July 15, 2002

Via email: insregs@usdoj.gov

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

Re: Comments to Proposed Rule Titled "Registration and Monitoring of Certain Nonimmigrants" INS No. 2216-02; AG Order No. 2589-2002; RIN 1115-AG70 (67 Fed. Reg. 40581) (June 13, 2002))

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on the proposed Special Registration regulations published in the Federal Register on June 13, 2002.

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 hundreds of thousands of families, businesses, educational institutions, students, workers and visitors, in navigating the complex minefield that comprises today's immigration rules.

Like all Americans, AILA's members were deeply affected by the events of September 11, 2001. Two of our largest chapters are in New York and Washington, D.C., the cities that came under direct attack. While, fortunately, none of our members lost their lives that day, several lost law practices that were located in or near the World Trade Center, and far too many lost loved ones, colleagues, friends, and clients. We recognize the need for effective preventative and deterrent measures. But those measures must *be* effective, and must recognize the values of freedom and justice that the terrorists tried to attack. We must defend those values with the same heartfelt diligence with which we defend our security. AILA fears that this proposal could undermine effective prevention and deterrence, and could be used to attack, rather than defend, freedom and justice. As discussed in detail below, we urge that the Department of Justice and the Immigration and Naturalization Service re-think their approach in this regard.

COMMENTS ON THE ASSUMPTIONS AND PRINCIPLES UNDERLYING THE PROPOSAL

The Proposal is Ill-Conceived and Constitutes a Poor Use of Resources.

As an initial matter, we must recognize the reality that resources, even in the battle against terrorism, are finite. It is Government's duty to spend those resources wisely to get the greatest return on the expenditure. When funds are used up on one idea, there may not be enough left for the next one. Thus, these ideas must be carefully considered and balanced against other initiatives that may be more effective. A reading of the proposed regulation causes one to wonder about the care with which it was considered. Virtually every pivotal implementation issue--where the 30-day/one-year registration will take place, who will execute it, how entry registration and departure control will be effected, what will be done with the information, how the requirements will be communicated to those affected—is deferred or ignored. No mention has been made of cost, which would have to be substantial, much less of how enforcement of these new rules would be added to the already over-strained enforcement of existing rules.

In the Attorney General's press conference announcing this regulation, the proposal was titled the "National Security Entry-Exit System". Although the regulation itself does not use this title, we must presume from the Attorney General's announcement that this proposal is part of the Congressionally-mandated Entry/Exit system, and that it therefore will be funded from the appropriations authorized for that system. AILA cannot help but wonder whether this registration program will drain so much money from Entry-Exit as to leave that necessary system ineffective. Was the potential preventive/ deterrence effect of Special Registrion balanced against the effectiveness of a nationwide system to record when each non-citizen enters and exits the United States? What will have to be sacrificed to fund a Registration system? Does the diversion of resources to Special Registration mean that Entry/Exit can never be a reality at land borders? Or that the only kind of system that can be effectuated at a land border is one that will result in hours or days-long backups at crossings? Is the potential "reward" of Alien Registration worth the loss of commerce and resultant loss of U.S. jobs?

We do not contend that the United States should not be able to effectively and efficiently maintain data about individuals to visiting the United States. The issue becomes how does one do so appropriately and efficiently given the many demands upon limited resources.

A May 20, 2002 Department of Justice Inspector General report found that " the INS's current, paper-based tracking system is inefficient, inaccurate, and unreliable." The current proposal would do nothing to correct that situation, but instead would drain resources from the effort. As we have seen from the likes of Richard Reid and Zacarias Moussaoui, British and French citizens respectively, citizenship is no predictor of whether an individual intends harm to the United States. If it is believed that better tracking will reduce the risk of terrorism, then our resource concentration should be on a system that provides objectively-obtained information on when persons enter and exit the

U.S., rather than on self-reported information from a class of persons identified by national origin.

This Program Will Not Provide Disincentives to Terrorists, nor Increase Our Ability to Apprehend Them.

With many millions of taxpayer dollars to be invested in a Registration system, what benefit will result? Terrorists and other "lesser" alien criminals intent on doing harm to or in the United States can go about their ill-intent in a number of ways that Special Registration will not change:

- They will comply fully with Special Registration, but because they have valid visas and no "history," registration will not prevent them from committing terrorist or criminal acts at any time; or
- They will comply with Special Registration upon entry, but will then "go underground" and never report again for follow-up, and will commit terrorist or criminal acts at any time; or
- They will enter without inspection, as do thousands every day across the Northern and Southern borders, and will commit terrorist or criminal acts at any time; or
- They will use "proxies" (U.S. citizens or other lawfully admitted persons from other countries) to carry out terrorist or criminal acts at any time. A tourist from France or a citizen of the United States can be just as dangerous as one from Iraq or Saudi Arabia. Note, in this regard, the alleged terrorist acts committed by U.S. citizens John Walker Lindh, Jose Padilla (Abdullah al-Muhajir) and Yasser Hamdi. Note also the recent indictments in "Operation Eagle Strike" concerning a U.S. embassy employee involved in providing counterfeit U.S. visas; and the INS agent in San Diego who pleaded guilty to selling work permits under-the-counter.

