



In March 2001, we wrote an article for the *Michigan Bar Journal* discussing the globalization of the economy and the impact of immigration laws on global business. Six months later, the events of September 11, 2001 (9/11) occurred, shocking the world and forever changing global travel. Today, the effects of 9/11 resonate at airports, consular posts, and border crossings; at the Department of Homeland Security (DHS), the Department of Labor, and the Social Security Administration (SSA); and at every immigration practitioner's doorstep. Additional burdens have been placed on the government to improve border security; on the international traveler to comply with new passport requirements, endure longer visa wait times, and observe more stringent U.S. entry/exit requirements; on the SSA, DHS, and consular posts to perform additional background checks; and on the immigration practitioner to interpret the new laws, provide accurate information to clients, and prepare them for the new rigors of global travel.

By Galia Avramov, Myra Maclsaac, and Michele Polito

Post-9/11 Challenges

FOR THE
Immigration
Paralegal



Our immigration group provides a wide range of services to international corporations and individuals, including employment-based non-immigrant visas, green card applications, labor certification, naturalization, citizenship, and nonimmigrant waivers. We have considerable experience with outbound visas and work permits for numerous countries, including Brazil, Canada, China, Mexico, South Korea, Thailand, and the member nations of the European Union.

Following the events of 9/11, the U.S. Congress enacted at least 19 immigration-related acts aimed at enhancing national security and improving border protection, compared to only 5 new comprehensive acts in the previous 15 years.¹ This revolutionary change in the law has resulted in a need to wholly re-educate ourselves on the law of immigration and the Social Security and driver's license regulations that affect the ability of our foreign national clients and their families to live and work in the U.S.

Of this new legislation, the Enhanced Border Security and Visa Entry Reform Act,² Intelligence Reform and Terrorism Prevention Act 2004,³ Homeland Security Act,⁴ REAL ID Act of 2005,⁵ and Western Hemisphere Travel Initiative⁶ play a preeminent role in our work post-9/11. How those acts dictate our daily practice is briefly addressed in this article.

The Enhanced Border Security and Visa Entry Reform Act mandated the implementation of a new entry and exit security procedure—the U.S. Visitor and Immigrant Status Indicator Technology Program (U.S. VISIT)—at certain airports, seaports, and land border posts.⁷ U.S. VISIT currently applies to all visitors (with limited exemptions) possessing nonimmigrant visas, regardless of country of origin. U.S. VISIT biometric entry procedures are currently in place at 116 airports, 15 seaports, and in the secondary inspection areas of 154 land ports of entry.

In most cases, the U.S. VISIT process begins abroad during the visa application process at the U.S. consulate, where visitors' biometrics (digital

fingerscans and photographs) are collected and checked against a database of known criminals and suspected terrorists. When the visitor arrives at the port of entry, biometrics verify that the person at the U.S. port of entry is the same person who applied for and received the visa. Additional entry security procedures involve inkless digital fingerprinting and photographing of non-U.S. citizens (excluding Canadian citizens). Given that non-compliance with the U.S. VISIT requirements may mean the denial of entry into the U.S., it is vital that clients are informed of this new requirement well in advance of their international travel.

Section 5301 of the Intelligence Reform and Terrorism Prevention Act added a new Section 222(h) to the Immigration and Nationality Act,⁸ which provides detailed statutory requirements for personal interviews of nonimmigrant visa applicants for the first time. Previously, a personal interview at a U.S. Consulate abroad was a discretionary part of the visa application and approval process. Today, all persons between the ages of 14 and 79 applying for a nonimmigrant visa must be interviewed unless eligible for a waiver of the interview requirement under 22 CFR 41.102(b)(3) or (b)(4).

The personal interview requirement has created visa appointment backlogs at U.S. Consulates, wrought financial problems on U.S. companies in immediate need of foreign workers, and generated more work for immigration practitioners and paralegals. Preparing a client for the visa interview requires considerable advance planning. It is our responsibility to research appointment availability, confirm visa application procedures specific to each nationality and consulate, and coordinate the visa scheduling and application processes to accommodate clients' busy travel and work schedules. This has become extremely difficult as the consulates have generally reduced staff, and the number of available appointments for visa interviews has not increased.

The Homeland Security Act abolished the Immigration and Naturalization Service and replaced it with the U.S. Citizenship and Immigration Services, now part of the DHS. The DHS now also includes the U.S. Customs and Border Protection and the U.S. Immigration and Custom Enforcement agencies.⁹ The names reflect the border security aspects inherent in many of the new acts. In addition to the new names, the duties and responsibilities of the various agencies have been realigned. We are responsible for assisting immigration attorneys with determining which agency now controls what facet of immigration, customs, and enforcement, and explaining these changes to our clients.

