permanent ties in the United States and thus remain in the country illegally." While AILA supports policies that foster this country's national security, we believe that the INS's proposal to change the admission period for B nonimmigrant visitors and restrict their eligibility to seek extensions of stay will provide no appreciable gain in national security. An individual seeking to remain in the United States beyond his or her period of authorized stay would likely overstay a 30-day admission period as readily as a six-month admission period, and nothing in the proposed rule would appear to provide the Service with additional tools or resources to track and/or remove such individuals. More fundamentally, however, the proposed rule appears to be built around the faulty assumption that individuals who overstay their visas necessarily mean to do us harm. Again, while AILA supports the INS in its efforts to enforce our immigration laws, we are concerned that the proposed rule leans too far toward "equating tourism with terrorism."

AILA believes that a better approach would be to focus on improved technology, both at

the ports of entry and in the interior, and better training of INS inspectors. Our ports of entry need state-of-the-art technology with immediate fingertip access to information and intelligence from all other INS databases, as well as from other agencies such as the FBI, CIA, DOL, and DOS. Having meaningful, comprehensive data at the ports of entries so that inspectors can screen out would-be visitors who may pose a threat would do much more to enhance our nation's security than will the proposed rule's restrictions on length of admission and eligibility for extensions of stay.

AILA also questions the wisdom of any new proposal to deal with visa overstays without a comprehensive and effective entry/exit control system in place. Currently, the INS cannot accurately "flag" apparent overstays or register actual overstays as a means of enforcement. It would be premature for the INS to implement the provisions in the proposed rule without first designing and implementing the national entry/exit control system mandated by the Data Management Improvement Act of 2000 (Pub. L. No. 106–215), as amended by § 302 of the recently passed "Enhanced Border Security and Visa Entry Reform Act of 2002" (H.R. 3525). The current schedule calls for full implementation of an integrated entry/exit control system by December 2005.

The Proposal's Requirement of a "Case-by-Case" Inquiry at the Ports of Entry Would Lead to a Default 30-Day Admission Period in the Majority of Cases and Cause Extreme Delays at the Ports of Entry

The proposed rule would replace the current six-month minimum admission period for B–2 visitors with a period of time that is "fair and reasonable for the completion of the purpose of the visit." The preamble to the rule adds that, "[w]hile inspecting Service officers will make every effort to take into account language and cultural differences when eliciting the information needed to determine a reasonable period of admission, the burden still rests with the alien to adequately establish the precise nature and purpose of the visit." Moreover, the rule continues, "in any case where there is any ambiguity whether a shorter or longer period of admission would be fair and reasonable under the circumstances, a B–1 or B–2 nonimmigrant should be admitted for a period of 30 days."[2]

While the preamble reiterates that this 30-day period is neither a minimum nor a maximum, AILA is concerned that 30 days will become the "default" period of admission for a large percentage of visitors, regardless of their individual travel needs. Visitors entering the U.S. currently spend an average of little more than one minute with an INS inspector at the port of entry. Despite last week's passage of the "Enhanced Border Security and Visa Entry Reform Act of 2002," section 403 of which repealed the previous 45-minute time limit on the inspection of arriving flights, current INS resources continue to make it unlikely that INS inspectors will be able to devote the amount of time necessary to make a reasoned determination as to an appropriate period of stay for each individual visitor. Moreover, requiring primary immigration inspectors to elicit from each international visitor the details of his or her prospective visit in order to determine "a period of admission that accurately comports with the stated purpose of the visit" will

[2] 67 Fed. Reg. 18065–66 (Apr. 12, 2002).

significantly add to the time required to process arriving travelers, causing missed connections and additional scheduling problems for the already depressed travel and tourism industry.