Put another way, fingerprinting, photographing and periodically interviewing a person, whether citizen or alien, cannot predict or deter future terrorist or criminal behavior. The only true preventative measure would be for every "suspect" alien in the United States to be surreptitiously "tailed" round-the-clock by a team of armed law enforcement officers - clearly not a cost-effective or acceptable option.

And, as the suicide hijackers demonstrated, some terrorists will risk death or capture after the fact: the "threat" of criminal prosecution and conviction and/or deportation is simply no deterrent at all to the committed criminal or terrorist.

Thus Special Registration appears to be soporific; merely an expensive attempt to convince the public that the government is "doing something," yet providing no material gain whatsoever.

This Regulation Would Overreach in Impact.

The Attorney General told the U.S. Mayor's Conference, on October 25, 2001, that "Robert Kennedy's Justice Department, it is said, would arrest mobsters for 'spitting on

the sidewalk' if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror." Even if one were to accept the appropriateness of this tactic, the results of what the Department proposes to do here threaten the goal of justice that underlies all American laws.

This proposal creates a new violation that would be both obscure and *de minimis,* and that would apply only to persons selected largely on the basis of national origin. Far from setting out a publicity campaign to ensure that those subject to the rules would know about and be able to obey them, the proposal emphasizes publicity by Federal Register notices.

This regulation would provide the most technical and non-substantive bases yet by which inviduals could be detained and eventually removed. The proposed regulation would apply to persons from countries with predominantly Muslim populations,[1] and would invent a new "stealth" requirement that most persons so subject will wind up violating out of ignorance. The regulation is being introduced while the Department is conducting highly controversial detentions on individuals of Muslim background. It is hoped that the Special Registration proposal is not merely a pretext to widen the net on these highly questionable detention practices.

Even apart from these questions of justice, this approach encourages, and even requires, ineffective intelligence-gathering. With so simple a tool for detention and removal at hand, there is no need to look further. To encounter a Muslim is to have an excuse to lock him up. This will undoubtedly be perceived around the world as an act of religion or national origin-based hostility, and could hurt the United States' standing among many countries that should be our allies. It also is likely to harm our ability to convince nationals of those countries to work with, rather than against, us in intelligence gathering.

As U.S. Senator Edward M. Kennedy (D., Mass.) says, the proposal "will further stigmatize innocent Arab and Muslim visitors... who have committed no crimes and pose no danger to us."[2] Special Registration sends a clear message: all aliens from listed countries are intrinsically suspect, and are deserving of harsh treatment. Such a broad-brush treatment of entire nationalities is indefensible.

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[1] This is not spelled out in the proposed regulation. Instead, the proposal merely indicates that it would apply to individuals from "certain designated countries" to be named later in Federal Register Notices, thus avoiding notice and comment with respect to the vital issue of who will be subject to the rules.We must therefore use this opportunity to comment on what is believed to be those designated countries; namely, countries that have significant populations that follow the Moslem faith.

[2] Statement of Senator Edward M. Kennedy Regarding the Justice Department's Proposed Fingerprint, Photograph and Register System," June 5, 2002 (available at http://www.senate.gov/~kennedy/statements/02/06/2002606846.html)

The Suggestion of State and Local Police Involvement in the Program is Troublesome.

This regulation is also disturbing when considered in conjunction with the Attorney General's remarks announcing the rule and encouraging state and local law enforcement to enforce civil violations of the immigration laws. These remarks signal a dramatic departure from long-standing Department policy and should be subject to public debate and consideration. At a minimum, they should have been made part of this rulemaking.

For decades, courts and previous Department opinions have made it clear that although state and local law enforcement may assist in enforcing *criminal* violations of the INA, enforcement of its *civil* provisions is reserved to the federal government exclusively. For example, in 1978, Attorney General Bell stated that "local police should refrain from detaining any person not suspected of a crime, solely on the ground that they may be deportable aliens."[3] Similarly, in 1989, the Office of Legal Counsel ("OLC") determined, "[b]ecause 8 U.S.C. § 1251 makes clear that an alien who has lawfully entered this country, lawfully registered, and who has violated no criminal statute may still be deported for noncompliance with the noncriminal or civil immigration provisions, the mere existence of a warrant of deportation does not enable all state and local law enforcement officers to arrest the violator of those civil provisions."[4] In 1996, the OLC again reiterated this view, by concluding that "State police lack the recognized legal authority to arrest or detain aliens solely for purposes of *civil* deportation proceedings, as opposed to criminal prosecution."[5]

In his prepared remarks outlining the proposed National Security Entry-Exit Registration System, Attorney General John Ashcroft announced that the OLC has revised this long-standing and consistently held view and will encourage state and local police "voluntarily" to arrest aliens for civil violations of the INA.[6]

Although the Department has not disclosed significant details about the plan, the Attorney General's remarks state the Department's intention to add the names, photographs and other information of individuals who violate the proposed rule into the National Crime Information Center ("NCIC") database -- which is reviewed by police

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[3] Local Police Involvement in the Enforcement of Immigration Law, 1 Tex. Hisp. J.L. & Pol'y 9, 36 (1994) (quoting Att'y Gen. Bell, Dep't of Justice Press Release, Jun. 23, 1978).

