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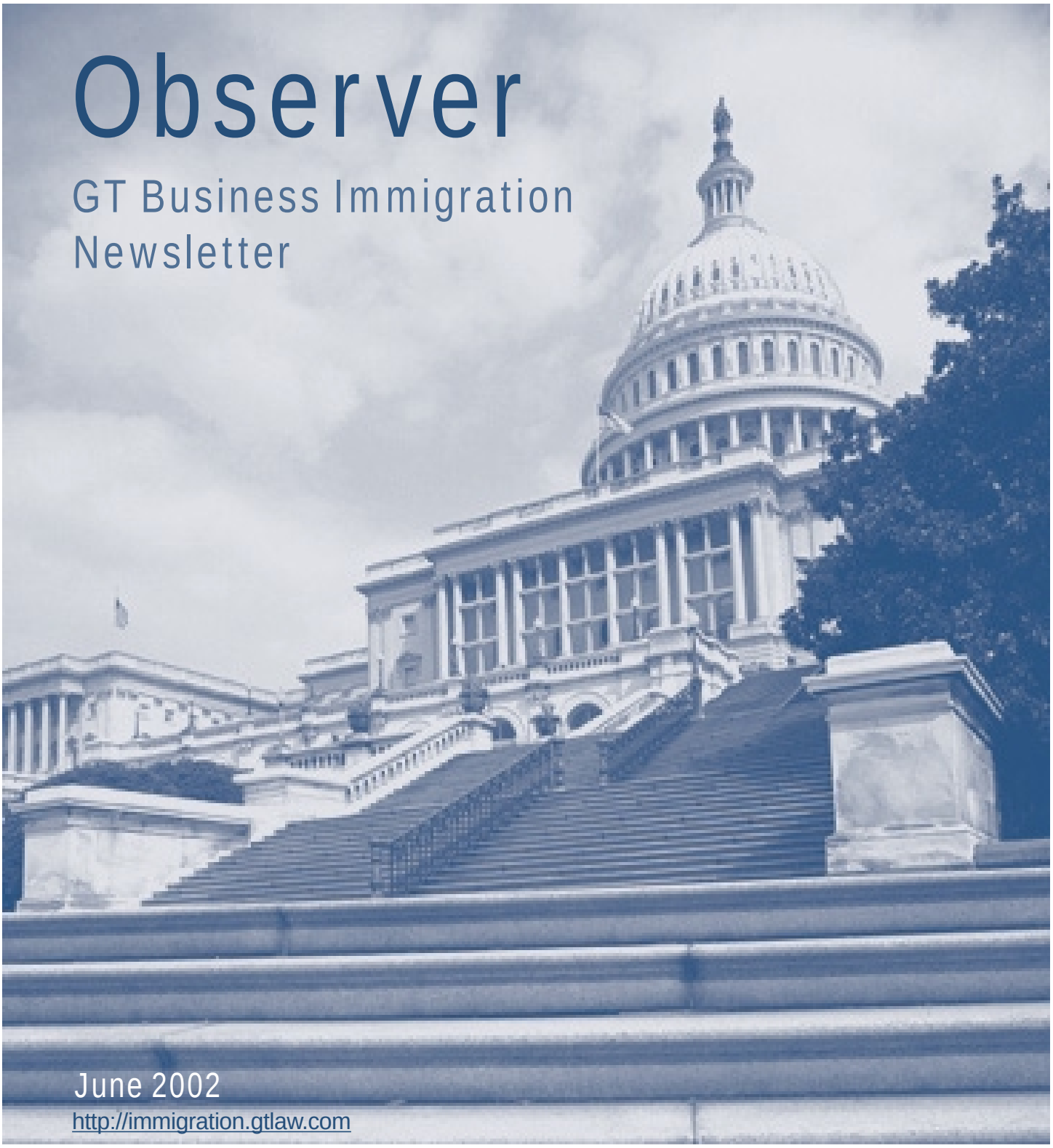

June 2002

http://immigration.gtlaw.com

Observer

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The GT Business Immigration Observer is published by the business immigration practice group at Greenberg Traurig. GT Of Counsel, Dawn M. Lurie serves as the Editor of the Observer. The newsletter contains information concerning trends and recent developments in immigration law. Moreover, the authors analyze and report on relevant immigration related issues as well as legislative issues.