Even where the visitor has documentation to justify an extended period of stay, communication and language barriers, coupled with the need on the part of the INS inspector to "keep the traffic moving," will likely lead to routine use of the "default" 30-day admission period. The deleterious impact of this result on travelers requiring additional time in the U.S. is compounded by the fact that the proposed rule also seeks to rewrite the law governing eligibility for extensions of stay, restricting their availability, for the most part, to "cases that have resulted from unexpected events…[or] compelling humanitarian reasons."[3]

The Current System Should Be Retained, as it Minimizes the Need for Unnecessary Extensions, While Providing INS Inspectors with Sufficient Flexibility to Deviate from the Six-Month Minimum Stay When Warranted

Current INS Operations Instructions provide the following guidance to INS inspectors regarding the admission of B nonimmigrant visitors:

> ***If found admissible***, a B-2 shall be admitted for 6 months. The district director *may delegate individual review of the minimum admission period* no lower than a supervisory inspector. Referral of individual cases to the supervisor may occur when it is evident that the alien is admissible, but does not have sufficient resources available to maintain a 6 months visit. The Service does not require that an applicant for admission have with him or her funds to maintain a 6-month stay, but the applicant must demonstrate that he/she has access to sufficient resources.
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> A B-1 shall be admitted for a period of time which is fair and reasonable for completion of the purpose of the trip. Any decision to reduce a B-1's admission from the time requested shall be authorized by a supervisor.[4]

The current system makes good sense in that it allows the INS to focus its limited resources on "who," rather than on "how long." In other words, the difference between admitting an individual for 30 days, 90 days, or longer should not be a material concern if that individual's activities in the U.S. are appropriate for his or her visa classification and he or she is otherwise admissible.

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[3] Id. at 18066.

[4] INS Operations Instruction 214.2.

In addition, the current six-month minimum admission period minimizes the need for the INS to adjudicate additional applications for extensions of stay by nonimmigrant visitors for pleasure and business. In fact, the preamble to the proposed rule cites the fact that "The Service implemented this 6-month minimum admission period many years ago to reduce filings of extensions of stays from aliens who develop a need to stay in the United States longer than the initial period of admission."[5] With the INS under intense pressure from Congress and the Administration to reduce backlogs, it makes little sense to implement a system, such as that set forth in the proposed rule, that will generate myriad additional and unnecessary filings, and lead to enormous delays at the ports of entry.

A more appropriate focus for the INS would be on the provision of adequate resources to the ports of entry so that immigration inspectors have the tools necessary to make informed admissions determinations. Such resources include, but are not limited to, adequate numbers of thoroughly trained personnel, investigative support and state-of-art database systems that contain the necessary intelligence information.

The Proposed Rule Would Have an Adverse Impact on Visiting Family Members and Cohabiting Partners

AILA members are particularly concerned about the potential impact of a de facto 30-day rule on certain family members and cohabiting partners of foreign nationals employed in the U.S. Family members of foreign national employees often visit for extended periods of time. Mothers and grandmothers come to help out with a new baby, elderly parents need companionship, college-age children visit for the summer, and unmarried partners wish to remain together. In addition, foreign national parents often come to care for foreign students under the age of majority. Families often plan and save for these visits long in advance.

It is also common practice for cohabiting partners to accompany E, H, and L and other nonimmigrant workers to the U.S. for an extended period. The INS officially recognized this particular use of the B-2 visitor's visa in 1994, sanctioning its use for long-term visits to accompany a nonimmigrant worker.[6] Last year, the State Department formalized this practice by amending the *Foreign Affairs Manual* to provide specifically for the issuance of B–2 visas to cohabiting partners, as well as to extended family members and other household members not eligible for derivative status, such as the parents and adult children of these nonimmigrant employees, as well as parents coming to care for F-1 students under the age of majority.[7] Moreover, in addition to family members of nonimmigrants who are not eligible for derivative status, the *Foreign Affairs Manual* also provides that "B-2 classification may also be accorded to a spouse or child who qualifies

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[5] Id. at 18065.

[6] Letter from Jacquelyn A. Bednarz, Chief of the Nonimmigrant Branch, INS Office of Adjudications, March 30, 1994, discussed and reproduced in 71 Interpreter Releases 993, 1009 (Aug. 1, 1994).