[4] Memorandum for Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, From Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File at 9 (Apr. 11, 1989).

[5] Office of Legal Counsel, Dep't of Justice, Memorandum Opinion for the United States Attorney, Southern District of California (Feb. 5, 1996) (available at www.usdoj.gov/olc/immstopo1a.htm). *See also Gonzalez v. City of Peoria*, 722 F.2d 468, 478 (9th Cir. 1983) (stating that authority of state officials to enforce the INA "is limited to civil violations"); *Gates v. Superior Court*, 193 Cal. App.3d 205, 213, 238 Cal. Rptr. 592 (1987) (stating "[t]he civil provisions of the INA constitute a pervasive regulatory scheme such as to grant exclusive federal jurisdiction over immigration, thereby preempting state enforcement.").

[6] Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, June 6, 2002 (available at www.justice.gov/ag/speeches/2002/060502agpreparedremarks.htm).

officers when making routine traffic stops and other encounters -- and permit state or local law enforcement officers to "arrest that individual and transfer him to custody of the INS."[7]

Indeed, there are strong public policy issues at play that deserve, and in fact require, public vetting and consideration. For example, by calling on local law enforcement to enforce civil violations, the Department would send a signal to immigrant communities that all police are a threat, undermining years of efforts on the part of local law enforcement to build ties with these communities. For this very reason, many local law enforcement personnel have objected to the Attorney General's proposal and this new "authority." As stated by Amy Bertsche, spokeswoman for the Arlington Police Department in Virginia -- the local police force most involved in the September 11 attacks on the Pentagon -- "[the proposed Federal policy] would be a huge step backward in terms of our relations with the immigrant community. . . . We need the immigrants to be comfortable talking to us. I don't know that enforcing immigration laws is the proper role for local police."[8]

The OLC's memorandum and the Attorney General's remarks are a clear reversal of agency policy that will substantially impact the enforcement of federal immigration laws. Such a change should not be made without public consideration and debate. Accordingly, before finalizing the rule or adding alleged status violations to the NCIC database, the Department should revise the proposed rule to fully disclose its plans for enforcement and publish these provisions for public debate.

COMMENTS ON THE SPECIFICS OF THE PROPOSED REGULATION

The Designation of Individuals Subject to Special Registration Undermines the Goals of Antiterrorism.

Under 8 CFR 264.1(f)(2) the designation of classes of nonimmigrant aliens to be subject to these registration requirements is left to the Attorney General, in consultation with the Secretary of State. The proposed rule notes that such designation will apply to "natives" or "citizens" of a country.

The application of this provision to both citizens as well as "natives" (assuming that native refers to those born in a particular country) clearly reflects the lack of intelligence apparently possessed by the U.S. in order to ascertain potential security threats to this country. This rule can be applied to someone who was only in a particular country upon birth with no other tie to the country at issue, and yet, the rule would not apply to someone born in a non-suspect nation with substantial ties to a suspect country. Of course, the case-by-case option provided by these proposed rules could apply to such a person, but what indicia can an inspector realistically be expected to review during an

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[7] *Id.*

[8] Bradley, Paul "Police Shun Federal Plan", Richmond-Times Dispatch (June 2, 2002). *See also*, McDonnell, Patrick, "Police Want No Part in Enforcing Immigration Law," L.A. Times (Apr. 5, 2002); Emily, Jennifer, "Two Chiefs Oppose Immigration Role" Dallas Morning News, (Apr. 5, 2002).

admission interview? In addition, today's global economy, which is interlinked by the internet, does not require actual travel to or residence in a particular country to have potential ties to terrorist cells.

It is important that the U.S. use its scarce resources in a focused and intelligent manner. The base premise of Special Registration allows a more thorough review of citizens and nationals of certain countries just because of nationality. Terrorism is not tied to a nationality. It is not even tied to the omnipresent "alien." It is tied to an ideology of hatred and destruction. To link Special Registration to nationality promotes the simplistic and dangerous view that our enemies in the war on global terrorism are cloaked in the guise of a passport or stated place of birth. The examples of Mr. Padilla's recruitment in the U.S. by Al Queda operatives and the insane actions of our own Timothy McVeigh are obvious examples that this premise does not hold water. The use of Special Registration is an optical solution to the American public, which provides potential false hopes for security painted with a simplistic nationalistic brush.

