



U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: The Deputy Attorney General

FROM: Viet D. Dinh
Assistant Attorney General

SUBJECT: Registration of Aliens from Countries Sponsoring Terrorism and Other High Risk Countries

Events of the last two months have clearly identified many of the weaknesses of the existing immigration system, which does not provide a means to track the status of aliens after they are admitted to this country and often fails to hold aliens accountable if they enter this country unlawfully or if they overstay their authorized status. Although these are common problems in many areas, the inability to track aliens or hold them accountable has created a particular vulnerability exploited by terrorists.

Many of the longstanding problems relate to the inadequacies of the automated information and support services maintained by the Immigration and Naturalization Service, and the Department, with the support of the Administration and the Congress, is working to redress those technical shortcomings.

However, in other respects, the current system seems to be designed to fail because the current procedures do not allow INS to gather adequate information with respect to aliens living in the United States – INS collects only cursory information at the time of entry and almost no information after the alien has entered unless the alien thereafter applies for some immigration benefit. Moreover, the current legal and regulatory standards do not provide sufficient means to make the legal standards clear to the aliens and to punish them for failing to adhere to them. The Department needs to address the existing flaws in the standards and procedures for the alien registration process, in addition to the shortcomings of the computer systems themselves.

The existing statutory provisions for aliens registration, in sections 261 through 266 of the Immigration and Nationality Act (Act), provide some additional authorities that the Attorney General can invoke, some of which appear to have lain dormant over the years. There are some actions that the Attorney General can take immediately, through the publication of a Notice in the Federal Register, to alleviate some of the problems that currently exist due to inadequate registration

requirements. In other respects, the Department will need to amend the existing regulations in order to make necessary improvements. Moreover, with respect to any changes in forms or information collection requirements, the Department will need to obtain clearance from the Office of Management and Budget under the Paperwork Reduction Act.

I. Designation of Countries Whose Nationals Should Be Subject to Additional Scrutiny

As noted below, the INS currently imposes special registration procedures for fingerprinting and photographing nationals of Iran, Iraq, Libya, and Sudan at the port of entry, pursuant to the existing authority under 8 C.F.R. § 264.1(f). The most recent designation of those countries was published as a Federal Register Notice at 63 F.R. 39109 (July 21, 1998) (TAB A). The Attorney General has authority to expand the designation to include nationals of additional countries for these special registration procedures.

Based on preliminary discussions, the following state sponsors of terrorism and 28 other high-risk countries may be appropriate for the imposition of the special registration procedures:

- Designated state sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Syria, Sudan.
- Other high-risk countries: Afghanistan, Algeria, Bahrain, Bosnia-Herzegovina, Croatia, Djibouti, Egypt, Eritrea, Indonesia, Jordan, Kazakhstan, Kuwait, Lebanon, Malaysia, Morocco, Oman, ["Palestine"], Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen.

The Attorney General's designation of additional countries for special registration procedures should be published prior to or at the same time as the regulatory changes discussed below. Publishing the list of designated countries as a Federal Register Notice rather than as part of a codified rule will allow for greater flexibility and avoid the need to amend the regulations each time the Attorney General may wish to revise the list of designated countries.

Aliens who are admitted to the United States as A or G nonimmigrants (in general, those classifications relate to aliens with diplomatic status and to employees of certain international organizations, respectively) are exempt from all registration requirements under the Act. Accordingly, those aliens would also be exempt from any of the special registration procedures discussed in this memorandum.

The existing Federal Register Notice pertaining to Iran, Iraq, Libya, and Sudan requires all other nonimmigrants to be fingerprinted and photographed at the port of entry, subject to waivers granted by the Service at the recommendation of the State Department based on foreign policy and national security considerations. This exception was promulgated in 1998 at a time when a sports team from one of the designated countries was planning to come to the United States and the State Department objected to the fingerprinting requirement.