[7] U.S. Dept. of State, 9 *Foreign Affairs Manual* (*FAM*) 41.31 n11.4. See also "State Department Instructs on B-2 Classification for Cohabiting Partners," 78 Interpreter Releases 1175 (July 16, 2001); "INS Discusses B-2 Eligibility for Parents of Underage F-1 Students," 73 Interpreter Releases 970 (July 22, 1996).

for derivative status (other than derivative A or G status) but for whom it may be inconvenient or impossible to apply for the proper H-4, L-2, F-2 or other derivative status."[8] For all cases in which the above classes of individuals plan to remain in the U.S. for more than six months to accompany the nonimmigrant employee, the *Foreign Affairs Manual* instructs that "they should be advised to ask INS for a one-year stay at the time they apply for admission. If needed, they may thereafter apply for extensions of stay, in increments of up to six months, for the duration of the principal alien's nonimmigrant stay in the U.S."[9]

These family members and cohabiting partners are, for the most part, not eligible for other nonimmigrant visas. In such cases, the 30-day admission period envisioned under the proposed rule would be woefully inadequate. Moreover, most such individuals would be rendered ineligible for an extension of stay under the proposed rule's amended extension language, as the need for such an extension would be neither "unexpected" nor required for a "compelling humanitarian need."

Should the proposed rule become final, many individuals considering a trip to the U.S. to accompany a family member or non-spouse partner during a period of temporary employment may decide to stay away. Accordingly, it is also likely that some of the nonimmigrant workers affected by such a decision will decide not to accept a position in the U.S. if their family members or companions are unable to remain with them, a fact that will have a direct and adverse impact on our economy.

The proposed rule will also affect the ability of parents of U.S. citizens who reside abroad to visit their U.S. families for practical periods of time. While parents of U.S. citizens are immediately eligible to immigrate to the U.S., most of them choose not to become permanent residents. However, many of them enter the U.S. for extended stays to visit with grandchildren and other relatives. The majority of these parents of U.S. citizens do not speak English well and will not be able to communicate their intentions to an officer at the port of entry in the brief time available for inspection. Overall, the proposed regulation will reduce the ability for extended families to remain connected. A trip to the U.S. is extremely costly and a limited 30-day stay will be discouraging to most elderly parents. Additionally, those parents that do enter the U.S. will be forced to apply for costly INS extensions of stay, continuing to overburden the system in ways that can easily be avoided by lengthening the initial period of stay to a more reasonable time.

The Proposed Rule Would Hinder Legitimate Business Activity and Render the U.S. Less Attractive to Potential Investors

According to the *1999 Statistical Yearbook of the Immigration and Naturalization Service* ("*1999 Statistical Yearbook*"), approximately two-thirds of the 151,353 foreign nationals admitted to the U.S. in E status in 1999 were investors. These individuals were either principal investors or key employees of international companies that have made

[8] U.S. Dept. of State, 9 *FAM* 41.31 n11.4.
[9] Id.

substantial investments in the U.S. Many first entered the U.S. as visitors for business to evaluate investment opportunities or to establish the new offices, plants and warehouses for their foreign companies. The *Foreign Affairs Manual* provides that exploring investment opportunities in the U.S. is an appropriate use of the visitor for business (B–1) visa. Indeed, over 4.5 million visitors in 1999 were visitors for business, many of whom were prospective investors. Without an opportunity to research and plan effectively their business investment by seeking out prime locations, quality employees, and adequate resources, foreign investors will look elsewhere for a more hospitable country in which to invest their funds and conduct business. One of the prime considerations for any business entity seeking an appropriate investment is the ability to control and predict the factors and forces that will impact on the success of the investment. The inability to predict with any degree of certainty the length of time that critical personnel may be permitted to remain in the U.S. and the inability to extend the period of admission to meet business demands will become a controlling factor driving investment to other countries.

Other legitimate business activities would also suffer were the proposed rule to become final. As an example, the B–1 visa is widely used by international companies for the short-term transfer of key personnel to the U.S. Both the State Department and the INS recognize the "B–1 in lieu of H" visa as a valid use of the visitor for business classification. The *Foreign Affairs Manual* provides:

> There are cases in which aliens who qualify for H–1 or H–3 visas may more appropriately be classified as B–1 visa applicants in certain circumstances, e.g. a qualified H–1 or H–3 visa applicant coming to the United States to perform H–1 services or to participate in a training program for which the applicant will receive no salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay. For purposes of this Note, it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad….[10]

The proposed regulation would severely circumscribe the ability of multinational employers to use the B–1 in lieu of H visa. As the above note to the *Foreign Affairs Manual* indicates, there are cases in which the B–1 is a more appropriate visa than the H, as the individual will continue to be paid from the foreign company, but may need to be in the U.S. for several months. The uncertainty surrounding an initial period of admission under the proposed rule, together with the proposal's restrictions on eligibility for extensions of stay, would likely render the use of the B–1 visa an "historical curiosity" for this important class of nonimmigrant workers. The increased cost and time required to transfer key personnel to the U.S. for brief periods of work or training would almost certainly result in international companies opting not to do business in this country.