Registration of nonimmigrants should not be based on place of birth or citizenship alone. The Enhanced Border Security and Visa Entry Reform Act (Pub. L. No. 107-173) provides for the use of pre-arrival passenger manifests, enhanced database sharing, improved technology, increased staffing of inspections, etc., all with the hope to enhance our capability as a nation to interdict outside of the U.S. those who would harm us. Section 212(a)(3)(A) provides consular officers and immigration inspectors with broad authority to exclude those whom we believe may engage in any unlawful activity from entering the US. If a consular officer or immigration inspector "has a reasonable ground to believe" that someone will enter the U.S. to engage in unlawful activity, why would we admit the person and subject them to Special Registration? The obvious security response in this situation is to deny the visa or to deny admission to the U.S. Such denials must be based on sufficient security related information, which is available to the inspector or consular officer.

In order to appreciate the gravity of the situation, a U.S. citizen must place himself or herself at an airport or consular post trying to explain numerous business visits to an "unfriendly" nation. Is this the standard we want to apply to someone merely because their parents were located in a particular country at the time of the person's birth?

U.S. citizens and legal permanent residents will be a prime target for terrorism recruiters, since they are not subject to such scrutiny. Bottom line, such generic measures to target a sophisticated, non-nationality based foe is poorly conceptualized and naive.

We do encourage improved use of technology, intelligence gathering, and training to deal with and eradicate, if possible, the current terrorist threat. Nationality based Registration, though, is a myopic and ill-conceived solution, which insults the multi-racial and national nature of our country and our knowledge of the sophistication of our terrorist foe.

The Regulation Perpetuates an Ineffective Approach to Address Change.

The proposed regulation's effect on an individual's "legal obligation" to file Form AR-11 within ten days of a change of address is problematic for several reasons.

First, INS Form AR-11 (Alien's Change of Address Card) is not integrated into any existing INS file systems. The AR-11 provision of the regulations, which is largely unknown, unpublicized and, until recently, unenforced, requires that the form be sent to INS headquarters, where it appears that nothing is done with them. Are the data from the forms entered into a database? AILA's members' experiences with trying to update INS files regarding clients' addresses would tell us "no" Is the INS actually equipped to accept and process tens of millions of forms? Do inspectors and field offices have a way to check that huge store of AR-11 forms? Does the office have a reliable way to confirm receipt of a form? Does the office keep reliable records of the actual dates of receipt? The Department should take the time to consider carefully ways to make the reporting requirement meaningful, and not just needless paperwork. Nothing in this regulation or in any other public pronouncement indicates a plan for the treatment of these forms to change.

Indeed, any INS officer in the field knows from experience that the AR-11 has no impact on a case file. The nature of the Service's databases is such that that only chance of having a change of address matched with a case is to provide the change information directly to the office where an action is pending, along with details about the case itself. For example, if an application or petition is pending at an INS Service Center, the action is adjudicated through the CLAIMS system, which is case-based, rather than person-based. The only way to get a change into CLAIMS is to notify the specific Service Center, providing the file number assigned by that Service Center. There is no way for INS to enter a change of address into this system based on the person's name.

Proclaiming the AR-11 as the means to notify INS of a change of address ensures that INS files are *not* updated with the correct address, since few persons with pending nonimmigrant or immigrant visa petitions, naturalization cases, asylum filings, or removal or exclusion hearings will know that the official means of notifying the INS of an address change is not an effective means. Thus, if they follow the instruction of which this rule "reminds" the public, their address changes will not be matched with their files.

AILA acknowledges that the AR-11 provision has long been in the statute and regulations, but its notorious ineffectuality has long since rendered the provision irrelevant. To suddenly announce that this provision will be enforced, while making no provision for it to be effectual in actually updating anybody's records, is puzzling at best.
The Proposed Regulation Errs in Its Characterization of the Impact of Failing to File an AR-11.

The preamble to the proposed regulation errs in its broad statement that "the Attorney General may also remove nonimmigrant aliens who violate the provisions of section 265 of the Act and the implementing regulations." In fact, the statutory provision for removal

of those who fail to provide address changes is highly limited: under INA section 266(b), in order for a person to avoid deportation for failure to report an address change, the failure must be "reasonably excusable" or "not willful". In light of the widespread ignorance by most nonimmigrants of the existence of this provision, and of the Government's utter failure to publicize the requirement in any meaningful way, virtually all "violations" of this provision will not be willful. And, given that fact that those few who are aware of the existence of the AR-11 process are also aware that it is a futile exercise, failure to fill out a form for the sake of filling out a form is quite "reasonably excusable." Indeed, the Fifth Circuit Court of Appeals said it best in another immigration context: "The law does not require a person to do a vain and empty thing."[9]

