SEPTEMBER 11 USHERED IN A NEW ERA IN IMMIGRATION LAW and PRACTICE

by Angelo A. Paparelli and John C. Valdez

One consequence of the tragic events of September 11 is that immigration law has achieved new visibility and a much greater sense of national importance in the minds of legislators, the Bush administration, the media and the public. This attention has already resulted in changes in immigration law and practice in the post-September 11 era. Many more changes are likely in the future. This article offers observations and predictions of some of the likely attributes of this new era.

INCREASED DEMAND FOR THE SERVICES OF EXPERIENCED IMMIGRATION ATTORNEYS

Experienced immigration lawyers will likely be in greater demand than ever before and clients, whether corporate or individual, will come to recognize the need to pay for expertise in this complex specialty area oflaw. The "do-it-yourself' mentality that has at times prevailed particularly with the ready availability of online resources - will probably be replaced by a new cautiousness, and a healthy recognition that even a seemingly simple petition or application may contain traps to ensnare the uninitiated. The near-term situation will likely resemble the era that followed the enactment of the Immigration Reform and Control Act of 1986, which signaled a new wil1ingness on the part of corporations to retain competent immigration lawyers because corporate conduct for the first time was subj ect to sanctions under the Immigration and Nationality Act.

INCREASED SCRUTINY IN THE ENFORCEMENT OF THE IMMIGRATION LAWS

In the post-September 11 era, enforcement of all of the immigration laws will no doubt be more vigorous. Government bureaucrats - whether they are adjudicators at the Regional Service Centers or inspectors at ports of entry will likely be less willing to exercise favorable discretion. An illustration of a more rigid posture regarding the exercise of favorable

discretion by the INS can be found in the position announced in a new memorandum released by INS Headquarters [Memorandum from Michael Cronin, Acting INS Executive Commissioner, Office of Programs, *Deferred Inspections, Parole and Waiver of Documentary Evidence Requirements,* File no. HQINS 70/10.10 (Nov. 14,2001)] ("the Cronin memorandum").

The Cronin memorandum limits the authority of INS officers to grant parole, waivers of visa or other documentation requirements, and deferred inspection. In particular, it provides that "[d]uring the nation's heightened security alert and until further notice" inspectors at Ports of Entry ("POEs") and Port Directors no longer have authority to grant deferred inspections, waiver of passports, visas and other documents, or to exercise parole authority. It also limits the exercise of these powers to District Directors, Deputy District Directors, Assistant District Directors for Inspections, and Assistant District Directors for Examinations.

While claiming that the new policy restricting the number of authorized officials who can exercise discretion does not change the existing statutory standards for paroles and documentary wai vers, the memorandum allows the favorable exercise of discretion only if the following criteria are met:

- All appropriate database checks have been completed; and
- The alien is likely to comply with the terms of the exercise of parole or documentary waiver discretion, and
  - inadmissibility is technical in nature (i.e., involving documentary or paperwork deficiencies); or
  - compelling humanitarian circumstances require the alien's entry

What does the Cronin memorandum mean for your clients?

The Cronin memorandum will cause increased scrutiny and difficulties for some clients attempting to reenter the United States, as the fol1owing scenarios suggest:

- The Hapless F -1 Student:

- An F -1 student is returning from a trip outside of the United States after she has completed a course of study. She is returning for authorized practical training, but her Form 1-20 is technically expired - the form says the Designated School Official at the alien's college or university must have endorsed it in the last year, but the regulations say that the 1-20 must have been so endorsed in the last six months. See 8 C.F.R. section 214.2(f)(13)(ii). Thus, a subtle paperwork deficiency may prevent the alien's entry to the United States. Unlike the situation in the past, a POE inspector or Port Director no longer has the authority to grant a waiver, parole, or deferred inspection in this situation, and the alien must seek assistance in accord with the requirements set out in the Cronin memorandum.

- The "Porting" H-IB Traveler:

  - An H-IB alien, invoking H-l B portability, I is returning from a trip abroad. He left the United States before receiving the INS fee receipt and lacks other documents to show that his new employer filed a new H-IB petition on his behalf. Previous INS Headquarters memoranda dated January 29, 2001 and June 19, 20012 contemplated a search of the INS CLAIMS database as a first step to confirm eligibility for portability. As an alternative, the cited memoranda say that generally an applicant who lacks evidence of a pending H-IB petition should not be processed for expedited removal unless there is evidence of fraud or misrepresentation. With the issuance of the Cronin memorandum, it is unclear whether the earlier memoranda are still applicable. '.Vill inspectors at POEs question whether the January 29 and June 19,2001 memoranda continue to state agency policy in light of the Cronin memorandum? Will officers go to the trouble to track down the persons authorized to grant parole or deferred inspections or documentary waiver when the CLAIMS system, the INS database that issues fee receipts and confirms submissions at the Regional Service Centers, reflects the acceptance of the new employer's H-IB petition but the alien lacks documentary evidence? Unlike Blanche DuBois in Streetcar Named Desire,

2 http://www.ilw.comllawyers/immigdaily/ins news/200 1 ,0626-Memo.pdf

this writer would suggest that aliens and their attorneys not rely on the kindness of strangers.

Lawyers should therefore caution clients about the closer scrutiny they may face when applying for entry from abroad and the INS' increased reluctance to exercise discretion favorably. Indeed, the consequences of an adverse finding at a POE can be severe, as suggested in an AILA Infonet report that a number of employment-based nonimmigrants at major POEs have been "placed in custody and subjected to expedite removal" since the Cronin memo was released. See Jonathan Ginsburg, Vice Chair, *Notice By AlLA Visa Office Liaison Committee,* as reported in *AlLA Infonet* on December 12,2001.

Practice Pointers for Lawvers Counselinf! Clients on Travel in the Post September 11 th Era

- Forewarn your clients about the risks of foreign travel;
- Urge them to delay any truly unnecessary travel;
- Make sure they carry all possible documents demonstrating their eligibility for admission;
- Explain the nuances of withdrawal of application for admission (and resultant visa cancellation by INS) versus request for deferred inspection, parole or documentary waiver and advise them of the reduced list of INS officials authorized to grant such benefits.
- Offer general trips on traveling after September II tho (See Cyrus Mehta's article on the ilw.cOl11 web site: http://www.ilw.comllawvers/colum article/articles/200l, 1218Mehta.shtm; see also an article by Steve Yale-Loehr and Stanley
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  as appearing in the Dec. 24, 2001 issue of the New York Law Journal. This publication will be reproduced shortly in Bender's Immigration Bulletin.

Other Enforcement Issues

In addition to changes the government will make to address matters of national security, the INS willlike1y continue to enforce the nation's immigration laws in matters that are unrelated to the need to snare terrorists

and protect our homeland. Some recent 1llustrations of INS' increased enforcement efforts include the following:

- The indictment of Tyson Foods and certain executives and other employees for alleged alien smuggling. INS Commissioner, James Ziglar, has stated that this "case represents the first time INS has taken action against a company of Tyson's magnitude." The indictment al1eges that "Tyson Foods cultivated a corporate culture in which the hiring of illegal workers was condoned" and "aided and abetted" aliens in procuring "false documents so they could work at Tyson poultry plants." In pursuing this matter, the INS, in an unusually broad government investigation, has worked in cooperation with the United States Attorneys Office for the Eastern District of Termessee, the Federal Bureau of Investigation, the Internal Revenue Service, the Department of Agriculture, the Department of Labor, the Social Security Administration, the Bedford County Tennessee Sheriffs Department, the Shelbyville Tennessee Police Department, and the Tennessee Highway Patrol. Department of Justice Press Release, #654: 12-19-01, www.usdoi.gov/03press/031I.htm1.

- Indictment of Golden State Transportation for alleged alien smuggling. **In** a criminal matter involving one of the largest asset forfeiture in an alien smuggling case, the Department of Justice has procured indictments against Golden State Transportation, a Los Angeles-based bus company, its principal officers, and more than 30 employees in the United States District Court in Tucson, Arizona alleging that they conspired with migrant smugglers to move undocumented immigrants from the southwest border to locations across the United States. Department of Justice Press Release, #636: 12-10-0 I, www.usdoi.gov/03press/03 1 l.html.

- Recognition by the 2nd Circuit of a civil private right of action under the Racketeer Influenced Corrupt Organizations Act ("RICO") by one cleaning company against another on a claim that the knowing use of workers who lacked employment authorization caused the law abiding company to lose a bid for a valuable janitorial services contract. See *Commercial Cleaning Services LLC* v. *Colin Service Systems,* 271 F.3d 374 (2nd Cir. 2001).

. *us. v. O'Conner,* 158 F. Supp. 2d 697 (E.D. Va. 2001). In this case, two business associates were defendants in a sixty-one count criminal indictment in connection with their role in inducing 200 aliens to invest money for the purpose of obtaining visas under the EB-5 treaty investment program. The defendants were convicted of all offenses cited in the indictment, which included conspiracy to commit immigration fraud, conspiracy to commit money laundering, and filing false income tax returns.

The foregoing cases demonstrate the increased willingness of the federal government and of private parties to venture into the business arena in the enforcement of the immigration laws. They also show the government's commitment to apply additional resources, both in terms of money and personnel, to achieve enforcement goals.

While there may be good reasons for INS to target specific employers, lawyers representing employers will be called upon to protect the interests of their clients against unwarranted and intrusive investigations of business practices. This responsibility will require lawyers to fully document cases that demonstrate eligibility for the immigration benefit the client seeks, to advance creative legal arguments zealously and ethically within the bounds of the law, and to go into federal court as and when needed to prevent injustice and governmental overreaching.

ADDITIONAL POST-SEPTEMBER 11 DEVELOPMENTS

The post-September 11 era may well include new developments that fundamentally change the way the INS conducts operations. Two likely areas of development of critical importance will involve restructuring of the INS itself and changes in the use of technology. In addition, legislation and federal cases not involving the events of September 11 continue to change immigration law, sometimes in ways that benefit aliens.

INS Restructuring Proposal

Although the INS' recent proposal for restructuring and splitting the agency into two separate entities promises more efficient enforcement of the immigration laws while producing better customer service in the adjudication of applications, there are ominous signs that the INS' major focus will be more on enforcement and less on service. Evidence of this emphasis can be found in INS' proposal to keep the Inspections function in the Bureau of Immigration Enforcement rather than in the Bureau of Immigration Services, despite its recognition in the proposal that "Inspectors have a unique role as both facilitators of bona fide travelers and as law enforcement personnel."

INS has declined to a follow a suggestion by some to create a separate Inspections Bureau reporting directly to the Commissioner. By creating a separate Inspections Bureau, the agency could establish a unit that would theoretically place an equal emphasis on service and enforcement goals. Instead, the INS' proposal aims to place this unit within the enforcement arm of the INS in order to "ensure law enforcement coordination at ports of entry." Query how inspectors working under newly revised policies limiting the use of discretionary powers and separated from the Bureau of Immigration Services will be trained on current standards of eligibility for admission under the family-based and employment-based categories. History teaches that inspectors have often been among the last to learn of new eligibility criteria. These new changes are likely to make matters worse for some applicants for admission.

Other noteworthy recommendations in the INS restructuring proposal include:

. Providing "[p]rofessional communication skills training for all Inspections field staff';
. Expanding the "automated inspection systems to expedite entry oflow risk travelers at seaports and land border pedestrian lanes";
. Hiring of "25 Customer Service Representatives to work in Headquarters" in order "to respond more quickly and systematically to case inquiries" and "solve specific case problems raised by immigrants, U.S. citizens, and Congressional Offices";
. Creating a Chief Information Officer position;
. Allowing for on-line filing of at least two immigration benefits applications of FY 2002 and expanding so-called "e- filing" to additional form types in FY 2003 and FY 2004; and
. Integrating all governmental databases containing information on aliens.

The INS restructuring proposal can be found at www.ilw.com/lawyerslimmigdaily/ins news/200 1, ll16-proposal.pdf.

New Uses of Technology

New, advanced technologies will playa prominent role in the post-September 11 methods of operations for both the INS and the Department of State. According to a report in the Los Angeles Times, in January 2002, the State Department planned to begin relaying digital images of foreign travelers to INS officials at ports of entry in the United States. The agencies hope that this new procedure w111, for the first time, permit INS inspectors to confidently compare the physical appearance of travelers to the United States standing before them to authentic pictures of these aliens taken at the time they applied for visas abroad at a U.S. consulate or embassy. The unique, personal identifiers - such as digitized fingerprints on visas that the State Department grants to foreign nationals who wish to travel to this country, as well as on passports of aliens from 29 nations. This bill passed the House on December 19,2002 and enjoys broad support in the Senate. Jonathan Peterson, *Digital Images Will Verify Identity a/Visitors to u.s.*, Los Angeles Times, January 2,2002.

The State Department is also relying on new technologies for security measures involving the Olympic games. The State Department has reportedly issued more than 9,000 visas to Olympic participants using a new

high-tech security system that makes it possible to check the applicants' backgrounds for terrorist connections before electronically issuing a forgery-proof document. The secure document includes a digital picture of the participant on the visa and threads of colored paper that help prevent forgeries. The Olympic Visa Information Database 2002 (OVID 2002) began approving credentials on November 15,2001. State Department officials anticipate the system will issue as many as 20,000 visas to athletes, coaches, the media and other officials for the Olympic and ParaolYillpic Winter Games scheduled to begin Feb. 8 in Salt Lake City. The procedures followed by the State Department mark "the first time that the State Department has issued visas electronically." Iudi Hasson, *IT in Play at Olympics,* Federal Computer Week, December 10,2001 (see www. fcw.com).

Current national security concerns, as well as the need for more efficient processing of immigration applications, will place increased demand on government officials to develop and implement new technologies. To meet the practice demands caused by these changes, lawyers must likewise be prepared to commit time and resources to the introduction of technology enhancements in their offices. They must also make a *daily_commitment* to continuing education through frequent visits to immigration portals like www.ilw.com and AILA infonet, so that they can remain up-to-date on technology advancements used by INS and adapt their use of technology accordingly.

Silver Linings: Positive Changes in Immigration Law in the Post-September 11 Era

Notwithstanding the events of September 11, immigration law changes, unrelated to national security concerns, continue to unfold. Pressure from immigrant activists, the business sector, attorneys, and others is a key factor in motivating Congress to make sensible immigration laws that benefit the nation, immigrants, and the economy.

Recently enacted bills liberalizing the Immigration and Nationality Act include the following benefits:

. Allowing spousal employment for E and L visa holders; and

. Reducing from 1 year to 6 months the required prior experience with the petitioner abroad for blanket L-l visa applicants.

These legislative gains prove that advocacy of business concerns involving the use of foreign labor and immigrant rights can be successful even in an era when aliens face increased scrutiny and restrictive policies and practices at the border. Immigration lawyers and their clients can, and should, marshal resources for legislative and agency advocacy efforts and enlist the aid of the media in fostering a better public understanding of the need for enlightened immigration laws.

Equitable Tolling - An Opportunity for Effective Advocacy

One line of cases that promises to arm immigration lawyers with new legal arguments in the defense of their clients in the post-September 11 era is best illustrated by *Socop-Gonzalez v. Immigration* & *Naturalization Service,* No. 98-70782 (9th Cir. December 5, 2001); see also, Varela v. INS, 204 F.3d 1237 (9th Cir. 2000) and lavorski v. INS, 232 F.3d 124 (2nd Cir. 2000). In *Socop-Gonzalez,* the Ninth Circuit Court of Appeals found that the principle of equitable tolling applies to the 90-day period to reopen a deportation case after a Board of Immigration Appeals decision under 8 CFR 3.2(c)(2), and applies even if the applicant knew, or should have learned of, the tolling event before the expiration of the original period oflimitations.

The *Socop-Gonzalez* Court ruled that the factual circumstances of the case waITanted equitable tolling of the 90-day period to reopen a deportation matter. Of particular importance to the case, was the Court's finding that the nlaintiffhad received incorrect advice from an INS officer while his anneal of the denial of an asylum application and order of deportation was pending at the Board of Immigration Appeals ("the BIA"). Subsequent to the immigration judge's order of deportation, the plaintiffmaITied a U.S. citizen. Acting without the advice of counsel, he approached an INS officer at an INS office in Westminster, CalifoTIlia. That officer advised the plaintiff to withdraw his appeal and file an immigrant visa petition and adjustment of status application with the INS. This advice was faulty. The plaintiffs spouse should have filed an immigrant visa petition with the INS. After approval of the immigrant visa petition, the plaintiff could have submitted a motion to remand his case from the BIA to the Immigration Court, along

with the immigrant visa approval notice and an application for adjustment of status.

Following the INS officer's advice, the plaintiff submitted his request to withdraw his appeal to the BIA, which resulted in a final order of deportation. Before the plaintiff was able to sort out his confusion over the matter, caused primarily by faulty advise from an INS officer, the limitations period for filing a motion to reopen with the BIA expired.

Socop-Gonzalez contains the following useful observations:

- Although an alien may be barred from asserting equitable estoppel against the INS, see e.g., *Mukheljee v.INS,* 793 F.2d 1006, 1008 (9th Cir. 1986), the alien may nonetheless rely on equitable tolling to forgive the late-filing of a required documentary submission;
- Both equitable estoppel and equitable tolling stop a limitations period from running, but the two doctrines are distinct: equitable estoppel focuses on the action of the defendant while toning focuses on the alien's excusable ignorance of the limitations period and on the lack of prejudice to the government;
- To establish a basis for equitable tolling, the alien must show that despite his or her due diligence, the alien was prevented from making a timely submission by circumstances beyond the alien's control that were caused by something more than merely "excusable neglect";
- Equitable tolling also requires a showing that, despite the exercise of reasonable diligence, the proponent of tolling could not have discovered essential information bearing on his or her claims or rights;
- Equitable tolling can be applied where INS negligently provided
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situation involving ineffective assistance of counsel, but the court in Socop-Gonzalez emphasized that it is by no means limited to these two situations; and
- As established by the Supreme Court in *Holmberg* v. *Armbrecht, 327* U.S. 392 397 (1946), the rule oflaw is that equitable tolling is presumed to be part of <u>every</u> federal limitation periods . thus, conceivably it could be relied on in a variety of situations involving immigration deadlines.

Since equitable tolling is presumed to be part of all federal limitation periods, the holding of *Scoop-Gonzalez* could conceivably be applied in a

variety of situations involving immigration deadlines. A short list of examples could conceivably include the time to respond to an INS Request for Evidence, the time to submit a change of status application (e.g., where alien is unexpectedly terminated from H-lB employment and thinks he/she is authorized to remain in the United States during the unexpired period of authorization noted on the Form 1-94), and the time to submit an extension of status application (e.g., where alien is understandably confused about the effect of dueling Forms 1-94 under the INS so-called "last action rule").3

CONCLUSION

The post-September 11 era is a time of increased awareness of the need for greater national security. Concerns over national security have led to greater scrutiny of our immigration laws and practices. Within this period, while perhaps more difficult than previously, immigration lawyers will be called upon to develop creative legal arguments to protect clients and advance the development of immigration law in a manner that protects and supports our constitutional due process protections and our bedrock principle that we are a nation of immigrants.

3 For a sample of documents on the "last action rule," see Memorandum from Thomas Cook, *Travel After Filing a Request/or a Change of Nonimmigrant* Status, June 18,2001, *reported in* 78 IR 1378 (Aug. 27, *2001); AdvisOlY letter from INS concerning a filing/or H-I B status change of employer and validity date 0/ the petition subsequent to travel,* by Thomas \V. Simmons, October 20, 1999, *reported in* 76 IR 1723 (Dec. 3, 1999); and INS Letter from Jacquelyn A. Bednarz, *INS on Effect ojH&L Alien Departure,* May 6, 1993, *reported in* 70 IR 1604 (Dec. 6, 1993).

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