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[10] U.S. Dept. of State, 9 *FAM* 41.31 n8.

The Proposal's Restrictions on Eligibility for Extensions of Stay Would Have a Widespread Negative Impact

As stated throughout these comments, AILA believes that the proposal to restrict eligibility for an extension of stay to "cases that have resulted from unexpected events…[or] compelling humanitarian reasons," would have a far-reaching negative impact on the U.S. economy. The INS has long recognized the value to the U.S. of welcoming visitors for business and tourism. In its *1999 Statistical Yearbook*, the Service hails the open admissions policy of the U.S. and rightly notes that encouraging tourism is a "boon to the U.S. economy."[11] Contrast that reasonable policy to the underlying rationale of the proposed B extension regulations:

> "Requests for extensions of stay only heighten the probability that alien visitors will establish permanent ties in the United States and thus remain in the country illegally."[12]

While AILA supports policies that foster the security of the U.S., we are troubled by this stated ideological underpinning that views a mere request for an extension of stay as an act, that in all "probability" will further illegality. Can there be any question that with this underlying premise, INS examiners who adjudicate applications to extend stay will tend to deny them?

As discussed above, AILA is concerned that 30 days will become the default period of admission for a large percentage of visitors, regardless of their travel needs. Given that the INS appears convinced that "[v]irtually all B visitors with legitimate business or tourism interests are able to accomplish the purposes of their visits in less than six months,"[13] (in fact, in 30 days), and assuming that most non-English speaking visitors will not be able to "establish the precise nature and purpose" of their visits, and will therefore be admitted for only 30 days, it is clear that many visitors will need to file applications for extensions of stay.[14]

The Standards for B Extensions. The Service is rewriting the law when it says: "Under the proposed rule, all B visitors for business or pleasure will continue to be eligible to apply for extensions of stay, *but only in cases that have resulted from unexpected events… [or] compelling humanitarian reasons*…."[15] AILA is deeply troubled by the Service's new definition of "eligibility" for filing an application to extend stay.

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[11] 1999 Statistical Yearbook of the Immigration and Naturalization Service, "Temporary Admissions for Fiscal Year 1999," at 3.

[12] 67 Fed. Reg. 18065–66 (Apr. 12, 2002).

[13] Id. at 18066.

[14] See, e.g., P. Herrera, "Part-time residents from abroad try to decipher proposed INS rule change," naplesnews.com (Apr. 24, 2002) (reporting that: "Chris Bentley, a public affairs officer with the INS, said most people would be granted 30 days.").

[15] 67 Fed. Reg. 18066 (Apr. 12, 2002).

The proposed rule would add a new meaning to the term "nonfrivolous." In erecting such stringent limitations on extensions, and by bringing into question an individual's basic eligibility to file the application for extension of stay, we fear that the INS is rewriting the very meaning of the term "nonfrivolous," which up to now, has clearly been defined as "having an arguable basis in law and fact."[16] Under the proposed rule, an "arguable basis" would appear to become a documented, significant, unexpected circumstance, out of the alien's control, which prevents him or her from leaving. Moreover, as discussed below, we fear that the standards for extension as enunciated in this rule, and the possible new meaning of "nonfrivolous," will have severe consequences on the visa voidance provisions of INA § 222(g), and the unlawful presence provisions of INA § 212(a)(9)(B).

Who Would be Eligible to Apply for an Extension of Stay Under the Proposal? At newly added 8 CFR § 214.2(b)(6), the INS states that it will grant an extension of stay *only* if the alien establishes that:

(a) an "unexpected circumstance"

(b) which the Service defines as a "documented" and "significant" situation or event

(c) that is "out of the alien's control" and

(d) "prevents" the alien from departing by the end of his or her authorized period of admission.

By this standard, almost no one will qualify for an extension of stay, as is illustrated by the following examples.