Additionally, the threat of removal for simple failure to report a change of address is an example of enforcement excess that will only generate lawsuits and legislation, thereby eating up INS' resources on issues not relevant to terrorism. First, there are serious questions about how INS would prove whether or not an AR-11 was filed by a foreign national upon change of address. Certainly INS' track record in document retrieval is problematic at best, and does not suggest INS could ever meet its burden of proving no AR-11 was filed in a particular matter. Requiring the individual to keep a copy, or only file the AR-11 with a certified mail receipt, imposes an unacceptable burden on that population and still does nothing to address the many ways such a record could be falsely constructed. Considering the lack of past enforcement of this regulation, the enormous volume of filings the Service would have to handle in a timely fashion for the system to be a useful law enforcement weapon, and the complete lack of education in the foreign national communities about this proposal, imposition of criminal penalties and removal proceedings for failure to register a change of address is patently excessive.

There are also questions about how the Service will enforce the "legal obligation" to register a change of address. Currently there is nothing in the proposal that deals with the enforcement of this section. The only regulatory section deals with the form itself. Will INS initiate removal proceedings as the enforcement response to a failure to file? The cost of such an extraordinary response to a missed form would bankrupt INS' enforcement budget, and yield only protracted litigation.

It also appears that there will be some selective enforcement issues, as it logically follows that there cannot be complete and uniform enforcement of this provision without dedicating all INS resources, and those of every other federal enforcement agency, to tracking the millions of foreign nationals in the U.S. who change their address each month. The proposed regulation does not make it clear who will and will not be penalized or removed for failure to provide the notice within ten days, nor how a later-filed AR-11 might impact the penalties.

Also, some clarification is needed of what is a "change of address." Most who visit the United States stay for a very short time, and many travel around the country during that time. These individuals never establish an address to change, nor does it make sense to clutter any database that might eventually be developed with data indicating that an

[9] *Mashi v. INS*, 585 F.2d 1309 (5th Cir. 1978).

individual has "moved" from the Holiday Inn in Anaheim to the Holiday Inn in Orlando. Requiring address changes of casual tourists who never establish an address is not practical. A foreign national who decides to visit Disneyworld instead of Disneyland is not likely to search out the AR-11 form, but certainly is the most innocent of visitors.

The other group of foreign nationals who do not regularly file applications or petitions with INS are those who have been granted lawful permanent resident status. However, this group is large, dynamic, widespread and protected by the same Constitutional rights enjoyed by full citizens. Fortunately, legal permanent residents leave their fingerprints all over the U.S. the same as citizens do, so use of the databases that are used routinely to track citizens [social security records, driver's licenses, credit reports, home ownership, etc.] apply with equal effectiveness to permanent residents. There is no need to create another database through the AR-11, especially one that is guaranteed to be too large, and too unfocused, to be either fast or thorough.

The Proposed Form of Special Registration Is Problematic.

This is another provision that appears to be poorly thought through. The preamble explains that nonimmigrants subject to Special Registration will be fingerprinted and photographed, "and must provide expanded information on a required form." Whether the print will be the full ten-finger print needed for FBI clearance, or an index finger biometric, is not specified. No form is proposed, nor is an adequate description of the form given. There is no existing database or other system for this information to feed into, nor is there an infrastructure in place to make full use of the data collected. Like the change of address, the proposal seems to be collecting data for the sake of itself, with no plan for its use. Instead of putting together a multi-million dollar program that promises to alienate friends abroad, would it not be best to first establish a system into which this data can be fed? The speed with which this program is being established makes no sense from either a cost or enforcement effectiveness perspective. AILA urges that the Service and Department, at a minimum, devise an actual plan for implementation before rushing forward with what appears to be an impetuous proposal.

Apart from the broad concerns about whether the Service is ready for this program, we have specific concerns about the content of the form of registration. This proposed regulation presumes that the local practices and life situations of all nonimmigrants are identical to those for United States citizens. For example, the requirement for a second form of identification can be impossible for nonimmigrants. Many arriving nonimmigrants will not have a driver's license, and their countries may make no provision for alternative forms of identification other than their passports or not include photographs on the identification. Some classes of nonimmigrants (H-1B, L, E, O, etc.) are not required by U.S. law to maintain an address abroad, and will not have a "point of contact" there.

The information to be provided at "certain intervals" also poses problems. As U.S. states make it increasingly difficult, if not impossible, for some nonimmigrants to obtain driver's licenses or identification cards, an alternative form of identification may not be

available. Proof of tenancy often is impossible. Short-term visitors (such as students touring for the summer) often travel around the United States, with no set address as they stay in hostels or camp. For others, it is not uncommon to stay with friends or relatives, and thus have no proof of tenancy in their names.