Finally, the GT Observer serves as an invaluable resource to individuals, and human resource managers, recruiters and company executives who must keep current on these matters.

SPREAD THE WORD

If you have enjoyed reading this newsletter and have found useful information in it, we'd greatly appreciate your help in spreading the word about it. You can do this by forwarding a copy to your friends and professional peers and telling them about it.

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New Department of Homeland Security to be Created

The White House announced on June 6th its intent to create a new Department of Homeland Security in order to develop and execute more effective policies with regard to this function. According to a White House press release, the new Department would consist of four divisions: Border and Transportation Security, Emergency Preparedness and Response, Chemical, Biological, Radiological and Nuclear Countermeasures, Information Analysis and Infrastructure Protection. The changing nature of the threats facing America requires a new government structure to protect against invisible enemies that can strike with a wide variety of weapons. Today no one single government agency has homeland security as its primary mission. In fact, responsibilities for homeland security are dispersed among more than 100 different government organizations. America needs a single, unified homeland security structure that will improve protection against today's threats and be flexible enough to help meet the unknown threats of the future.

According to the White House plan, the INS would be included within the new Department in the Border and Transportation Security Division. For more information on this division on this division visit the following link to the Homeland website at: http://www.whitehouse.gov/deptofhomeland/sect3.html However, it appears the INS would still under-go some form of its currently-anticipated reorganization with the processing of immigration benefits and services being separated in some way from the enforcement activities. While it also appears the State Department would still be involved in processing and issuing visas through U.S. Embassies and Consulates abroad, the new Department would "assume the legal authority to issue visas to foreign nationals and admit them into the country" so it is unclear how the new Department will interact with the State Department. Secretary of State Colin Powell, has voiced concerns over the new structure. Finally, the Department would also incorporate the United States Customs Service (currently part of the Department of Treasury), the Animal and Plant Health Inspection Service (Department of Agriculture), and the Transportation Security Administration (Department of Transportation) along with the Immigration and Naturalization Service and Border Patrol as part of its border security jurisdiction.

For more information see:
http://www.whitehouse.gov/deptofhomeland/

Immigration and Naturalization Service Proposes Amendment of Academic Honorarium

The Immigration and Naturalization Service (INS) published a proposed rule in the Federal Register, relating to the acceptance of academic honoraria by nonimmigrants admitted to the United States as B visitors. The amendment is the result of the changes in the Immigration and Nationality Act brought about by the American Competitiveness and Workforce Improvement Act of 1998. This is a proposed rule and comments must be submitted on or before July 29, 2002.

Specifically, the amendment clarifies that foreign nationals in the United States for whom opportunities arise subsequent to arrival in the United States may accept honoraria when they are in either B-1 or B-2 status. Foreign nationals not yet in the United States who anticipate that they will engage in activities for which they may receive honoraria, must seek admission as a B-1, rather than a B-2 nonimmigrant. For those eligible to seek admission under the Visa Waiver Program, the corresponding WB (Visa Waiver/Business) classification is the appropriate one. Prior to the change in law in 1998, honoraria could not be paid and B-1 visitors were permitted only reimbursement for reasonable, out-of-pocket expenses. The benefit of permissible honoraria applies to such activities as lecturing, teaching, consulting, conducting research, attending meetings, and symposia or seminars in association with institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and Governmental research organizations.

The proposed rule also limits honorarium activity by restricting honorarium and reimbursement of the associated expenses from no more than five organizations, and the event may not last more than 9 days at any single institution. These limitations apply to 6-month periods.