1. A visitor presents himself for admission at the port of entry. He states that he is in the U.S. on a B-1 in lieu of H-1B visa for an assignment that may last from three to six months. The INS inspector decides to admit the visitor for three months. As predicted, the assignment goes on longer than three months. Can this B-1 visitor apply for an extension? Not under the newly proposed standards. Since the visitor told the inspector on day one that the project would take up to six months, it's not an "unexpected circumstance."

2. A tourist comes to the United States to visit Disney World. The inspector admits her for 30 days. After two weeks, she decides she would like to extend her stay to visit

[16] See, e.g., Memorandum of Michael A. Pearson, then-Executive Associate Commissioner of the INS's Office of Field Operations, Mar. 3, 2000 (AD 00-07), "Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act" (hereinafter "Pearson Tolling Memo"). ("To be considered nonfrivolous, the application must have an arguable basis in law and fact and must not have been filed for an improper purpose.").

family and friends, and to see the Grand Canyon and Golden Gate Bridge. Can she extend her stay? While the circumstance of wanting a longer sojourn may have been unexpected to this tourist, it is unlikely that the Service would consider it a "significant" event that is "out of the alien's" control. And clearly, while the tourist may want very much to stay longer, her desire to do so will not "prevent" her from departing within 30 days.

3. A visitor comes to Arizona for its dry and sunny climate. He has rented a home for two months and tells the inspector precisely that. He is admitted for two months. Toward the end of his intended stay, he decides he would like to stay for another month. Can he extend his stay? While he did not expect that he would want to stay longer, again, it is unlikely that the Service would find a "significant" event, "out of the alien's" control. Yet, if he *owned* that home instead of renting it, he would benefit from proposed § 214.2(b)(6)(ii)(G), the provision that would allow for extensions for those who "own" a home in the United States and occupy it on a seasonal basis. Does this disparate treatment of owners over renters make any sense?

The very strict, if not extreme, standard for granting extensions of stay will put a serious damper on tourism and commerce. Business visitors will not have the flexibility to extend their stays to develop business or pursue business leads, when projects or other business activities demand that they do so. Rather than adhering to a reasonable standard of business practicality, or even business necessity, the Service would allow for an extension of stay only under the most limited and extenuating circumstances. Similarly, tourists will find themselves with no flexibility in their agendas, and family members and partners of highly skilled foreign workers will be unable to accompany those workers to the U.S. for long-term visits.

The Compelling Humanitarian Reason as a Basis for Extension. The INS, in its proposal, does make allowances for "compelling humanitarian reasons" and, in those circumstances, would grant an extension of stay. What are those compelling humanitarian reasons? While the Service does not provide an inclusive list of compelling grounds, the only stated reasons are medical treatment for the alien, medical treatment or special education for the alien's *minor* child, or medical treatment for an *acutely ill immediate family member.*

AILA applauds the Service for acknowledging the exigencies of medical treatment, but points out that if the initial period of admission were more generous, an extension of stay might not be necessary. We would also point out that it is in just those circumstances that cry out for humanitarian consideration that a visitor may be unable to submit a timely application for an extension of stay. A visitor who is in the U.S. for chemotherapy and needs to remain longer than the 30-day period of admission for additional treatment may be least likely to be able to attend to the complications of filing an application for extension of stay.

Other Stated Grounds for Extensions. We are pleased that the Service acknowledges that a foreign national in the U.S. in B-1 status to establish a new office that might later

support L visa consideration will be granted an extension of stay.[17] However, as noted previously in these comments, we would hope that the final rule will also take into account the B-1 visitor who is seeking to make an investment in the United States which could qualify him for status as an E-2 investor. Long recognized in the *Foreign Affairs Manual* as an appropriate reason to issue a B-1 visa,[18] the business visit of one here to establish such an enterprise should be included in the final rule as one eligible for favorable B-1 extension consideration.

The final rule should also render eligible for favorable B-1 extension consideration the less traditional B-1 visitors discussed earlier in these comments, such as family members and cohabiting partners of nonimmigrant workers who are not eligible for derivative visa status, parents of foreign national students under the age of majority who come to the U.S. to care for such students, elderly parents of U.S. citizens, and spouses and children of nonimmigrant workers who qualify for derivative status but for whom it may be inconvenient or impossible to apply for such status.