The expanded Federal Register Notice requiring special registration, fingerprinting and

photographing at the port of entry could be applied to all nonimmigrants from the designated countries other than A or G nonimmigrants -- as is the case under the existing designation of Iran, Iraq, Libya and Sudan -- or it could be tied to nonimmigrants and their dependents in designated nonimmigrant classifications where the aliens are likely to remain in the United States for some period of time, including the following:

- B-1 or B-2 classification -- visitors for business or pleasure¹
- F or M classifications -- students at academic or vocational institutions
- H classification -- nurses; skilled temporary workers; agricultural workers; trainees
- J classification -- participants in exchange programs
- L classification -- intra-company transferees
- R classification -- religious workers

Limiting the scope to the classifications listed above, however, would not include aliens who are treaty traders or investors (E classification), accredited foreign journalists (I classification), or aliens who are visiting scholars, artists, performers or sports team participants (O or P classifications).

II. Registration and Fingerprinting at the Port of Entry for Nonimmigrants Arriving from the Designated Countries

The Attorney General can accomplish an expansion of the fingerprinting requirements for newly-arriving nonimmigrants from designated countries through publication of a Federal Register Notice expanding the list of designated countries for special procedures. However, the Attorney General will need to amend the existing regulations to provide for an expansion of the registration requirement for such aliens, both at the time of admission and on a continuing basis thereafter.

A. Fingerprinting and Photographing

Most nonimmigrants are currently exempt from fingerprinting requirements and provide only limited registration information to INS. Section 262(a) of the Act requires that aliens who remain in the United States for thirty days or longer must apply for registration and be fingerprinted within that thirty day period. However, section 262(c) of the Act allows for waivers of the fingerprinting requirement. Under the current provisions of 8 C.F.R. § 264.1(c), all nonimmigrant aliens who are maintaining their current status are exempt from fingerprinting if they are nationals of countries

¹ INS is currently working on promulgating a separate rule to limit the standard period of admission for the B-2 visa (visitors for pleasure, such as tourists, family visits, medical treatment, etc.) to a maximum of 30 days, unless the alien can justify a longer period of initial admission at the time of entry. (The current INS regulations at § 214.2(b)(2) provide for a minimum authorized period of admission of six months (!) even if the alien asks for a shorter period of time.) However, even if the standard period of admission is shortened to 30 days, there is still a justification for the initial registration, fingerprinting and photographing of B-2 aliens from the designated countries, since the abuse of the B-2 tourist visa is a common means for aliens to enter the United States and remain illegally after their period of admission has expired. Section 263(a) of the Act authorizes such special registration requirements even for aliens who would not normally be subject to the regular registration requirements under section 262 of the Act, such as aliens who remain in the United States for less than 30 days.

which do not require fingerprinting of U.S. citizens temporarily residing there. All other nonimmigrants (except those covered by the existing Federal Register Notice) are currently exempt from fingerprinting unless they remain in the U.S. for more than one year or violate their nonimmigrant status. As a result, incoming nonimmigrant aliens routinely provide only a Form I-94 for registration purposes, which does not include fingerprinting and photographs.

However, pursuant to § CFR 264.1(f), the Attorney General can order fingerprinting and photographing of nonimmigrants from designated countries by publishing a comprehensive Notice in the Federal Register. A 1998 Federal Register Notice (TAB A) provides for nonimmigrants from Iran, Iraq, Libya, and Sudan (other than diplomats and employees of international organizations) to be photographed and fingerprinted by the INS at the port of entry, subject to the possibility of exceptions on foreign policy grounds.

The Attorney General can immediately publish a new Notice which broadens the scope of these fingerprinting and photographing procedures at the port of entry to include newly-arriving nonimmigrants from the designated countries, as discussed above (TAB B).

B. Expanded Registration Requirements

Under current regulations at § 264.1(a), all nonimmigrant aliens are registered with INS through Form I-94, Arrival/Departure Record (TAB C) -- a form that provides only the most cursory information pertaining to the alien. Even for aliens from countries subject to the special registration procedures, § 264.1(f) only provides for registration of such aliens using Form I-94 and does not provide for any supplementary registration, either at the port of entry or at any time after the alien has entered the United States. These existing provisions are plainly inadequate to allow INS to collect the necessary information as to aliens from the designated countries at the time of their admission to the United States, and they do nothing to allow INS to monitor the alien's status after admission.