To View the proposed regulations published in the Federal Register
Go to:
http://www.gtlaw.com/practices/immigration/news/2002/06/10CFR.pdf

INS Comments on Eligibility for H-1B 7th Year Extensions

Under AC21, provision 106(a) allows H-1B holders who are reaching their maximum period of stay of six years in H-1B status to extend their status in one-year intervals they are applying for permanent residence through labor certification and meet certain criteria. At first glance, this provision appears very beneficial to H-1B holders who are running into their six-year cap and have not completed their application for permanent residence status through labor certification because of processing backlogs.

However, on closer examination, the provision benefits only those lucky individuals who have managed to make it out of the Department of Labor backlogs and 1) have filed an **I-140** or an I-485; and 2) 365 days have passed since the filing of a labor certification application or I-140. Those who get left out of the relief offered by these provisions are those poor individuals whose labor certifications have been pending for 365 days but remain un-adjudicated and therefore can not file an I-140 based on the labor certification. Since the INS has yet to release any type of regulations and gives little guidance on interpreting AC21, individuals in the immigration field have been pondering scenarios that could allow those individuals who are unable to file I-140s based on their current labor certifications because they are still pending, to take advantage of the 7th year extension.

In recent correspondence with the INS, an attorney asked what would happen if an individual had a labor certification pending for his current employer for the allotted time (which had not yet been approved so they couldn't file an I-140) but also had an approved labor certification and pending I-140 from a previous employer. In this instance, the practioner wanted to know, would the alien still qualify for a 7th year extension? In his response, Efrain Hernandez III, Director, Business Trade and Services, said it appears that provision 106(a) of AC21 would allow this individual to apply for a 7th year extension based on the described scenario. Mr. Hernandez said "the language of AC21 appears to allow the employer of an H-1B nonimmigrant to seek the extension of stay beyond the 6th year as long as the alien is the beneficiary of ANY (emphasis added) labor certification application or any immigrant worker petition. The labor certification application and Form I-140 do not need to relate to the alien's current employment situation." Mr. Hernandez goes on to note that this will be further explored in the rulemaking process. Therefore, while this strategy is valid according to the letter, there is no guarantee that this interpretation will necessarily be reflected in the final rule.

Under this interpretation, which the INS has indicated is acceptable, it appears individuals who have labor certifications pending but can not file an I-140 or I-485 based on it could also consider other methods to filing an I-140. Individuals may want to consider exploring whether they are eligible to apply for any other immigrant category which allows the filing of an I-140, such as an Outstanding Researcher or Extraordinary Ability petition, in order to take advantage of the 7th year extension provision. However, it is important to note that individuals should contact immigration counsel to discuss these options. Finally, attempting to secure a 7th year extension by filing frivolous I-140 petition may have adverse immigration consequences and should not be pursued.

Old Mexican Border Crossing Cards are Valid until October 1, 2002

As part of the Enhanced Border Security Act, the INS announced that the older, non-biometric Mexican Border Crossing Card will be valid until October 1, 2002. The U.S. Department of State has issued over five million new cards since April 1998 and encourages Mexican nationals to apply as soon as possible for the new biometric BCC, Form DSP-150. The new biometric BCC was mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. With the enactment of the Enhanced Border Security Act, holders of the old border crossing cards, Form I-186 or I-586, now have until October 1, 2002, to replace them with the new biometric, machine-readable cards (DSP-150). This document has a photo and machine-readable biometric information. Beginning October 1, 2002, the old BCC will no longer be a valid entry document.

With passage of the new law, those persons seeking admission to the United States must possess one of the following:

- The old border crossing card, Form I-186 or I-586 (until October 1, 2002);
- A valid biometric, machine readable, B1-B2 visa/BCC (DSP-150);
- A B1/B2 visa and BCC combination document issued by DOS before 1998, where the visa is still valid, along with a valid passport; or
- Other valid visa and passport.

The U.S. Department of State has been accepting applications for the new document since April 1, 1998. To schedule an appointment for issuance of the card, applicants must call a toll fee number in Mexico (01-900-849-4949). The posts that are accepting biometric BCC applications are located in Mexico City, Ciudad Juarez, Guadalajara, Hermosillo, Merida, Matamoros, Monterrey, Nogales, Nuevo Laredo, Tijuana, and at the Tijuana and the Mexicali Temporary Processing Facilities. Visa information is available at no charge on the U.S. Embassy homepage at www.usembassy-mexico.gov.

INS Proposes Signifcant Changes to Rule Governing Visitors and Students

In light of September 11th, the Immigration and Naturalization Service (INS) proposed several changes to the rules governing visitor admissions.

Prohibition On Attending School Prior to Approval

The new interim rule was effective on immediately upon publication, but stills allow for public comment. The rule prohibits non-immigrant visitors admitted under B-1 or B-2 visas from pursuing a course of study at a school in the United States prior to receiving INS approval of their request to change non-immigrant status to that of an F (academic) or M (vocational) student. To facilitate this process, INS has set a target processing time of 30 days for all requests to change or extend non-immigrant status, with all four Service Centers achieving that target within the next 60 days.

Minimum Admission Period Eliminated

The proposed rule will eliminate the current minimum six months admission period for B-2 visitors for pleasure, replacing it with *"a period of time that is fair and reasonable for the completion of the purpose of the visit."* When B visa holders apply for entry to the United States, they will be required to explain to an INS Immigration Inspector the nature and purpose of their visit so the Inspector can determine the appropriate length of stay. While INS Inspectors will make every effort to determine a fair and reasonable time period, the burden of proof rests with the alien. When the time needed to accomplish the purpose of the visit cannot be determined, INS will grant a 30-day period of admission. It will be very important for visitors to carry the necessary documentation with them to provide to INS Inspectors at the point of entry into the U.S.

Changes to Standards for Extension of Stay

The proposed rule will limit the conditions under which a B visitor can obtain an extension of stay, and will reduce the maximum extension period that can be granted. Persons in B status will be eligible to extend their stay in cases that have resulted from **"***unexpected or compelling humanitarian reasons,***"** such as medical treatment or a delay in the conclusion of a business matter. The request using Form I-539 (Application to Extend/Change Nonimmigrant Status) must be properly filed on a timely basis and be non-frivolous. The alien must also prove that there are adequate financial resources to continue their stay in the United States and that he or she is maintaining a residency abroad. The rule also reduces the maximum extension that can be granted from one year to six months.

New Requirements for Change of Status

Individuals planning to attend school in the United States are expected to obtain the proper student visa prior to their admission to the United States. However, INS stated that it recognizes that some intending students will want to visit the United States first for bona fide visitor purposes, such as touring campuses or interviewing for admission. The proposed rule will establish new requirements for B non-immigrant visitor visa holders who wish to become students. Persons admitted under B non-immigrant visitor status will still be able to change their status to that of a student, but only if they stated their intent to study in the United States when they initially applied for admission and presented any I-20 forms that may have been issued to them. Inspectors will be required to note "Prospective Student" on the alien's I-94 form Arrival/ Departure Record).

This rule will impact only those students admitted in B status after the rule's effective date. Existing rules allowing the commencement of studies before a change of status is approved will continue to apply to those already in the United States in B non-immigrant visitor status, since they may have already started a course of study in reliance upon existing rules.

INS's Zero Tolerance Policy

The American Immigration Lawyers Association reported a rise in the level of scrutiny for adjudications of change and adjustment of status applications. Although not formally announced, the INS has instituted a "zero tolerance" policy. This means that if people are out of status, INS adjudicators will no longer be exercising discretion to consider the status violation de minimis and approve the benefit being sought. There is tremendous pressure being brought to bear by the Administration, the Congress, and the INS itself to ensure that the present state of the law is being followed precisely. GT attorneys have reviewed requests from the INS to prove applicant's continuous status in the U.S. as well as evidence of continued work authorization.

In light of these evolving new policies, maintaining status has never been more important for employees and it is important that each application filed by the INS is reviewed for potential issues by competent immigration counsel.

See next month's observer for a more indepth article on this issue.

Student and Exchange Visitor Information System (SEVIS) to Begin on July 1, 2002

On July 1, 2002, the INS and State Department are expected to begin implementation of the Student and Exchange Visitor Information System (SEVIS) for approval, entry, tracking, and maintenance of all students and exchange visitors.

On May 16, 2002, the Immigration and Naturalization Service (INS) released a proposed rule to have the new Student and Exchange Visitor Information System (SEVIS) up and running by July 1, 2002. This would be for voluntary participation only; the proposed mandatory compliance date will be January 30, 2003. At that time, all F and M students and dependents must have a SEVIS-generated form in order to enter the United States or to apply for any immigration benefit such as change of nonimmigrant classification, reinstatement, or extension of status. A separate rule to amend the J-1 regulations for the issuance of IAP-66s is expected shortly from the Department of State (DOS), but has not yet been issued. The dates for compliance, however, are expected to be the same.

SEVIS has its origins in Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In that statute, a mandatory tracking system for students and exchange visitors was directed to be developed; a system was already underway at INS. The system, which became SEVIS, is an internet-based system that will enable schools and exchange visitor programs to transmit the information and the event notifications that are required, which currently include terminations in programs or changes of programs (for exchange visitors), electronically to the INS and the Department of State. Currently, all information exchange is done through a paper-based system: the same system that has drawn much criticism of the INS in the wake of the September 11 terrorist attacks, and in particular the lack of adequate tracking of those hijackers who entered through the student system. The rule incorporates the expanded reporting requirements of IIRIRA.

Critics of the SEVIS system have noted that it may be burdensome to many schools, who will undoubtedly have trouble meeting the January 2003 reporting deadline. The Service has asked specifically for comments on the deadline and the difficulties in transitioning to the electronic notification system. The proposed rule also allows for different reporting processes during the transition.

The rule requires that schools who will use SEVIS will have to be recertified prior to enrolling. A separate rule will be issued to provide for preliminary SEVIS enrollment.

In other student news, the Enhanced Border Security and Visa Entry Reform Act (Public Law No. 107-173, formerly H.R.3525) (see below) contains certain transitional provisions that will take effect 120 days after May 14, 2002, and will remain in effect until SEVIS is fully implemented. These provisions require schools with F, M, and J designations to electronically notify the State Department of an alien's acceptance to their institution before the student or scholar can be issued an F, M or J visa. In addition, the INS must notify the institution when an alien accepted for admission to that institution enters the United States, and the institution must correspond back to the INS within 30 days of the deadline for registering for classes if the alien has failed to enroll. The INS and DOS have not yet issued regulations about how these requirements will be fulfilled.

INS Confirms its Enforcement of Change of Address Provisions

As part of its effort to implement a related section of the law requiring fingerprinting and registration of aliens **(see GT Web update)**, INS officials confirmed at the annual conference of the American Immigration Lawyers Association that the agency will enforce the requirement that all aliens notify it of changes of address in the United States.

Section 265 of the Immigration and Nationality Act requires all aliens living in the United States to notify the AG in writing of a change of address within 10 days of the change. Section 266 provides for both criminal and monetary penalties—upon conviction of a failure to notify of the address change, an alien can be fined up to $200 or imprisoned for 30 days, or both. However, the law also provides that the alien can be removed from the US for failure to notify of an address change, unless the alien can establish that the failure was not willful or was reasonably excusable. The requirement lasts until naturalization.

The appropriate method for notifying the INS of a change of address depends upon the status of the alien. If a nonimmigrant has an application pending with the Service, he or she should advise the office where it is pending of the address change using the preferred method of that office. If no case is pending, the nonimmigrant should use Form AR-11, available from GT or on the INS website. The AR-11 includes the address to which the form should be sent. All permanent residents must notify INS of changes of address using Form AR-11.

Foreign nationals are advised to discuss this situation with their attorneys.

LEGISLATIVE UPDATE:
Enhanced Border Security and Visa Entry Reform Act of 2002

On May 14, President Bush signed into Law the Enhanced Border Security and Visa Entry Reform Act of 2002. The law focuses on securing the borders of the United States and provides funding to that end. The law also calls for interagency cooperation. The bill provides for funding to increase the number of border patrol agents at the northern and southern borders, including pay incentives for those agents remaining in the position more than one year. Additional staff will be allocated for those airports that receive a significant number of individuals who arrive from countries that do not have preclearance checks and those airports that have high incidents of fraud. In an attempt to reduce fraud, the President has called for the adequate staffing and training of consular offices in detecting fraudulent visa applications.

The President has provided funding to enhance the technology at the border as well as to provide additional training for those agents at the border. The improvements will hopefully ease the flow of commerce and individuals across the borders and make it possible for preclearance for entry into the United States. The bill also calls for the federal law enforcement data bases to be linked to those of the INS and Department of State to aid in the issuance of visas to individuals wishing to enter the United States.

The President has stressed interagency cooperation to enhance border security. To that end, the bill requires the INS and the Department of State to submit the necessary information they need from other governmental agencies and the intelligence sectors that would allow them to effectively protect the borders and prevent the entry of those individuals who are inadmissible to the President and congressional committees. The collection of information raises many privacy concerns. As a result, the law provides limitations on the use and dissemination of the collected data. In addition, the bill provides guidance for incorrect and outdated information, including criminal penalties for the misuse of the data collected.

In an effort to safeguard and confirm the identity of individuals traveling, the bill requires that travel documents that contain biometric identifiers be issued. Those countries participating in the Visa Waiver program will also be required to issue travel documents with biometric identifiers as a condition of remaining in the program. In addition, biometric scanners must be installed at all ports of entry in the United States. This mandate carries with it the necessary funding requirements.

The countries participating in the Visa Waiver program must also establish a reporting system to alert the United States of all the stolen blank passports. This will aid in the enhanced security at the borders given that individuals from visa waiver countries simply present their passports at the ports of entry and are not subject to security clearances at United States embassies and consulates prior to entry to the United States.

The enhanced border security bill calls for a great deal of interagency cooperation and increased effort by the INS and Department of State to take an active role in securing the United States borders against undocumented and falsely documented individuals. Only time will tell if a more secure border will be the result of interagency cooperation. The new Homeland Security Agency discussed above will further revamp the Security of the U.S.

INS Discusses New Plans to Improve International Adoptions

INS Commissioner James Ziglar provided testimony at a Congressional Hearing on May 22, 2002, in which he reviewed the INS's critical role in the international adoption arena, and shared plans for improvements to the international adoption process. The circumstances that arose in connection with the suspension of the adoption of children from Cambodia and Vietnam have brought the issue to the forefront for Commissioner Ziglar. In light of this issue, the INS Adoptions Task Force is looking to borrow from the Hague Convention and the best practices in the field to make important changes and improvements to the process. Commissioner Ziglar pointed out that one of the most important improvements to international adoptions is the implementation of the Hague Convention through the Inter-country Adoption Act (IAA). The lead agency in implementing the IAA is the U.S. Department of State. The Hague Convention and the IAA will require that the child's eligibility to immigrate be determined before either adoption or placement for adoption may occur in countries party to the Hague. It will also significantly expand the group of children who will be available for adoption and who can immigrate to the United States. It will not be necessary for each child adopted from a Hague Convention country to be an orphan. Also, the Hague Convention will provide for counseling for all prospective adoptive parents. These schedules will not take place until 2004.

Implementation of New Security Checks by INS Impacting Processing Times

The INS has begun performing new security checks on all new and currently pending petitions filed at all INS offices, including the four regional service centers, District offices and sub-offices. At the time these checks were implemented, the INS said it could not assess how these security checks might affect processing times. It has now become increasingly clear that these security checks are increasing processing times depending upon the location of the application. In some districts, processing times appear to have reached a slow crawl as immigration practitioners and applicants find their applications sitting at various Service Centers and INS offices while the INS attempts to process these applications and complete the security checks.

According to a *Washington Post* article, INS officials have acknowledged that the processing of applications has "ground to a halt" in an number of INS offices due to the security checks. These security checks are done through the Interagency Border Inspection System (IBIS). This system accesses information supplied by federal agencies such as the INS, U.S. Customs Service, and the FBI on the criminal and immigration histories of individuals. These checks have impacted processing times mainly because many of the INS offices have not received the training to use the security database or do not have enough computers that have access to the system. For example, there were no computers with IBIS access at the INS office in Hartford, Connecticut and the New York District office has only one computer that is able to access IBIS to process the over 1,000 new applications that arrive daily. The INS is said to be working on supplying the needed computers and training. Some offices are no longer able to approve adjustment applicants on the same day of an interview, many are told they will be contacted with a decision.

These security checks are also being applied to Green Card Renewal Applications which can cause a problem for green card holders who wish to travel or who may currently live outside of the U.S. Before the implementation of the security checks, an individual who had attained lawful permanent residence status and needed to renew their green card would be issued evidence of their status in their passport by the INS at the time they submitted their application. This allowed them to have immediate evidence of their permanent resident status while the renewal card was being processed. However, due to the security checks, in some district office the INS can no longer provide this renewal stamp in the passport on the same day the Green Card Renewal Application is submitted. Now the INS is conducting security clearances before they place a stamp evidencing Permanent Resident Status in the passport. While the security clearances are supposed to take approximately two weeks, green card holders with expiring green cards, who are planning on traveling or are only in the U.S. for a short time to renew their Green Cards, should allow more time to receive the renewal stamp based on this security checks.

With regards to the backlog of cases, premium processing cases seem to be faring the best. It appears the INS is still working to get those cases processed within the fifteen day deadline. However, for the majority of other cases, it appears the backlog of applications continues to grow as the INS tries to supply the required computers and training to implement the new security checks.

Guest Worker Essential Worker Immigration

EWIC is a coalition of businesses, trade associations, and other organizations from across the industry spectrum concerned with the shortage of both skilled and lesser skilled ("essential worker") labor.

Greenberg Traurig Shareholder Laura Reiff is a co-chair of the coalition.

For more information see:

www.EWIC.org

Immigration News

Business Immigration Group:

Mahsa Aliaskari 703.749.1385	Tysons Corner aliaskarim@gtlaw.com	**Elissa McGovern** 703.749.1343	Tysons Corner mcgoverne@gtlaw.com	**Brenda Supple** 305.579.0734	Miami suppleb@gtlaw.com
Kristina Carty-Pratt 703.749.1345	Tysons Corner prattk@gtlaw.com	**Mary Pivec** 202.452.4883	Washington pivecm@gtlaw.com	**Cora Tekach** 703.749.1391	Tysons Corner tekachc@gtlaw.com
Craig A. Etter 703.749.1315	Tysons Corner etterc@gtlaw.com	**Laura Foote Reiff** 703.749.1372	Tysons Corner reiffl@gtlaw.com	**Shana Tesler** 202.331.3144	Washington, D.C. teslers@gtlaw.com
Oscar Levin 305.579.0880	Miami levino@gtlaw.com	**John Scalia** 703.749.1380	Tysons Corner/D.C. scaliaj@gtlaw.com	**Carol Williams** 703.749.1376	Tysons Corner williamsc@gtlaw.com
Elizabeth Lewis 703.749.1321	Tysons Corner lewise@gtlaw.com	**Elliot Scherker** 305.579.0579	Miami scherkere@gtlaw.com		
Dawn Lurie 703.903.7527	Tysons Corner luried@gtlaw.com	**Martha Schoonover** 703.749.1374	Tysons Corner schoonovermgtlaw.com		

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