Also, because the regulation leaves open the questions of who will be collecting the information and what will be done with it, other serious questions arise. It has been suggested that the nonimmigrants might be required to report to state or local police offices. If this is the case, will they be evaluating the legitimacy of the information provided? The suggestion by the Attorney General at the press conference that violations will be entered into the NCIC certainly implies such a situation. If an individual's proof of employment indicates a different employer than the one reflected on his visa, will the police be the ones to make a judgment as to whether this might be a status violation? The rules regarding when an employer is a successor in interest, such that an employee can work for the company without any amendment of his documentation, are complex. It is unlikely that an officer unfamiliar with these rules can effectively enforce them. And, if the information is simply sent to the INS, will the INS have the capacity to know, for example, that a change of employer application was filed in a distant office and that the individual is working for the new employer under the provisions of the American Competitiveness in the TwentyFirst Century Act? Mere collection of the information is meaningless, but analysis of the meaning of the information requires more knowledge than is possessed by a local police officer, or even by many INS officers.

There are Better Alternatives than Special Registration on Entry.

The proposal glosses over one of the most important issues: whether the INS facilities at ports of entry have the capacity to take fingerprints and photographs. We assume from the fact that limitations on the ports through which the subjects of Special Registration can depart are discussed, but no such limitations on ports of entry are mentioned, that such limitations on entry points are not planned. Given the lack of visible facilities to absorb the taking of fingerprints at most ports, we can only therefore assume that a single finger print is contemplated, and not a full ten-finger print.

Even at that, we question whether the INS has the capability at this time to implement this proposal, and whether ports of entry are the appropriate venue for such fingerprinting and photography. It would seem more effective to have these biometrics collected at the U.S. Department of State Consular Offices that would be issuing the nonimmigrant visas. Our understanding is that all ports of entry are, or soon will be, electronically connected to the U.S. Department of State Visa database so that when an individual enters the United States, the Inspector at the port of entry can call up the picture and other biometric data about the individual standing in front of the Inspector to be certain that it is the same person who was granted the visa. If there is a suspicion that an individual seeking entry is intent upon doing harm while in the United States, is it not better to identify the individual at this earlier stage and prevent the entry? In addition, if the purpose of fingerprinting is to allow comparison to existing databases to determine whether the alien has previously entered the country under another name, it would be best done overseas as

part of the application process. Currently, few ports of entry have the physical facility to take the fingerprints and clear through the existing databases, and it appears that the prospects of obtaining those facilities are well in the future, if they exist at all.

Registration and Re-Registration by Persons in the United States Is Impractical.

The proposed regulation would require any individuals that the Attorney General or the Secretary of State or their designees "have determined should be monitored within the United States in order promote the nation's security or law enforcement interests" to re-register if they are in the U.S. for a period exceeding 30 days. Thus, they must report in after 30 days and again every year that they are here. This would apply equally to persons who were subjected to Special Registration on entry and those who become subject to it after they are admitted.

Among the many implementation issues left open is the pivotal question of where this registration will take place. Currently INS District Offices are overburdened, grossly understaffed, and grossly underfunded. At the larger offices, a line starts forming at 4:00 am, and even then there is no guarantee of being seen that day. The Adjudication Support Centers (ASCs) are not a good alternative. They are set up to see people only by appointment made via the INS office where the related application was submitted. The ASCs initially tried to operate on a walk-in basis, but that proved unworkable, which is why the now largely well-functioning appointment system was established. But the appointment system requires a related application, and it ordinarily takes several weeks or even months for an appointment to be issued. If one is required to register within 10 days of one's 30-day or one-year anniversary of entry, this kind of timing will not work.

Nowhere is there any statement as to what additional resources, manpower or space will be made available in order for District Offices, or other locations, to be able to provide appropriate settings for this registration. The only thing that will happen is that other resources must be redirected. Whether this means Information Officers, Investigators, Deportation Officers, or Adjudicators is completely unclear in the proposed regulation.

Also, the individuals themselves will be forced to travel sometimes hundreds of miles to make these check-ins. INS District Offices, and even Application Support Centers, are not located in all reaches of the U.S.—in fact, not all states have an office. State and local police stations have been suggested for this purpose, but it seems unlikely that they will have the information and wherewithal to make themselves available for these purposes.[10]

[10] It would appear that, quite appropriately, the Department has rejected this idea. The proposed regulation indicates, in connection with Executive Order 13132, that the regulation "will not have substantial direct effects on the relationship between the national government and the States," and inidcates, in connection with the Unfunded Mandates Reform Act of 1995, that the rule "will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year…" Since, when taken with the costs that this rule will inflict on the private sector, that figure of $100 million is likely to be reached, we can only assume that the Department has no intention to involve State and local governments in this plan.

The burden of these trips is not decreased by the provision that the District Director may waive the requirement. Nearly all INS District offices have long since ceased to be accessible by telephone, and most are backed up months or years in responding to correspondence. Thus, the only way to ask for a waiver from a District Director would be to make the long journey to appear in person to make the request, which rather negates any potential relief afforded by this provision.