Under section 263(a) of the Act, the Attorney General has the authority to "prescribe special regulations and forms for the registration and fingerprinting of . . . aliens of any other class not lawfully admitted to the United States for permanent residence." This authority extends not only to the use of special forms for registration of such designated aliens, but also special regulations governing the registration process for those aliens. Accordingly, the Attorney General should amend § 264.1(f) to provide that all covered nonimmigrants from the designated countries will be subject to supplemental registration requirements, in addition to fingerprinting and photographing at the port of entry, as follows.

1. Appearing in person at INS office

Under current regulations, there is no general obligation for aliens to appear in person at an INS office except in connection with the alien's application for certain immigration benefits. The alien typically is required to come in to an INS office only for fingerprinting or an interview, or for the filing of certain applications that are adjudicated at the district offices rather than the regional

service centers.² Many other kinds of applications for immigration benefits, including a change or extension of nonimmigrant status, for adjustment of status to lawful permanent residence, or for an employment authorization document, are filed with the Service by mail.

Under the authority of section 263(a) of the Act to prescribe special regulations for the registration of designated classes of aliens, the Attorney General should prescribe supplementary registration procedures for all covered nonimmigrants from the designated countries. These supplementary procedures should include a requirement for those aliens to appear in person at the local INS office as follows:

- Within 30 days after his or her admission as a nonimmigrant;
- On an annual basis thereafter until the alien has departed from the United States or has adjusted status to lawful permanent residence; and
- At any other time when the alien changes his or her employer, school or exchange program upon which the alien's nonimmigrant status is based.³

2. Supplemental Registration Form

In addition to the Form I-94, Arrival/Departure Record, the Attorney General should provide for promulgation of a new supplemental registration form for covered aliens from the designated countries. This could require all covered aliens from the designated countries to provide additional information pertaining to their status, such as: a second form of identification (e.g., birth certificate, driver's license, school or work ID); a statement of the alien's intended length of stay; proof of residency at the stated address; and evidence of employment or enrollment at an academic institution or exchange program. A sample supplemental form – arbitrarily labeled as Form I-XYZ for discussion purposes – is attached at TAB D. In conjunction with the obligation for covered nonimmigrants to appear in person at a local INS office, this new supplemental registration form will provide the necessary information for INS to be able to track the alien's immigration status over

² For example, an alien applying for asylum is required to appear at an INS asylum office for fingerprinting and an asylum interview, and also to receive a copy of the INS's decision, as provided in § 208.9(b), (d); and aliens applying for adjustment of status to lawful permanent residence must appear for an interview, as provided in § 245.6. Failure to appear for fingerprinting or for an interview may be grounds for denial of the application. For asylum applicants and other applicants for immigration benefits who must be fingerprinted in connection with their application, the INS schedules an appointment at an INS Application Support Center, as well as through arrangements with designated Law Enforcement Agencies (LEA's), and notifies the alien of the time and place. Because of overcrowding concerns, INS has discontinued allowing walk-ins for fingerprinting.

³ This would require, for example, that an H-1B temporary skilled worker would be required to appear in person at an INS office upon a change in employers upon which the visa is based, and an F or M nonimmigrant student at an academic or vocational institution would be required to appear in person at an INS office if the student transfers to or enrolls at a different school. However, an F student who is authorized to engage in part-time employment in connection with his or her attendance at a particular school would not be required to appear in person each time the alien changed employers as long as the student remained in attendance at the same school.

time, and also to be able to check the documentation provided by the alien as school enrollment or employment on which the alien's status is based, as well as proof of the alien's current residence.

As with all other information collections, the use of a new supplemental registration form is dependent upon obtaining clearance from the Office of Management and Budget under the Paperwork Reduction Act.

3. Notice of Supplemental Registration Requirements and Penalties for Failure to Comply

The regulatory amendments to § 264.1(f) should provide that all covered nonimmigrants from the designated countries should be given specific written notice, at the time of the alien's admission into the United States, of the supplemental registration obligations imposed on covered nonimmigrants from the designated countries. INS should develop a standard notification form to be given to all covered nonimmigrants from the designated countries, at the time of admission, to inform them that they will be required to appear in person at a local INS office in person within 30 days to submit the information required on Form I-XYZ, and thereafter as provided in the regulations and forms. INS will not be able to effectively enforce these requirements unless the alien is given a clear notice of what is required.

- Section 266(a) of the INA provides that an alien who willfully fails or refuses to register or to be fingerprinted as required under the Act is subject, upon conviction, to a fine of \$1,000 and six months' incarceration. This penalty for failure to register should be applicable not only to the alien's initial registration but also to the special registration regulations and the Form I-XYZ promulgated by the Attorney General pursuant to section 263(a) of the Act.
- The Attorney General should also amend the regulations at § 214.1 to provide that a covered alien's unexcused failure to comply with the supplemental registration requirements will constitute a violation of the alien's nonimmigrant status, thereby rendering the alien removable.

4. Special Notification of Obligation to Provide a Current Address

In addition, the supplemental registration form (TAB D) should contain an explicit notification of the importance of having the alien provide a current address at which the alien may be contacted by the INS.

There is an existing requirement, under section 265(a) of the Act, for all aliens who are subject to the general registration requirements to notify the Attorney General of each address change and provide their new address within 10 days. Form AR-11 (TAB E). Section 237(a)(3)(A) of the Act provides that an alien who fails to do so is deportable unless the alien establishes that the failure was reasonably excusable or was not willful. Section 266(b) of the Act also provides for prosecuting such failures as a minor misdemeanor.

However, enforcement of the obligation to provide a change of address notification is very

difficult in the present circumstances, because INS has done very little to publicize this requirement for aliens. INS will not be able to impose effective sanctions against aliens for failure to provide a current address when the Service itself has done so little to advise aliens of their obligation to do so.

As a further complication, a recent decision of the Board of Immigration Appeals in *Matter of G-Y-R*, 23 I&N Dec. 181 (BIA 2001), concluded that an alien cannot be ordered removed in absentia unless the alien has received notice of the proceedings either in person or at his or her current address; in that case, the Board dismissed the removal proceedings because the INS did not have a current address to provide the necessary notice to the alien. The Board's decision is based on the statutory language pertaining to in absentia orders in section 240(b)(5) of the Act, which allows for entry of an in absentia order of removal if the Notice to Appear was sent to the current address provided by the alien. In turn, section 239(a)(1)(F) provides that the Notice to Appear, among other things, must advise that the alien is obligated to provide (or to have provided) a current address and telephone number at which the alien may be contacted for purposes of removal proceedings, as well as any change of address or telephone number, and that the alien's failure to provide current address and telephone information may lead to the imposition of an in absentia removal order if the alien fails to appear for a removal hearing. The Board concluded that an alien cannot be subject to in absentia removal unless the alien has received notification of the obligation to provide a current address for removal purposes and the consequences of failing to do so, as provided in section 239(a)(1)(F), and that the alien has not received the latter notification unless he or she was served in person or the Notice to Appear was mailed to an address at which the alien could be expected to receive it. Under the Board's decision, if the INS is aware that the alien no longer is living at the alien's last known address and INS was not able to serve the alien in person, the INS cannot obtain an in absentia removal order against the alien if the alien fails to appear for the removal hearing.

This interpretation, though based on the existing law and regulations, creates something of a Catch-22, because the INS will not be able to have an alien ordered removed in absentia if the alien has "disappeared" and has failed to provide a current address. Although there is some language in the Board's decision to the effect that the alien can only receive the requisite notice about the obligation to provide a current address for purposes of removal proceedings, and the consequences of failing to do so, in the Notice to Appear itself, the Board's decision is also based on the lack of any other official notice — in the current regulations and forms — advising aliens of the consequences of failure to provide (or "have provided") a current address in connection with removal proceedings.

In view of the general importance of publicizing the obligation to provide a current address, as well as to respond in part to the Board's recent decision, INS should provide notification of the address requirement to covered nonimmigrants from the designated countries, and the consequences of failing to comply. INS can include this notice in the information that is to be provided in person to covered nonimmigrants at the port of entry, as discussed in part II.B.3 above. Once INS promulgates the new supplemental registration form for covered nonimmigrants from the designated countries, then INS should incorporate this notice of address requirements into the supplemental registration form. The alien's signature on that supplemental registration form can then be used as proof that the alien had received the requisite notice about the obligation to provide a current address

and the consequences of failing to do so, including the possibility of an in absentia removal order if the alien fails to appear for removal proceedings after a Notice to Appear is mailed to the alien's last known address.

III. Collection of Additional Information for Aliens Already Residing in the United States

Currently, the INS has only the information provided in a Form I-94 for almost all nonimmigrants already admitted into the United States, and some other limited information provided by the alien or his or her employer or school, but that information is often negligible at best.⁴ This lack of information makes it impossible for INS to track nonimmigrants or to establish which nonimmigrants are out of status. This is a particular concern for aliens from the designated countries, whose nationals have been able to remain and travel in the United States without effective oversight. Some nonimmigrants may remain in the United States for extended periods of time. F-1 students are admitted for duration of status -- i.e., for as long as they are still attending school in the United States -- and H-1B workers are admitted for periods of three years, plus a possible extension.

On the other hand, the Service's authority with respect to aliens who have already been admitted to the United States as a nonimmigrant is somewhat limited as long as the aliens are continuing to maintain their status. Unlike newly-admitted aliens who will be covered by the regulatory changes discussed in Part II above, the Service has not made compliance with the supplemental registration and fingerprinting requirements a condition of maintaining nonimmigrant status for those aliens already here. However, there are several actions that the Attorney General can take to obtain information with respect to aliens from the designated countries who are already residing in the United States.⁵

A. One-Time Request for Current Address and Other Information

Under section 265(b) of the Act, the Attorney General, in his discretion, can immediately publish a Notice in the Federal Register requiring that all aliens from the countries designated in that Notice (or any subclasses of such aliens) must provide a current address to the INS, and to "furnish such additional information as the Attorney General may require." This authority to require a current address and other information is in addition to any other registration requirements under the Act, and applies regardless of the alien's status or whether the alien has previously provided a current address to INS. In essence, this provision allows the Attorney General to take a snapshot of who the aliens are from the designated countries and their current addresses.

⁴ In some respects, the Student and Exchange Visitor Information System (SEVIS) that INS is currently developing (to become operational next year) will provide INS with additional information regarding the continuing enrollment of F, J, and M nonimmigrants in the school or exchange program on which their visa is based. Among other things, INS anticipates that colleges will notify INS electronically if an alien who was expected to enroll has failed to do so. However, the SEVIS system will be based on information reported by the participating schools and exchange programs. The initiatives proposed in this memorandum will be directed to requiring the covered aliens themselves from the designated countries to provide information to INS regarding their ongoing activities.

1. Supplemental Registration Form

Under section 265(b) of the Act, the Attorney General has the authority to publish a Federal Register Notice requiring that all of the aliens from the designated countries who are currently in the United States in a nonimmigrant status must provide the information required in the supplemental registration form discussed in Part II above, Form I-XYZ (which includes their current address as well as other information relating to their status). This will allow INS to collect the same information from nonimmigrants from the designated countries as well as from newly-arriving nonimmigrants. A draft Federal Register Notice is attached at TAB F.

Section 265(b) of the Act only requires aliens to submit the required information to INS; it does not provide authority for INS to require the covered aliens to appear in person at an INS office. Covered aliens would be able to provide this information to INS by mail.

Although the Act allows the Attorney General to require a reporting of current addresses from nationals of the designated countries within 10 days, it may be more appropriate to adopt a requirement of 30 days for aliens who are already in the United States to submit Form I-XYZ. That time period would be consistent with the time period allowed to newly-arriving aliens and would also provide time for aliens to gather the necessary information to submit along with their Form.

2. Scope of the One-Time Reporting Requirement

Because aliens in an A or G nonimmigrant classification are exempt from registration, these new requirements would not apply to them. However, it is important to note that the Attorney General's authority to require all aliens from the designated countries to provide a current address and additional information pertaining to their immigration status is not limited to aliens in nonimmigrant status. It can also be broadened to cover all such aliens from the designated countries, whether or not they had previously registered or are in lawful or unlawful immigration status.

Under section 265(b), the scope of the Attorney General's authority to impose the special address requirement extends to all aliens who are "required to be registered." In turn, section 262(a) of the Act defines the obligation to register in very broad terms: "It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 221(b) of [the Act], or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days." Children under the age of 14 are also required to be registered; section 262(b) imposes an obligation on parents and legal guardians to apply for the registration of any child under the age of 14 who remains in the United States for 30 days or longer, within that 30 day period.

The plain language of the statute - "It shall be the duty of every alien now or hereafter in the United States . . . to apply for registration" - clearly forecloses any contention that the requirement to register is somehow limited to aliens who have applied for a visa at a consular office abroad or who have applied to the Service for admission or parole or for an immigration benefit. Thus, all

aliens who remain in the United States for 30 days or longer have a "duty" to apply for registration, unless that alien had previously registered as required under the provisions of the Act. The scope of the duty to register includes aliens who are present in the United States without admission or parole.

Our research has not disclosed any recent cases where an alien has been prosecuted for failure to provide a current address as provided under section 266(b) of the Act, nor are we aware of any recent use of the Attorney General's special authority to require current addresses of all aliens from designated countries under section 265(b) of the Act. However, there are prior court cases upholding convictions of aliens for failure to comply with the earlier requirement that aliens provide a current address on an annual basis. For example, in Gallegos-Covarrubias v. del Guercio, 251 F.2d 519 (9th Cir. 1958), the court upheld an alien's conviction for willful failure to provide a current address, even though it noted that "one of the reasons that she failed to make the address report required by law was that she was unlawfully in the United States and did not wish to disclose her whereabouts in this country." *Id.* at 521. Although section 265 no longer requires an annual address reporting from all aliens in this country -- perhaps that should be reconsidered legislatively -- it is clear that the scope of the address requirement under section 265 can properly be extended to aliens who are not in a lawful status in this country.

B. Imposition of the Special Registration Procedures on Covered Nonimmigrants Already in the United States

In order to be able to impose a requirement for aliens to appear in person at an INS office, to comply with the supplemental registration process discussed in Part II above, the Attorney General would need to exercise his authority under section 263(a) of the Act to impose special regulations and forms for registration the designated class of aliens. In addition, all nonimmigrants other than those from Iran, Iraq, Libya and Sudan are already covered by the existing waiver of fingerprinting requirements if they remain in the United States for less than one year and remain in status. Based on the language of the Act, it is not entirely clear if the special registration and fingerprinting procedures can be made applicable to aliens who have previously registered under the existing procedures and remain in current status. We will pursue this legal question with the Office of Legal Counsel.

However, the Attorney General can amend the existing regulations to provide that any covered nonimmigrant from one of the designated countries must submit the supplemental registration form, Form I-XYZ, and comply with the other special registration requirements described in Part II above, at the time the alien applies for an extension or change of nonimmigrant status, for adjustment of status to lawful permanent residence, or for any other immigration benefit. This would include the obligation to appear for fingerprinting and photographing if that had not been done previously.

In addition, as part of the one-time reporting requirement discussed above, the Service can advise all covered nonimmigrants that the existing waiver of fingerprinting only extends to aliens who remain in this country for less than one year and who do not come from countries that do not

fingerprint U.S. citizens living there.