The REAL ID Act of 2005 establishes, among other things, the federal driver's license standards and minimum requirements that must be listed on an individual's driver's license or personal identification card. Minimum driver's license or state identification card issuance standards are noted below:

- a photo identification document
- documentation showing the person's date of birth
- proof of the person's Social Security number (SSN) or verification that the person is not eligible for a SSN
- documentation showing the person's name and address of principal residence

Fast Facts

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The goal of enhancing national security and improving border protection has brought significant changes in immigration processes and procedures.

The Western Hemisphere Travel Initiative has generated more work for the immigration paralegal to obtain expedited passports to meet clients' international travel needs.

A state must verify with the issuing agency the issuance, validity, and completeness of each document presented before a driver's license or a state identification card can be issued, and resolve any discrepancies.¹⁰

The REAL ID Act of 2005 can adversely affect the families of immigration clients legally in the U.S. For example, the Driver License Division for the State of Texas requires all applicants for a driver's license to present proof of an SSN. However, with very few exceptions, the SSA no longer issues an SSN to foreign nationals or their dependents who are not authorized to work in the U.S., creating roadblocks for those in need of a driver's license. Although Individual Taxpayer Identification Numbers (ITN) are issued, an ITN does not qualify as an SSN in Texas or elsewhere.¹¹ Therefore, dependents of foreign nationals legally present in the U.S. cannot obtain an SSN, which is required to obtain a driver's license in 33 states.¹² In addressing this matter for specific clients, the immigration paralegal is called on to research and investigate creative problem-solving methods in each of the 33 states requiring an SSN to obtain a driver's license pursuant to the REAL ID Act.

The Western Hemisphere Travel Initiative (WHTI) seeks to strengthen border security and facilitate entry into the United States for U.S. citizens and legitimate international travelers.¹³ The WHTI has two phases. Phase 1, implemented on January 23, 2007, deals with air travel and requires all citizens of the United States, Canada, Mexico, and Bermuda to have a passport or other accepted document establishing the bearer's identity and nationality to enter or re-enter the United States from within the Western Hemisphere. Phase 2 deals with land and sea travel. Its implementation is anticipated as early as January 1, 2008, at which time U.S. citizens traveling between the United States and Canada, Mexico, Central and South America, the Caribbean, and Bermuda by land or sea could be required to present a valid U.S. passport or other documents as determined by the DHS to gain entry. While recent legislative changes permit a later deadline of June 2009, the DOS and DHS are working to meet all requirements as soon as possible. WHTI will not affect travel directly between the U.S. and its territories (which includes Puerto Rico and the Virgin Islands), unless traveling through a foreign port.

Certain exceptions to the passport requirement for Phase 2 are noted below:

- On February 22, 2007, DHS proposed passport flexibility for U.S. and Canadian citizen children ages 15 and younger, with parental consent to cross the land border into the U.S. with a certified birth certificate in lieu of a passport.

- Children ages 16 through 18, traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth athletics organizations will be able to enter the U.S. under adult supervision with a certified copy of their birth certificate in lieu of a passport.
- U.S. citizens traveling to and returning directly from U.S. territories (Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, Swains Island, and the Commonwealth of the Northern Mariana Islands) will not need to present a passport to enter, as travel to a U.S. territory is not deemed a departure from the U.S.
- An Alien Registration Card, Form I-551, containing biometric identification and issued by DHS, can be used to apply for entry to the U.S. by legal permanent residents without a passport.
- A Merchant Mariner Document, issued by the U.S. Coast Guard for U.S. citizen merchant mariners on official business, may be presented for entry into the U.S. in lieu of a passport.
- A NEXUS Air Card may be presented at designated NEXUS sites in participating airports in the U.S. and Canada (available only by pre-approval for low risk, pre-approved travelers into Canada and the United States) in lieu of a passport for entry into the U.S.
- U.S. military traveling on orders do not require a passport to gain entry into the U.S.¹⁴

Phase 2 of the WHTI causes the greatest concern locally, at the busiest land crossing in the U.S., the Detroit/Windsor border. The statistics demonstrate why:

- Only 40 percent of all Canadians have passports.¹⁵
- Approximately 27 percent of U.S. citizens have passports.¹⁶
- Nine out of 10 Canadians live within 100 miles of a U.S. border, many of them living in Ontario, Canada's most populated province.
- Michigan is the second most visited state by Canadians¹⁷ and one of the five states with the largest population of Canadians.¹⁸

Therefore, given the tremendous flow of Canadians and Americans across the border at Detroit/Windsor and elsewhere, Phase 2 of the WHTI has the potential for creating confusion and longer delays, disrupting the flow of international business. It is

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likely that clients who are not aware of the WHTI, or who are unable to obtain passports in a timely fashion, will attempt to cross the border without a passport and will be sent home. The WHTI has generated more work for the immigration paralegal in obtaining expedited passports to facilitate clients' international travel. Before WHTI, we were concerned primarily with the entry requirements for foreign national employees. However, with the implementation of the WHTI, we are increasingly being asked to assist Canadian and U.S. employees with their documentation.