In addition, while AILA appreciates the proposed rule's provision for extensions of stay for those who own a home in this country and who occupy that home on a seasonal or occasional basis, we find problematic the requirement that the home be "owned" by the "alien."[19] There are many foreign nationals who regularly travel to the U.S. on a seasonal basis and rent, but do not own, their residences. Others own time share properties, or stay at hotels or lodges on an extended basis. They, too, should be included on the list of individuals for whom an extension will be granted. Allowance must also be made for those whose "ownership" of a property is not direct, for example, those whose property may be held by a trust or corporation.

Extensions of Stay under Current Law. AILA sees no good reason to change the current standards for granting extensions of stay to visitors for business or pleasure. These applications receive a high level of scrutiny under current law. In support of their requests for extension of stay, visitors are regularly asked to make a showing that they have a residence abroad that they do not intend to abandon, that they were unable to accomplish the temporary purpose of the trip within the period granted, that they are not attempting to prolong their stay indefinitely, and that they are capable of maintaining themselves financially for any period of stay requested.

There is no reason to place any greater burden on visitors to our country. Nor is there any reason to believe that the limited opportunities for extensions of stay under the proposed regulations will protect our national security against those who intend to do harm to our country.

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[17] Proposed 8 CFR § 214.2(b)(6)(ii)(G).
[18] U.S. Dept of State, 9 *Foreign Affairs Manual* 41.31 n.6.7.
[19] Proposed 8 CFR § 214.2(b)(6)(ii)(G).

The Proposed Rule Would Lead to Unlawful Presence and Visa Voidance for Many Individuals

Let us assume that a B visitor files an application for extension of stay. He arrived in the U.S. as a tourist, fell in love with the Southwest, and wants to spend some additional time in Santa Fe. He files an I-539 application, but departs before it is adjudicated. What is the effect of this departure on future travel to the U.S.?

According to the Pearson Tolling Memo,[20] the next time the foreign national presents himself for admission at a port of entry, he must prove to the inspector that the abandoned application for extension of stay was timely filed and nonfrivolous. But under the proposed regulation, the meaning of nonfrivolous is no longer clear.

Even if the application was not frivolous, the foreign national would need to establish to the satisfaction of the inspector at the port of entry that the application was timely filed, meaning, the alien must travel with copies of a dated filing receipt (if, indeed, he ever received one, since many tourists do not have fixed addresses at which they can receive mail), or a canceled check payable to the INS, or some other credible evidence of a timely filing. If applying for a new visa, the foreign national would have to make the same showing to a consular officer.

The Pearson Tolling Memo, written when "nonfrivolous" had a generally accepted meaning, which is now open to question, raises another concern. Under the Memo, if the foreign national filed a timely, nonfrivolous application for extension of stay, did not engage in unauthorized employment, and then departed the country while the application was pending, he is not subject to the three- or 10-year bar to admission. Is that still the case in light of the proposed rule?

The Visitor Waited for an Answer on His Application, and the Answer Was "No." Again, we raise our concerns on what we are certain will be an escalating number of denials of extension applications. The Pearson Tolling Memo says this:

> "If the timely filed C/S or E/S application is denied because it was *frivolous* or because the alien engaged in unlawful employment, any and all time after the Form I-94 expiration date will be considered unlawful presence, if the alien was admitted until a specific date." (Emphasis added.)

We believe that the Service will in fact deny many applications that do not meet its exacting and unrealistic standards, and cite as a reason that the application was "frivolous." Not only will the alien then be accruing days in unlawful presence, but he will also be subject to the strictures of INA § 222(g): His visa will be automatically voided, and he will thereafter be required to apply for all future visas in his home country.

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[20] See supra note 16.

We raise these troubling questions to highlight the insidious, and perhaps unintended, possible consequences of what appears to be a sliding definition of "nonfrivolous," and ask the Service to reconsider its new standard in all of its possible ramifications.

The INS Should Clarify Status of Canadians Under the Proposed Rule

Canadians enter this country with relative freedom. So cordial is the relationship between our countries, that Canadians in the U.S. as tourists or as business visitors are not even given an I-94 on admission. Under current law, a Canadian who enters as a tourist is admitted for six months without an I-94. How will Canadians be treated under the new scheme? If a Canadian enters the country to spend the winter in Florida, as many do, will she be admitted for 30 days, six months, or something in between? When will she need to file an application for extension of stay? Or will she have to file an extension? If the answer to the last question is yes, will she be held to the new standard described above? There must be guidelines in the final rule that clarify the status of Canadian visitors.

The INS Should Clarify that its Proposed Changes do not Apply to Visa Waiver Program Participants

Neither the commentary nor the text of the proposed regulation references the application of the regulation to the Visa Waiver Program. The Visa Waiver Program, initially a pilot program enacted by the Immigration Act of 1990, and made permanent by Congress in October 2000, has served very successfully its dual purpose of promoting travel and tourism to the United States and reducing the need for consular services for short-term visitors. The *1999 Statistical Yearbook* reported that over 16 million visitors were admitted under the Visa Waiver Program in 1999. There are well-established limitations to the Visa Waiver Program, including the prohibition for an extension beyond 90 days and the inability to change nonimmigrant status. These restrictions are reasonable controls and reflect an appropriate balance for the millions of visitors annually from the designated countries that seek short-term admissions. The restrictions are effective and not onerous because they are well known and there is certainty to the process.

The INS should clarify that the proposed regulation does not apply to the Visa Waiver Program. Any policy that undermines the certainty and predictability of the Visa Waiver Program would destroy its benefits to the U.S. economy and the international traveler. The uncertainty generated by the proposed rule's provisions should not be extended to the Visa Waiver Program.

The Justice Department's Assessment of the Proposed Rule's Prospective Economic Impact is Flawed

In an effort to avoid classifying the proposed rule as a "major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996" (a classification which would subject the rule to further review), the INS states that the rule "will not result in an annual effect on the economy of $100 million or more." However, this statement and its

presumed underlying source data do not stand up to closer scrutiny. For example, the Southwest Florida region is, to a large extent, dependent upon tourism and home ownership by retirees and vacationers. There have been extensive studies performed on various segments of this market. One such study revealed that the total annual impact of tourism alone in Lee, Collier and Charlotte counties is estimated to be as much as $2.7 billion a year. Other studies have shown that an estimated 15,000–25,000 Europeans own homes in this region. Another study, based upon Southwest Regional airport arrivals and hotel/motel overnights in the year 2000 counted at least 268,000 European visitors to this region. Conservatively assuming an average annual expenditure of $4,000 per visitor in goods and services, including real estate-connected purchases, these visitors and/or homeowners alone contribute over $1 billion annually to the economy of this region.

Similarly, in 2000, 12 percent, or approximately 507,400 of the international tourists who traveled to New York City stayed 30 days or more in the U.S. That figure represents $337.4 million in visitor spending in New York alone.

Categorizing this proposal as a minor rule change is disingenuous and we urge the Justice Department to reassess the rule's prospective economic impact and provide for the concomitant level of review, as required by law.

Conclusion

Our immigration strategy should be structured to keep out those who mean to do us harm, while admitting those who support the economy of the United States and make our country stronger. We must be able to identify and separate out low risk tourists, investors, and visiting family members and facilitate their entry rather than discouraging it. The proposed rule's provisions limiting the admission period of B-1/B-2 visa holders and restricting their ability to seek legitimate extensions of stay will do nothing to enhance our national security. Rather, the rule will merely discourage low-risk travelers, convincing visitors, part-time residents, investors, and international business concerns that they are better off spending their vacation, retirement, and investment funds in a more welcoming environment. Moreover, the proposal's failure to recognize and make allowance for the commonplace extended stays of family members and cohabiting partners of nonimmigrant temporary employees is anti-family and could lead to a shortage of highly skilled workers in this country and an attendant decline in productivity, as qualified foreign national employees recruited for temporary employment in the U.S. decide to go elsewhere upon learning that their loved ones will be unable to accompany them during their temporary stay in this country.

The events of September 11 took a serious toll on the economic well being of the United States. AILA fears that the proposed rule will send the economy into a further downward spiral by creating new barriers to tourism and investment and a system that could inadvertently send international visitors into overstay status with serious implications for any return travel to the U.S. Countries whose nationals are placed in such a position may well decide to treat U.S. visitors reciprocally.

We urge the Department of Justice to revisit these proposals in light of these comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION