

AILA Issue Papers

American Immigration Lawyers Association

The 107th CONGRESS: A LEGISLATIVE AND REGULATORY OVERVIEW

The following is a review of the major immigration-related legislation passed by the 107th Congress and the regulations issued during the last Congressional session. The legislation is discussed in the order in which President Bush signed it into law and the regulations are listed in reverse chronological order.

Legislation Passed During the 107th Congress

Department of Homeland Security: President Bush, on November 25, signed legislation into law (H.R. 5005, Pub. L. No. 107-296) creating a new Department of Homeland Security, the composition of which will dramatically alter our immigration functions. Unfortunately, the Act fails to provide for one high-level official who is focused exclusively on our nation's immigration policy, relegates immigration services to a bureau that lacks its own Under Secretary, provides little or no coordination between immigration enforcement and services, and fails to adequately protect the important role of our immigration courts. (See AILA's Issue Paper, "Immigration and the Department of Homeland Security," for details.)

Department of Justice Appropriations Authorization: On November 2, President Bush signed into law the "21st Century Department of Justice Appropriations Authorization Act" (H.R. 2215, Pub. L. No. 107-273). The new law contains several immigration-related provisions, including changes to the AC21 provisions regarding the extension of status for H-1B workers past the six year limit; changes to the Conrad 20 program; ameliorative procedures for EB-5 investors; and modifications affecting naturalization.

The new law expands the provisions of the AC21 to allow H-1B workers who have labor certification applications pending for at least 365 days to extend status beyond the six-year limitation. Congressional statements by Senator Patrick Leahy and Representative Lamar Smith indicate that the provision allows H-1B workers who have already exceeded their six-year limitation to have a new H-1B petition approved so they can apply for an H-1B visa to return from abroad or otherwise re-obtain H-1B status prior to completing the one year abroad requirement. (For the congressional statements, see AILA InfoNet Doc. No. 02120440).

The "Conrad State 20" program changes include extending the program until 2004 and expanding the number of visas available per state from 20 to 30. A recent division policy statement by the Department of State clarifies that this expansion permits states that have reached the numerical limitation of 20 requests for 2002 to submit up to 10 additional visa waiver requests for fiscal year 2002.

The procedures for the EB-5 program are modified to give eligible investors caught by the retroactive application of the INS's changes an opportunity to establish or re-establish EB-5 eligibility. Some general changes to the EB-5 program are also incorporated into this section of the new law.

Eligibility for naturalization is modified in the following two ways: the deadline for allowing family members to apply for honorary posthumous citizenship for non-citizen veterans who died while honorably serving the U.S. is extended, and grandparents and legal guardians of children whose parent, who otherwise would be authorized to submit the petition, died during the preceding five years become eligible for filing an application of naturalization on behalf of the child.

Border Commuter Students. On November 2, the President signed the “Border Student Commuter Act of 2002” (H.R. 4967, Pub. L. No. 107–274). The new law amends INA § 101(a)(15)(F) and (M) by creating a new border commuter nonimmigrant classification under the F and M visa categories for Canadian and Mexican nationals who maintain residence in their country of nationality and commute to the U.S. for full or part-time academic or vocational studies. This legislation was triggered by a May 22, 2002, INS proclamation that commuter students residing in contiguous territory would no longer be allowed to enter the U.S. as visitors to attend school on a part-time basis.

Age-Out Protection: President Bush signed into law the “Child Status Protection Act” on August 6 (H.R. 1209, Pub. L. No. 107–208). Passage of this law was a significant accomplishment that will provide important protections to children who had previously fallen victim to INS processing delays. Under previous law, a child’s eligibility to receive a visa or be part of his or her parent’s application was based on the child’s age at the time that the alien relative petition was *approved*, not the time the petition was filed. Because of enormous backlogs and processing delays, many children turned 21 before the INS adjudicated the petition. In such cases, the child “aged-out” and was ineligible to receive an immediate relative visa or was no longer considered to be part of the parent’s application. The child’s petition was either automatically moved to a lower preference category or the child was required to submit his or her own petition, resulting in years of delays and possible ineligibility.

Originally sponsored by Representatives George Gekas (R–PA) and Sheila Jackson Lee (D–TX), and subsequently broadened and improved by Senate legislation (S. 672) sponsored by Senator Dianne Feinstein (D–CA), the Child Status Protection Act provides that the determination of whether an unmarried alien son or daughter of a U.S. citizen is considered an “immediate relative child” (under 21 years of age) will be based on the age of the alien at the time the Petition for Alien Relative (Form I–130) is filed on his or her behalf, rather than on the date the petition is adjudicated. The legislation makes similar determinations in the case of permanent resident parents who subsequently naturalize after having filed petitions for their sons or daughters and citizen parents who file petitions for married sons or daughters where such sons or daughters later divorce. In the former situation, the age determination will be made at the time of the parents’ naturalization. In the latter, the alien beneficiary’s age will be determined as of the date of his or her divorce.

For the children of legal permanent residents, or those who are accompanying or following to join on a petition for an immigrant visa, their eligibility will be determined based on the date that a visa becomes available to them, but only if they seek to acquire permanent resident status within one year of such availability. In addition, the legislation provides age-out protection to alien children who accompany or follow to join parents who have filed for asylum or refugee status. Finally, the new law provides that the family-sponsored petition of an unmarried alien son or daughter whose permanent resident parent subsequently becomes a naturalized U.S. citizen will be converted to a petition for an unmarried son or daughter of a U.S. citizen, unless the son or daughter elects otherwise.

Border and Visa Entry Reform: On May 14, the President signed into law the Enhanced Border Security and Visa Entry Reform Act (H.R. 3525, Pub. L. No 107–173). This measure balances this nation’s need to enhance security with our history as a nation of immigrants. Among other provisions, the new law helps provide people on the front line with the training, staff and funding they need to do the job, authorizes increased staffing and funding at the INS and the State Department, and also provides necessary training for personnel at both agencies. The law mandates the sharing of intelligence and law enforcement data with the INS and State Department on a real-time basis so the agencies can identify high-risk individuals who seek to enter our country. The law also seeks to create a North American Security Perimeter. A North American Security Perimeter would bolster security through law enforcement coordination and intelligence sharing, reducing the chance that someone wishing to do us harm would travel to a neighboring country and then cross by land into the U.S.

Affidavit of Support Measure: On March 13, President Bush signed into law the “Family Sponsor Immigration Act” (H.R. 1892, Pub. L. No. 107–150). The new Act amends the INA to permit the acceptance of an affidavit of support from another eligible sponsor if the original sponsor has died and the Attorney General has determined for humanitarian reasons that the original sponsor’s classification petition should not be revoked.

Under the Act, the list of eligible sponsors who may sign in place of the deceased petitioners include the spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent, or grandchild of a sponsored alien or a legal guardian of a sponsored alien.

The legislation was necessary to fix a problem created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Under that law, an applicant for permanent residence must have an affidavit of support signed by the family member who filed the petition. If the petitioner dies during the process, the Attorney General can allow an immigrant to go forward with the application for humanitarian or family unification reasons. However, the requirement that the original sponsor sign financial support affidavits has rendered this authority meaningless. Applicants who have been given permission to continue their application after the death of the petitioner have routinely had those applications denied for failure to obtain the signature of the deceased petitioner.

Spousal Work Authorization: On January 16, the President signed into law two bills (H.R. 2277 and H.R. 2278) allowing spouses of intracompany transferees, treaty traders, and treaty investors to work in the United States. H.R. 2277 (Pub. L. No. 107–124) provides work authorization to the spouses of E visa holders. H.R. 2278 (Pub. L. No. 107–125) not only provides work authorization to the spouses of L visa holders but also reduces the required one-year period of prior continuous employment for certain intracompany transferees to six months if the importing employer has filed a blanket petition and meets the requirements for expedited processing of aliens covered under such petition

USA PATRIOT Act: On October 26, 2001, President Bush signed into law the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” (USA PATRIOT) Act of 2001 (H.R. 3162, Pub. L. No. 107–56). The PATRIOT Act includes provisions that: expand the definition of terrorism for the purposes of inadmissibility and removal, provide for mandatory detention of aliens who the Attorney General suspects have engaged in terrorist activity, and limit judicial review. However, the law also includes some provisions, which AILA helped to develop, that preserve immigration benefits for the families of victims of the terrorist attacks and others impacted by the attack. For example, it allows

derivative family members to remain here legally, extends filing deadlines affected by the disaster and allows pending applications for permanent residence to be completed as if the sponsoring person was still alive.

The law's immigration measures are less restrictive than the proposal the Administration earlier had presented to Congress. That proposal would have given the U.S. government sweeping, unchecked powers. It would have allowed indefinite detention, allowed the government to detain individuals without charging them for any crime or any immigration violation, and provided no meaningful opportunity for a hearing to determine the reason for an individual's detention. Our Congressional allies, led by Representative John Conyers (D-MI) and Senators Patrick Leahy (D-VT), Edward Kennedy (D-MA), and Sam Brownback (R-KS) worked to ameliorate some of the worst provisions of the bill. Notwithstanding these efforts, the new law includes several troubling provisions. It includes language that will allow for the detention and deportation of people engaging in innocent associational activity and Constitutionally protected speech, and it permits the indefinite detention of immigrants and non-citizens who are not terrorists.

Regulatory Activity in Review: 2002

The following is a brief overview of some of the more important immigration-related regulations promulgated by the INS and other agencies during the past year. The items appear in reverse chronological order.

BCC Cards: On December 2, the INS promulgated an interim rule that establishes procedures to terminate the use of current non-biometric border crossing cards (BCCs), eliminates certain former versions of BCCs, and clarifies the validity period of waivers of inadmissibility issued under 8 CFR § 212.4. The rule took effect retroactive to October 1, and comments are due by January 31, 2003. (67 FR 71443, 12/2/02).

'S' Nonimmigrant Visas: The State Department, on November 4, finalized a rule implementing the 'S' nonimmigrant visa program. The S visa category is available to nonimmigrants determined by the Attorney General to have critical and reliable information concerning a criminal organization or enterprise. The final rule adopts without change the 1996 interim rule. (67 FR 67108, 11/4/02).

Certification of Foreign Health Care Workers: An October 11 INS proposed rule would implement a process for the certification of foreign health care workers under INS §§ 212(a)(5)(C) and (r), and would add a requirement that all nonimmigrants coming to the U.S. to work as health care workers, including those seeking change of status, be required to submit a certification. (67 FR 63313, 10/11/02).

Fee for Nonimmigrant Visa Raised: The State Department raised the machine-readable visa (MRV) fee charged for the processing of a nonimmigrant visa, or a combined nonimmigrant visa and border crossing card application, from \$65 to \$100, effective November 1. (67 FR 62884, 10/9/02).

ISEAS for Monitoring Foreign Students/Exchange Visitors: A September 18 State Department interim rule announced the creation of the 'Interim Student and Exchange Authentication System' (ISEAS) for monitoring the visa adjudication process and visa issuance to foreign students and exchange visitors. ISEAS will remain operational until SEVIS is fully deployed. (67 FR 58693, 9/18/02).

Part-time Study for Mexican and Canadian Students: A new INS interim rule allows Mexican and Canadian commuter students to study on a part-time basis, within the F-1 or M-1 NIV category, at schools located within 75 miles of the U.S. border. The rule took effect upon publication. (67 FR 54941, 8/27/02).

BIA “Reforms”: On August 26, the Justice Department finalized a rule that makes a number of procedural reforms at the Board of Immigration Appeals, including cutting the number of BIA Members from 19 to 11. The rule also: mandates single-Member review for the majority of cases; eliminates de novo review (with several exceptions); and sets accelerated briefing schedules and tight time limits for the adjudication of cases. Moreover, the new procedures set forth in the rule apply retroactively to all pending cases, although the Justice Department backed-off from eliminating the de novo standard of review with regard to pending cases. (67 FR 54878, 8/26/02).

Relief for Certain LPRs: A joint INS/EOIR proposed rule would allow certain legal permanent residents who pled guilty or nolo contendere to crimes before April 1, 1997, to seek relief pursuant to former INA § 212(c), in light of the Supreme Court’s ruling in *INS v. St. Cyr.* (67 FR 52627, 8/13/02).

Registration: The INS, on August 12, finalized a rule that requires certain nonimmigrants to undergo various registration processes, and imposes sanctions on those who do not follow the processes. (67 FR 52584, 8/12/02).

Concurrent Filing: A July 31 INS interim rule provides that Forms I-140 and I-485 may now be filed concurrently when a visa number is immediately available. In addition, eligible individuals with I-140 petitions pending on July 31 may now file the I-485 and associated forms. The rule took effect upon publication. (67 FR 49561, 7/31/02).

Change of Address Notification: A July 26 INS proposed rule would require every applicant for immigration benefits to acknowledge having received notice that he or she is required to provide a valid current address to the Service, including any change of address, within 10 days of the change. In absentia removal orders could flow from failure to so provide. (67 FR 48818, 7/26/02).

State and Local Law Enforcement during Mass Influx: The Justice Department, on July 24, finalized a rule implementing INA § 103(a)(8), which permits the Attorney General to authorize any state or local law enforcement officer, with the consent of those whose jurisdiction the individual is serving, to perform certain functions related to the enforcement of the immigration laws during the period of a declared “mass influx of aliens.” (67 FR 48354, 7/24/02).

SEVIS: The INS issued an interim rule on July 1, implementing the first phase of the certification process for access to the Student and Exchange Visitor Information System (SEVIS). The rule allows eligible schools to enroll preliminarily in SEVIS provided they meet the established criteria. (67 FR 44344, 7/1/02).

LIFE Late Legalization: The INS issued a final rule on June 4, implementing the adjustment of status application procedures under the LIFE Act’s ‘late legalization’ provisions. The rule extends the filing deadline to June 4, 2003, and makes various other changes based on comments received to the interim rule. (67 FR 38341, 6/4/02).

Surrender Procedures for Aliens Subject to Final Order of Removal: A May 9 proposed DOJ rule would amend both INS and EOIR regulations by requiring aliens subject to a final order of removal to surrender themselves to the INS. The rule also establishes procedures for surrender and provides that aliens violating those procedures will be denied certain benefits. (67 FR 31157, 5/9/02).

PERM: The DOL has published the proposed 'PERM' rule that would amend the agency's regulations governing the filing and processing of labor certification applications for permanent employment in the U.S. The rule would also amend the regulations governing an employer's wage obligation under the H-1B program. (67 FR 30466, 5/6/02). See AILA InfoNet Doc. No. 02050740.

Approval Needed to Change Status: An April 12 INS interim rule prohibits nonimmigrant visitors admitted in B-1 or B-2 status from pursuing a course of study prior to obtaining approval of a change to F-1 or M-1 student status. The rule amends 8 CFR Parts 214 and 248. (67 FR 18061, 4/12/02).

B Visa Changes: An April 12 INS proposed rule would eliminate the minimum admission period for B-2 nonimmigrant visitors, reduce the maximum admission period for B-1 and B-2 visitors, and restrict B visitors' ability to extend stay or change to student status. The rule would amend 8 CFR Parts 214, 235, and 248. (67 FR 18065, 4/12/02).

"T" Nonimmigrant Classification: On January 31, the INS published an interim rule implementing the new 'T' nonimmigrant classification, created by § 107(e) of the Trafficking Victims Protection Act of 2000. The rule contains the essential elements that applicants must demonstrate to receive 'T' status, as well as application procedures and evidentiary guidance. (67 FR 4783, 1/31/02).