The proposed regulations indicate that individuals may become subject to Special Registration after they have entered the United States. The only notification to these individuals contemplated by the proposed regulation is a Federal Register notice. The notion that publication in the Federal Register constitutes public notification of a requirement is a legal fiction that is completely detached from reality. Few Americans, much less nationals of other countries, even know that the Federal Register exists. Publishing a notice in it does not tell anyone that the requirement exists. But we see no plan to publicize the requirement, or even to notify individuals. Will a notice be sent to the addresses they have provided? This would at least give some meaning to the nonsensical change of address requirement. Will Public Service Announcements, similar to those that were run years ago when Permanent Residents were required to register annually, be run on television and radio? Will the forms be made readily available, and clear instructions provided as to where and how to register? We see no plan for this necessary publicity, nor any space in the Department's budget to pay for it.

The Departure Control Requirements Are Overly Burdensome and the INS is Not Ready to Implement Them.

The proposed rule would require that a nonimmigrant subject to special registration also report his or her actual departure from the United States through inspection by a designated departure control officer. As departure control rarely has been used in the past, departure control capacity and facilities "will take substantial time to develop with airports, even for the small number of aliens covered by this proposed rule." Thus, at least for the foreseeable future, travelers who are subject to special registration will be permitted to depart the United States only through the limited number of ports with existing departure control officers and facilities.

This limitation represents not only a substantial inconvenience to the traveler, but a significant expense and, in some instances, an impossibility. Most persons already in the United States are already in possession of a return ticket, and usually the ticket is non-refundable and non-changeable without significant penalty. In the unlikely event that these individuals find out that they are subject to this requirement, they would have to change their departures to go through one of the tiny handful of airports that have the needed facilities. This would result, at best, in the individual having to pay a change penalty or having to change airlines and therefore forfeit the ticket and buy a new one at a much higher cost. But the impact is even deeper. Not all of the airports that have these departure facilities will be served by airlines that fly to the individual's destination. The individual may therefore be forced to transit through a country that will not allow their

transit. Or, a shortage of flights from the limited array of available airports could result in the individual being unable to book a flight that leaves before her period of stay expires,[11] thus forcing the individual to choose between violating one rule or another.

Even those who have not yet arrived may have bought their tickets before the rule was applied to them, or may not be aware of the need to depart from a limited number of airports. The airline and travel agent industries indicate that they were not consulted on the rule, and thus no plans are in place or even in development for obtaining those industries' assistance in seeing that affected visitors are made aware of the rule and their plans directed accordingly.

Therefore, while departure control may represent a reasonable security measure in the abstract, its implementation, even for the subset of nonimmigrants contemplated by the regulation, requires substantial planning and coordination that the Department of Justice readily acknowledges has not taken place. Accordingly, we strongly urge that the implementation of the proposed departure control reporting requirements be delayed until such time as the INS is prepared to handle processing at most ports and the anticipated new entry-exit technology can be applied to make the process more efficient.

The Department Errs in Trying to Impose a New Ground of Inadmissibility for Failing to go through Departure Control.

Another concern is that the proposed rule would effectively create a new ground of inadmissibility by characterizing failure to comply with the departure control provisions as "unlawful activity." Consequently, the individual would thereafter be presumed to be inadmissible to the United States under section 212(a)(3)(A)(ii) of the Act as an alien "who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in … any other unlawful activity." The presumption may be overcome by making a showing that satisfies an unspecified set of conditions.

This proposal represents an extraordinarily broad and unprecedented reading of INA section 212(a)(3)(A)(ii). The provision falls under the statutory heading of "Security and related grounds," a context that suggests sereious violations of law and not violations of technical, poorly publicized and counter-intuitive rules.Section 212(a)(3)(A) is written in the present tense and suggests active law-breaking. An alien is considered inadmissible under this section if there is a reason to believe he or she *currently* is seeking admission to the United States for the purpose of *engaging* in unlawful *activity*. To create a regulatory presumption that an applicant for admission is seeking admission to engage in unlawful activity simply because the applicant failed at some time in the past, whether unintentionally or intentionally, to appear before a departure control officer prior to departing the United States strains the logical bounds of this ground of inadmissibility

[11] Again, the Department has not subjected its list of countries whose nationals will come under these rules to notice and comment, but indications are that as many as 36 countries could be subject to these requirements. Flights going to that many countries from the few airports with these facilities will be very limited in number, thus forcing all nationals of those countries to compete for these few seats.

and the Attorney General's regulatory authority. A requirement to have departed a country as vast as the United States only through one of a handful of airports is not something about which most of the world's population would even think to ask. To presume inadmissibility on the basis that this shows an intent to engage in unlawful activity in the future is absurd.