Additional resources and personnel have been added to meet the increased demand for passports generated by these requirements. It has been reported that in fiscal year 2006, a record 12.1 million passports were issued to U.S. citizens, and it is anticipated that 16 million passports will be issued in fiscal year 2007.¹⁹

Despite the increase in staff, the State Department remains overwhelmed with the number of passport applications it has received and has not been able to keep up with the demand. For this reason, on June 8, 2007, the DHS temporarily waived the passport requirement for the Phase 1 portion for U.S. citizens flying to and from Canada, Mexico, the Caribbean, and Bermuda. U.S. citizens will be allowed re-entry without presenting a passport if they can provide a receipt from the State Department confirming a passport application has been received. They must also present government-issued identification, such as a driver's license.²⁰

Although it was just implemented in January 2007, the WHTI implementation has continued to evolve. Travelers should check either www.state.gov or www.uscis.gov for the most recent updates in policy.

In summary, since 9/11, with the implementation of many new travel and immigration-related acts, the role of the immigration paralegal has become more challenging. In the years after 9/11, the U.S. government has been involved in a nationwide and worldwide effort intended to prevent terrorism, reduce fraud, and improve the reliability and accuracy of identification documents issued by various federal and state government agencies. The goal of enhancing national security and improving border protection has brought significant changes in immigration processes and procedures. These changes have resulted in increasing the processing time for U.S. visas, implementing a policy requiring personal interviews for visa applicants at U.S. consular posts, and requesting international travelers visiting the U.S. to comply with new passport requirements and observe stricter U.S. entry/exit requirements in accordance with the U.S. VISIT Program. The changes have also affected the everyday lives of clients who need to obtain SSNs and driver's licenses. With an ever-changing landscape of regulations, law, policy, and procedures, it is important to stay informed to be able to find solutions to the vast array of issues presented by clients. ■



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The three previously co-authored "Going Global" in the March 2001 issue of the Michigan Bar Journal (Volume 80, No.3) and have presented at Butzel Long seminars on various immigration topics.

FOOTNOTES

1. Kurzban, "Post-Sept. 11, 2001," *Kurzban's Immigration Law Sourcebook* (American Immigration Law Foundation, 10th ed, 2006), pp xxi-xxiii.
2. 8 USC 1701.
3. 18 USC 4124.
4. 6 USC 101.
5. 8 USC 1101.
6. 8 USC 1185(b), 8 USC 1103, 8 USC 1104, 8 USC 1132.
7. See n 2, *supra*.
8. 8 USC 1202(h).
9. See n 4, *supra*.
10. See n 5, *supra*.
11. SSA Publication No. 05-10095, December 2005, available at <<http://www.ssa.gov/pubs/10096.html>> (accessed May 29, 2007).
12. Morris, Reed & Savage, *Protecting Democracy: States Respond to Terrorism: State Driver's Licensing: Security Concerns*, National Conference of State Legislatures, available at <<http://www.ncsl.org/programs/press/2002/issues/driverslicense.htm>> (accessed May 29, 2007).
13. See n 6, *supra*.
14. See Western Hemisphere Travel Initiative: The Basics <<http://www.dhs.gov/xtrlsec/crossingborders/whitbasics.shtm>> (accessed May 29, 2007).
15. See *Canadians Fear Fallout of U.S. Passport Rules*, The Washington Post, January 3, 2007, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2007/01/12/AR2007011201926.html>> (accessed May 29, 2007).
16. *Id.*
17. *Border Initiative Could Slow Binational Travel and Trade*, Stateline, January 2006, available at <<http://www.csg.org/pubs/Documents/slmw-0601BorderInitiative.pdf>> (accessed May 29, 2007).
18. *U.S.-Canada-Mexico Fact Sheet on Trade and Migration*, The Migration Policy Institute, November 2003, available at <http://www.migrationpolicy.org/pubs/three_us_mexico_canada_trade.pdf> (accessed June 8, 2007).
19. See *Passport Mania*, The Detroit Free Press, ("Last week, the State Department broke a record. It issued 412,000 passports in a single week. Instead of six weeks processing time, regular applications are taking up to 10 weeks. Expedited passports are taking up to two weeks.")
20. U.S. Department of State Media Note, "Joint Departments of State and Homeland Security Announcement: U.S. Citizens With Pending Passport Applications Allowed Temporary Travel Flexibility Within Western Hemisphere," June 8, 2007, <<http://www.state.gov/r/pa/prs/ps/2007/jun/86206.htm>> (accessed June 25, 2007); Creager, *Where's my passport?*, Detroit Free Press, June 9, 2007, available at <<http://www.freep.com/apps/pbcs.dll/article?AID=/20070609/FEATURES07/706090355&imw=Y>> (accessed June 25, 2007).