Apart from the Attorney General's questionable authority to impose this sanction, the provision ignores real life. There are countless reasons why a departing alien may *not* be able to personally report to a departure control officer at the time of departing the U.S. Most if not all of the reasons are not likely to be the result of a preconceived intent to engage in unlawful activity at the time of an alien's future entry into the U.S. The individual may not be aware of the requirement. The departure may have to be sudden due to money reasons, or the illness of the alien or a family member. In addition, the intentional limitation of the departure control officer will also lessen the chance of alien compliance with this regulation. Limiting the departure control officers to a few specific sites will encourage aliens to either depart without reporting or not depart the U.S. at all, since it will become more difficult to depart the U.S. than to enter. The presumption that unlawful departure is an indicator of future illegal conduct in the US is wrong. It is more likely that this regulation will increase the number of aliens who violate the immigration laws due to their impracticality and cumbersomeness, than provide an indicator of possible future terrorists.

The Proposed Amendment to Section 214.1(f) Is Illogical and Unlawful.

The proposal to amend section 214.1(f) to make compliance with the Special Registration requirements a condition of maintenance of status is flawed in two ways. First, Special Registration is a ministerial requirement, and is not intrinsic to a nonimmigrant's maintenance of status. An H-1B nonimmigrant with unexpired status who is working for the petitioning employer in a specialty occupation does not cease to do that which is the substance of his status because he does not complete a form asking where he now works or lives. An F-1 student pursuing a full course of study is not the less studying by not providing his fingerprints yet again. Indeed, even in the context of what constitutes a full course of study, the courts have found that they "must view the entirety of a student's academic efforts in a fair and reasonable manner," and that the rule requiring pursuit of a full course of study "can not be applied in a de minimis penalty clause manner."[12] Instead, violations must be viewed in the context of whether they constitute a "meaningful disruption" of the student's academic career.[13] Yet, applying the Special Registration requirements in a de minimis penalty clause manner is exactly what is

[12] *Mashi v. INS*, 585 F.2d 1309 (5th Cir. 1978).

[13] *Id*., citing with approval *Matter of Murat-Khan*, 14 I&N Dec. 465 (BIA 1973). The *Mashi* court rejected the Government's contention that, when a student dropped a course toward the end of the semester, his failure to maintain 12 credit hours in accordance with the regulations meant that he had failed to maintain status. While initially rejecting this contention based on the fact that that explicit credit hour requirement was not in the regulations at the time of the nonimmigrant's entry, the court also found other bases for rejecting the argument, including that the 12-hour rule cannot be applied arbitrarily and abusively.

proposed in this regulation. Failure to comply with Special Registration does not meaningfully disrupt the substance of the nonimmigrant's activity.

As the Fifth Circuit has stated in analogizing the application of "specific and detailed regulations" for students to other immigration situations, "a rule stating that an alien should carry an identification card at all times is certainly a reasonable and worthwhile regulation. But this is quite different from saying that the 'compliance' clause of a deportation regulation incorporates it and every other technical regulation in the Code of Federal Regulations on a per se penalty clause basis."[14] Similarly, a technical rule requiring persons to register at various intervals should not be converted to a per se deportation rule, as is proposed here.

The proposal also errs, both logically and legally, in attempting to include the Special Registration requirements in the already-discredited provision of 8 C.F.R. section 214.1(f) deeming willful failure to provide requested information regardless of materiality to be a failure to maintain status. Not disclosing information not relevant to status cannot, by any stretch of logic, be a violation of the status. If it is not relevant to a person's status, it has no effect on his status.

Even more importantly, this existing provision of section 214.1(f) has been invalidated by the Ninth Circuit, holding that "the Attorney General exceeded his authority when he promulgated 8 C.F.R. [section] 214.1(f), which imposes as a condition of a nonimmigrant's stay in the United States, the full and truthful disclosure of all information requested by the INS, regardless of whether the information is material."[15] The court's logic is well-reasoned: "We find no evidence suggesting that Congress intended to bestow unfettered discretion on the INS to request any information it desires, and then deport an alien for failing to deliver it truthfully. The truthful disclosure requirement must have some relevance to the alien's status."

Why, then, is a regulation being proposed that would expand on an already-rejected regulation? Even if one were to accept the INS' general position that a judicial precedent applies only in the jurisdiction of that court (a questionable proposition in and of itself), here is an attempt to expand a regulation that already has no effect in at least one major Circuit.

Conclusion

What appears at first glance to be a good idea: "let's keep track of what visitors to our shores actually do here" is, in its execution, a bad idea in search of a viable plan. The codification of the notion of, and the harsh treatment that would be meted out to, "suspect nationalities" is abhorrent to our national values and a danger to our foreign relations and our future ability to gather reliable intelligence from nationals of the countries in question. The program proposed is at best premature, since the systems that would feed into it and that it would feed into do not exist yet. The INS plainly is not yet ready to

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[14] *Id*.
[15] *Romero v. INS*, 39 F.3d 977 (9th Cir. 1994).

absorb the impact, and the resources to implement the program would have to be drained from the other programs on which it will be ultimately premised. Gaping holes exist in the implementation plan. The Service and the Department must think the proposal through and develop one that is less national origin-based, and more likely to prevent the entry of those who would do harm to the United States.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION