DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 214 and 264

[INS No. 2216–02; AG Order No. 2608–2002]

RIN 1115–AG70

Registration and Monitoring of Certain Nonimmigrants

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: Recent terrorist incidents have underscored the need to broaden the special registration requirements for nonimmigrant aliens from certain designated countries, and other nonimmigrant aliens whose presence in the United States requires closer monitoring, to require that they provide specific information at regular intervals to ensure their compliance with the terms of their visas and admission, and to ensure that they depart the United States at the end of their authorized stay. On June 13, 2002, the Department published a proposed rule to modify the regulations to require certain nonimmigrant aliens to make specific reports to the Immigration and Naturalization Service: upon arrival; approximately 30 days after arrival; every twelve months after arrival; upon certain events, such as a change of address, employment, or school; and at the time they leave the United States. This final rule adopts the proposed rule without substantial change.

DATES: This rule is effective September 11, 2002.

FOR FURTHER INFORMATION CONTACT: Dan Brown, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street, NW, Room 6100, Washington, DC 20536, telephone (202) 514–2895.

SUPPLEMENTARY INFORMATION:

Introduction

This final rule applies to only a small percentage of the more than 35 million nonimmigrant aliens who enter the United States each year: (1) Nonimmigrant aliens from selected countries specified in notices published in the **Federal Register**, and (2) individual nonimmigrant aliens who are designated by a consular officer outside the United States or an inspection officer at the port of entry based on information that indicates the need for closer monitoring of the alien's compliance with the terms of his or her visa or admission because of the national security or law enforcement interests of the United States. This rule expands the existing special registration rule to require that these designated nonimmigrant aliens provide more detailed and frequent information to ensure that they comply with the conditions of their visas and admissions, along with leaving the United States.

Adoption of the Proposed Rule Without Substantial Change

The Department received 14 comments on the proposed rule (67 FR 40581, June 13, 2002). Some comments supported the adoption of the proposed rule while other comments opposed the proposed rule. In several instances, specific comments repeated the views of other comments in a different form. Rather than respond to each comment individually, the Department is responding to the nature of the comments by subject matter.

In adopting the proposed rule as a final rule, the Department reiterates and adopts the Supplementary Information included in the proposed rule as explaining the final rule. The Department has made one set of changes in the final rule to reflect the fact that the special registration system will be paperless; the Department will not be developing a paper form to collect information. The second set of changes clarifies and limits the scope and applicability of 8 CFR 264.1(f)(8). The Department provides the following additional information in responding to the comments received.

Response to Comments Received

A. Constitutional Implications

1. Notice of the Requirements of the Rule

Several commenters argued that the notice requirement for nonimmigrant aliens subject to special registration who are already residing in the United States violates their due process rights. One commenter suggested that there needed to be a more formal notification structure developed before provisions relating to nonimmigrant aliens subject to special registration already in the United States could be enforced because the proposal affects such a small segment of society. The commenter argued that these individuals should be given some other way to voice their opinions other than the notice and comment period, citing *Londoner* v. *City & County of Denver*, 210 U.S. 373 (1908), and the notion that due process requires that they be given an individualized hearing. The commenter argues that those individuals, with limited English proficiency or literacy, are not being given adequate notice and that the opportunity to be heard must be tailored to the regulated group. Another commenter suggested that publication in the **Federal Register** as public notification of a requirement is a legal fiction.

These comments raise an issue related to two different processes. First, the commenters appear to raise the issue of whether the publication of the proposed and final rule in the **Federal Register** is sufficient notice of the content and applicability of the regulation under the Due Process Clause of the Fifth Amendment to the United States Constitution. Second, the commenters appear to raise the issue of whether publication of a notice in the **Federal Register**, as required by § 264.1(f)(4), of the applicability of the requirements of this rule to a specific country or class, is sufficient notice of the application of the rule under the Due Process Clause.

Such notice by publication in the **Federal Register** unequivocally constitutes sufficient notice for due process purposes. Congress has specified this form of notice and made that notice binding on all who are within the jurisdiction of the United States. 44 U.S.C. 1507 (publication in **Federal Register** ''is sufficient to give notice of the contents of the document to a person subject to or affected by it''). The courts have clearly relied upon the adequacy of notice by publication in the **Federal Register** since the **Federal Register's** inception. *See, e.g., Lyng* v. *Payne*, 476 U.S. 926, 942–43 (1986); *Dixson* v. *United States*, 465 U.S. 482, 489 n.6 (1984); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947). The Department rejects the notion that more notice is required as a matter of law.

The Department does recognize that the efficacy of the law is more assured when those subject to the law have actual notice of its terms, and, accordingly, the Department is taking steps in addition to publication in the **Federal Register** to publicize its actions relating to immigration matters. When classes of nonimmigrant aliens already in the United States are required to present themselves for special registration, the Department expects to publicize such announcements in additional fora, beyond what is required by the Constitution and the laws of the United States. However, as a legal matter there is no question that one who is within the jurisdiction of the law of the United States, whether by statute or regulation, must comply with the terms of the law. It is the individual's responsibility to know the law.

2. Notice of Violative Conduct

One commenter argued that the proposed rule, in defining the special registration requirements and applying the Attorney General's interpretive authority to violations of the requirements as indicia of disregard for the laws of the United States and the potential for further violations, creates a new violation of the Immigration and Nationality Act (''INA'' or ''Act'') that would be both obscure and *de minimis*, based only on publicity by **Federal Register** notices rather than actual notice. The commenter suggests that this rule would provide the most technical and non-substantive bases by which individuals could be detained and eventually removed.

The Department disagrees. As noted above, all who are subject to the jurisdiction of the laws of the United States are required to abide by those laws. Notice of the laws by publication is sufficient notice under the Constitution.

3. Discrimination

Several commenters argued that the rule targets specific minority ethnic groups and members of a specific religion, i.e., Arabs and Muslims. The commenters noted that several individuals currently being detained or prosecuted would not have been covered by the specific criteria set forth in the proposed rule. One commenter in particular argued that the proposal ''will further stigmatize innocent Arab and Muslim visitors * * * who have committed no crimes and pose no danger to us.''

The Department disagrees with this analysis. There are several means by which an alien may become subject to special registration. First, as provided in the regulations being amended and in the final rule, the Attorney General may designate specific countries, the nationals and citizens of which are subject to special registration. Currently, nonimmigrant aliens from Iran, Iraq, Libya, and Sudan are subject to special registration requirements, including fingerprinting. 63 FR 39109 (July 21, 1998). Accordingly, contrary to what some commenters appear to believe, this method is not new.

Second, a specific alien may be subject to special registration if intelligence information indicates that the individual, while qualified for a visa, warrants closer attention. Pre-established criteria will be applied. These criteria will be based on intelligence regarding the activities and behavior patters of terrorist organizations, not on racial, ethnic, or religious stereotypes. The Department strongly disagrees with the implication that it would develop or apply such criteria in an invidious manner on the basis of race, religion, or membership in a social group.

The Department strongly disagrees with the premise of the comments that the rule is invidiously discriminatory. Congressional enactments and regulations concerning immigration have historically drawn distinctions on the basis of nationality and related criteria. The political branches of the government have plenary authority in the immigration area. *See Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Matthews* v. *Diaz*, 476 U.S. 67, 80–82 (1976). In the context of immigration and nationality laws, the Supreme Court has particularly ''underscore[d] the limited scope of judicial inquiry.'' *Fiallo*, 430 U.S. at 792. The Supreme Court has stated that

> over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens * * * [T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.

Id. (internal quotations and citations omitted). Congress's ''inevitable process of 'line drawing' '' in the immigration context is therefore given great deference. *Id.* at 795 n.6. The substantive decision to relax requirements for only specified nationals, while excluding all others, is among those political decisions that are ''wholly outside the concern and competence of the Judiciary,'' *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring). When the Executive Branch exercises authority delegated by Congress in the immigration area, a court will not ''look behind the exercise of that discretion.'' *See Fiallo*, 430 U.S. at 794–95 (citing *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972)). As in *Fiallo*, the Attorney General must here make compromises involving ''the inevitable process of 'line drawing,' '' [whereby] Congress has determined that certain classes of aliens are more likely than others to satisfy national objectives without undue cost, and [it] granted preferential status only to those classes.'' *Fiallo*, 430 U.S. at 795 n.6. ''Congress regularly makes rules that would be unacceptable if applied to citizens.'' *Mathews*, 426 U.S. at 80. The distinctions drawn by the rule are appropriate in the context of immigration law and national security.

The Department recognizes that a few individuals in the United States have questioned the loyalty of some Muslim Americans to the United States. The Department also recognizes that some American Muslims have been targets of discrimination. Some mosques have been damaged and desecrated. A number of Muslim Americans—and others wrongly believed to be Muslims—have been threatened or attacked. These attacks against Muslim Americans and the Muslim communities are not only reprehensible; like terrorism, they are also attacks against the United States and humanity. The Federal Bureau of Investigation (FBI) has investigated such attacks and threats against Arab, Muslim, and Sikh Americans. The FBI has initiated more than 360 investigations in concert with state and local law enforcement authorities. More than 100 individuals have already been charged with federal, state, and local crimes relating to such attacks. The Department continues to treat such crimes as civil rights violations and will vigorously prosecute these violations.

The Department remains firmly committed to protecting the civil rights of all individuals in the United States while seeking to prevent acts of terrorism. The Department unequivocally rejects the notion that the requirements of the final rule, or the criteria for application of the final rule, to nonimmigrant aliens subject to special registration are, or are intended to be, invidiously discriminatory.

4. Applicability of the Act

One commenter argued that the reporting structure for nonimmigrant aliens subject to special registration once they have arrived in the United States does not fully comply with the reporting structure formulated in the Act. This commenter believed that section 265 of the Act (8 U.S.C. 1305) continues to require that aliens report to the Attorney General, in writing, their current address before January 31st of every year and that certain aliens update this address every three months for the duration of the time that they remain in the United States. These provisions of the Act were modified in 1981 to eliminate the ''January registration'' and 3-month provisions. The amendments continued a 10-day notification of change of address requirement. Public Law 97–116, section 11, 95 Stat. 1617 (1981).

As discussed in the proposed rule, section 262(a) of the Act (8 U.S.C. 1302(a)) provides that all aliens who have not previously been registered and fingerprinted pursuant to section 221(b) of the Act (8 U.S.C. 1201(b)), have a duty to apply for registration and to be fingerprinted if they remain in the

United States for 30 days or longer.[1] Under the existing regulations at 8 CFR 264.1(a), the Immigration and Naturalization Service (''Service'' or ''INS'') registers nonimmigrants using Form I–94 (Arrival-Departure Record). As authorized by section 262(c) of the Act (8 U.S.C. 1302(c)), however, the Service's existing regulations at 8 CFR 264.1(e) contain general provisions waiving the fingerprinting requirement for many nonimmigrants. Accordingly, the vast majority of nonimmigrant aliens are admitted to the United States without being either fingerprinted or photographed.

Notwithstanding the general registration requirements, section 263(a) of the Act (8 U.S.C. 1303(a)) also authorizes the Attorney General to prescribe special regulations and forms for the registration, among other classes, of ''aliens of any other class not lawfully admitted to the United States for permanent residence.'' Pursuant to this section, as well as the Attorney General's general registration authority under section 262 of the Act (8 U.S.C. 1302), the Attorney General promulgated 8 CFR 264.1(f), which authorizes the Attorney General, by notice published in the **Federal Register**, to direct that certain nonimmigrant aliens from designated foreign countries be registered, fingerprinted, and photographed by the Service at the port of entry at the time the nonimmigrant aliens apply for admission. *See* 58 FR 68024 (Dec. 23, 1993) (final rule); 63 FR 39109 (July 21, 1998) (notice). Moreover, the Attorney General is authorized to prescribe conditions for the admission of nonimmigrant aliens under section 214 of the Act (8 U.S.C. 1184). Section 265 of the Act (8 U.S.C. 1305) requires that all aliens who remain in the United States for 30 days or more (other than A or G nonimmigrants) must file a notice of change of address with the Attorney General within 10 days of any change of address.

This final rule provides for implementation of these requirements for nonimmigrant aliens subject to special registration. However, this Supplementary Information also serves as a reminder to all aliens (not just those nonimmigrant aliens subject to special registration) of their legal obligations under section 265 of the Act to notify the Attorney General, as delegated to the Service, within 10 days of any change of address by filing the general change of address form, Form AR–11.

B. Efficacy of the Rule

1. Acquiring Information Prior to Travel

Several commenters suggested that data acquisition for any effective monitoring of aliens after admission could be better performed at the visa issuance stage. A commenter questioned whether ''it would [be] more effective to have these biometrics collected at the U.S. Department of State Consular Offices that would be issuing the nonimmigrant visas.'' The commenter stated a belief that all ports of entry are, or soon will be, electronically connected to the United States Department of State consular database in order that, when an individual applies for admission to the United States, the inspector at the port of entry can call up the picture and other data about the individual.

The Department notes that the Department of State is acquiring a great deal of information through Form DS–156, the visa application, and related documents. These forms contain much, but not all, of the information that would be required through special registration. Accordingly, special registration is warranted to obtain the full array of information that is necessary to locate aliens who violate the terms of their visas or admission. However, even if all of the required information were acquired by the consular officers at the point at which they issue a visa, it would still be necessary to confirm the information—as a way of confirming identity—at the port of entry and subsequently during the alien's stay in the United States.

The INS has been working with the State Department to expand data sharing to ensure that Immigration Inspectors have access to the information gathered in the visa issuance process in the Consolidated Consular Database. As a result, this information is now available at all United States ports-of-entry (POEs), and INS has trained inspectors on how to use that data to detect and prevent fraud. Similarly, information is being provided to consular officers regarding the special registration process that can be provided to appropriate visa applicants.

2. Intelligence and Visa Disapproval

A commenter argued that the rule will not change terrorist or criminal methods: they will either comply fully, and registration will not prevent them from committing terrorist or criminal acts at any time; comply upon entry, but ''go underground''; enter without inspection; or use proxies. Several commenters contended that this system would not have acquired the required information on several individuals currently involved in certain notorious cases. At the same time, the commenter claimed that the rule does not mitigate visa fraud or immigration document fraud. This commenter concluded that fingerprinting, photographing, and periodically interviewing a person, whether citizen or alien, cannot predict or deter future terrorist or criminal behavior. One commenter also suggested that it was more important to deny the visa in the first place than attempt to monitor the individual once in the United States.

Another commenter noted that the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107–173, 116 Stat. 543 (2002), provides for such things as the use of pre-arrival passenger manifests, enhanced database sharing, improved technology, and increased staffing of inspections, all with the hope of enhancing the government's ability to interdict, outside of the United States, those who would harm America. The commenter further noted that section 212(a)(3)(A) of the Act (8 U.S.C. 1182(a)(3)(A)) provides consular officers and immigration inspectors with broad authority to prevent the admission of persons whom they believe may engage in any unlawful activity from entering the United States. Given this authority, the commenter questioned why the government would admit such persons and subject them to special registration.

The Department agrees that, where an individual is inadmissible, the Department of State should deny an application for a visa. However, when an alien is admissible and is granted a visa (or enters the United States properly without a visa), but should nevertheless be more closely monitored in the national security interest of the United States, this rule will provide the basis for that monitoring. The rule is not a substitute for proper determination of visa and admission eligibility, it is only a supplemental monitoring process for those who are eligible for a visa and admissible, but who warrant closer monitoring based on the standards set out in the rule.

The rule must be understood as a third line of defense. First, the Department of State must be satisfied that the individual is eligible for a visa. Section 306 of the Enhanced Border Security and Visa Entry Reform Act of 2002 bars the issuance of visas from a country that is a state sponsor of international terrorism unless the Secretary of State, in consultation with the Attorney General and the heads of

[1] The only exception is for aliens admitted as A or G nonimmigrants, which pertain to diplomats, employees of certain international organizations, etc. INA section 263(b)(8 U.S.C. 1303(b)).

other appropriate agencies, makes a determination that an alien from such a country does not pose a threat to the safety or national security of the United States. 8 U.S.C. 1735(a).

Second, the inspecting officer must determine that the alien is admissible. In this context, it is the alien's responsibility to prove admissibility. INA section 212 (8 U.S.C. 1182). If the nonimmigrant alien can satisfy these requirements, then the alien may be admitted.

However, there are national security and law enforcement reasons why some aliens who are admissible and have visas (or enter properly without a visa) require further monitoring. The final rule, like the proposed rule, provides a process under which such aliens will provide additional, confirmable information that will enable the INS to contact them quickly if necessary and will ensure that such aliens comply with the terms of their visas and the conditions of their admission. As for the terrorist who complies upon entry, but seeks to go underground immediately thereafter, this rule will provide a basis for alerting law enforcement organizations to that fact when the would-be terrorist fails to register at the 30-day point.

3. Change of Address and Form AR–11

One commenter acknowledged that the provision requiring filing of a change of address has long been in the statute and regulations, but argued that its ''notorious ineffectuality has long since rendered the provision irrelevant.'' A number of commenters noted that the Service does not maintain a central address file and that the most effective way to file a change of address is to file it with the office holding an application for benefits. Several commenters raised issues concerning whether there would be any electronic retrieval system to support the information provided; whether aliens know that the form is required; whether any means exist to confirm receipt of a change of address; and whether ''widespread ignorance'' of the provision renders ''virtually all ''violations'' of this provision'' not willful.

The Department has recognized the historical shortcomings of the address notification system and has taken steps to develop the necessary infrastructure to provide a complete address record system. For example, the Department's Inspector General recently reported on the historical process for recording student visas, and the failures of that system, and made recommendations for improvement. *See* Office of the Inspector General, *The Immigration and Naturalization Service's Contacts with Two September 11, Terrorists: A Review of the INS's Admissions of Mohamed Atta and Marwan Alshehhi, its Processing of their Change of Status Applications, and its Efforts to Track Foreign Students in the United States* 187 (May 20, 2002). The existing student visa process is being replaced by the Student and Exchange Visitor Information System (SEVIS). 67 FR 34862 (May 16, 2002); (Proposed Rule: Retention and Reporting of Information for F, J and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS)); 67 FR 44344 (July 1, 2002) (Interim Rule with Request for Comments: Allowing Eligible Schools To Apply for Preliminary Enrollment in the Student and Exchange Visitor Information System). Moreover, the Department has proposed changes in the forms that aliens use to ensure that they are aware of the requirements of the Act. 67 FR 48818 (July 26, 2002) (Proposed Rule: Address Notification to be Filed with Designated Applications). As a part of these processes, the INS is reconfiguring its computer systems to enhance the utilization of address and other information. Accordingly, the Department believes that the address notification system supporting this final rule is already sufficiently effective and will be improved in the future.

One commenter supported overall enforcement of address change requirements, but recommended leeway for previously unreported changes in address and electronic filing of the form. This commenter suggested that electronic filing would ease compliance while benefitting the INS in its efforts to provide electronic filing of various petition types. The commenter suggests that the vast majority of previous unreported changes of address were not willful violations of the Act, but an oversight in light of different INS priorities and confusion. Thus, the commenter suggests, employers and foreign nationals often file a change of address with an INS Service Center or District Office where a filing or petition is pending, believing this will provide INS with the proper notification of a change of address.

The Department does not disagree with the notion that electronic filing may be beneficial, provided that biometric and other identity confirmations can be included in such a system. However, until such a system is fully implemented, the Department will continue to require nonimmigrant aliens subject to special registration to make their special registrations in person to ensure the accuracy and integrity of the special registrations.

The Department notes that the process of registration will be essentially ''paperless'' in that information will generally be entered directly into an electronic format. While the proposed rule refers to the information being provided in the ''form'' required by the Service, the Department has found that a paper form will not be necessary. To ensure clarity, the Department has made minor revisions to the final rule to eliminate the suggestion that a paper form is being developed and will be used in special registration. The only paper process that is continued will be that of the change of address form (AR–11) and nonimmigrant aliens subject to special registration will be instructed at the time of their initial registration on the proper filing of this form. The limited number of individuals who are also within the SEVIS system will be required to notify their schools and the Service of changes of address.

One commenter suggested that there must be assurances that those who have previously moved without reporting a change of address will be able to rectify this oversight without subjecting themselves to fines, imprisonment, and possible removal. The commenter recommended that the rule include a provision recognizing the shift in enforcement priorities, and allow for electronically filed address corrections, while clarifying the process to effectuate a change of address throughout the Service. The Department has considered this idea carefully but declines to adopt it. The concept is technically outside the scope of this rule in that it applies to all address changes, not merely the prospective special registration system embodied in this final rule. This rule is designed to deal with nonimmigrant aliens subject to special registration, not the broader class of aliens.

The Department disagrees with the necessity of providing a specific mechanism to rectify past failures to provide a change of address, or a recognition of a ''shift'' in enforcement priorities. The requirements of the Act have been in effect for many years and a lack of publicity about specific enforcement of the provision does not change the legal effect of the requirements. The commenter's suggestion that electronic filing of changes of address should be provided does merit consideration and the Department is considering how best to implement such an electronic filing system.

The Department recognizes that the development and implementation of the information technology necessary to

support the special registration system requires time. In particular, the installation of data entry systems requires the acquisition of hardware in some ports-of-entry. Accordingly, while the registration system is expected to be brought on line in a timely fashion, it is also expected that 100 percent coverage will not be immediately available. The Department will exercise prosecutorial discretion, as is deemed appropriate based on the particular circumstances, with regard to the enforcement of the system at those ports-of-entry where the electronic system, or a manual system, is not immediately available. This exercise of discretion not to pursue the individual alien beyond requiring delayed compliance does not, however, absolve any alien from the requirements of the rule.

4. Airport Inspection Facilities

Several commenters stated concern that efficient passenger processing through POEs, airport facilities and airport operations may be negatively impacted by the special registration entry and exit processes. Commenters offered different solutions to perceived problems in the actual flow of arrivals.

One commenter recommended fingerprinting and photographing in secondary inspection areas of airports. The commenter suggested that this would allow the majority of international passengers to be processed efficiently through the primary inspection area, which would allow the Service to continue to strive to meet the 45-minute passenger-processing goal. The Department intends to conduct fingerprinting and photographing in secondary inspection areas in airports precisely because of this reasoning, even though there are no longer any statutorily mandated time limits for inspection.

One commenter suggested that facilities at ports-of-entry do not have the capacity to take fingerprints and photographs. The commenter's assertion is incorrect. The Department has been utilizing both two- and ten-fingerprint systems for the purpose of identifying aliens and rapidly comparing a specific set of fingerprints with existing fingerprint files, including the Federal Bureau of Investigation's Integrated Automated Fingerprint Identification System (IAFIS). Photographing capabilities also exist at all ports-of-entry.

Another commenter recommended that the Service work with international air carriers servicing United States international airports so that registration information can be electronically transmitted via the advanced passenger information system (APIS) to the Service and queried through the interagency border identification system (IBIS) prior to the non-immigrant alien's entry into the United States. This commenter noted that INS, Customs, and international air carriers have agreed to adopt the U.N. Edifact format for transmitting electronic information. Additionally, the commenter suggested that INS establish a consortium with each of the airport operators and international carriers servicing that federal inspection service area. The commenter noted that without federal funding possible modifications or expansion of a federal inspection service area is limited and costly to the airport.

The Department notes that many of these suggestions are already being implemented as part of the INS's continuing improvement of the inspection service. These issues do not address the provisions of the rule, but the manner in which the INS relates to the air carriers and airport administrations.

5. Economic Impact of the Rule

Several commenters suggested that the proposed rule on registration and monitoring of certain nonimmigrants could have the potential significantly to deter legitimate international travel to the United States. Accordingly, they suggested that registration of nonimmigrants must be targeted in a manner that enhances United States national security while not eroding economic security. The Department has attempted to balance these interests in adopting the proposed and final rules. The national security benefits from this rule outweigh the economic costs.

C. Specific Issues

1. Condition of Admission

One commenter argued that the proposal to amend 8 CFR 214.1(f) to make compliance with the special registration requirements a condition of maintenance of status is flawed because it is a ministerial requirement, not intrinsic to a nonimmigrant's maintenance of status. The commenter suggests that *Mashi* v. *INS,* 585 F.2d 1309 (5th Cir. 1978), limits the use of conditions of admission. However, *Mashi* v. *INS* holds no more than that the immigration judge and the Board of Immigration Appeals used the wrong regulatory provision in resolving that alien's case. The remainder of the opinion does not discuss the proposition cited by the commenter.

This commenter also argued that 8 CFR part 214 could not be used to establish conditions because, the commenter argued, one court had found that the Attorney General exceeded his authority when he promulgated 8 CFR 214.1(f), which imposes as a condition of a nonimmigrant's admission and continued stay in the United States the full and truthful disclosure of all information requested by the INS, regardless of whether the information is material, *Romero* v. *INS,* 39 F.3d 977, 979 (9th Cir. 1994). However, that case related to whether the Service could properly impose a condition to provide full and truthful disclosure of information that was *not material* to the respondent's immigration status. *Id.* at 980. Here the information that aliens are required to provide *is* material to their immigration status. Moreover, this rule is promulgated under the Attorney General's authority not only to establish conditions of admission under section 214 of the Act (8 U.S.C. 1184), but also to promulgate regulations for the registration, reporting of changes of address, and special registration of non-immigrants under sections 263 and 265 of the Act (8 U.S.C. 1303, 1305). This confluence of authority is much broader than the authority interpreted in *Romero* and depends not merely upon an interpretation of the Act, but the specific delegations of authority in the cited provisions of the Act.

2. Identification of Aliens

One commenter argued that it is impossible for many nonimmigrant aliens subject to special registration to acquire a second form of identification from their country of origin. The commenter suggests that some countries do not have second forms of identification. The Department disagrees. Many countries issue more than one form of identification, such as a national identification card and a driver's license. A second form of photographic identification is not specifically required by the regulation, but the Service is authorized to request confirmatory information.

3. Pre-existing Criteria

One commenter argued that, while the proposed 8 CFR 264.1(f)(2)(iii) states that nonimmigrant aliens subject to special registration will be subject to special registration if they meet ''pre-existing criteria,'' no criteria are provided. The commenter questions what these criteria would be, and how specific they would be.

The criteria by which an alien may be required to make a special registration cannot be made public without defeating the national security and law enforcement effectiveness of the criteria.

As with the criteria the United States Customs Service and the Drug Enforcement Administration use in determining which individuals entering the United States will be subject to greater scrutiny for trafficking in controlled substances, publicly announced criteria for requiring special registration could be evaded by those who are subject to the requirements. Even if some details of a specific profile were to become publicly available, it is worth noting that the constantly changing patterns of criminal activity require constant adjustment of the criteria through improved intelligence and more refined analysis, *cf. United States* v. *Berry,* 670 F.2d 583, 598–599 & n.17 (5th Cir. 1982), and cases cited therein, and any public profile is, at best, of evanescent value.

The international response to the September 11th attacks has been defined by multilateral cooperation. The success of this response has depended in large part on improved sharing among governments of information relating to terrorists, their associates, and their activities. Continued vigilance requires procedures to institutionalize such coordination of information. Accordingly, the Attorney General has directed the FBI to establish procedures to obtain, on a regular basis, the fingerprints, other identifying information, and available biographical data of all known or suspected foreign terrorists who have been identified and processed by foreign law enforcement agencies. The FBI also coordinates with the Department of Defense to obtain, to the extent permitted by law, the fingerprints, other identifying information, and available biographical data of known or suspected foreign terrorists who have been processed by the United States armed forces. Such information is, and will continue to be, regularly evaluated in order to update the criteria that are used in identifying nonimmigrant aliens who are appropriately subject to special registration.

In the same vein, sections 203 and 905 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Public Law 107–56, 115 Stat. 272, 278, 388 (2001), authorized and required sharing of foreign intelligence and counterintelligence information in new ways, subject to limitations otherwise provided by law and exceptions delineated in regulations to be issued by the Department.

4. Reason to Believe

A commenter noted that proposed 8 CFR 264.1(f)(2) also states that a nonimmigrant will be subject to the special registration requirements if there is ''reason to believe'' that the nonimmigrant is a national or citizen of a specific country or meets the pre-existing criteria, and questioned what criteria would be used. In this context, the commenter questioned whether language or dress would be considered appropriate indicia. Another commenter argued that the proposed rule was a delegation of the Attorney General's discretion to the inspecting officer at the ports-of-entry, allowing discretion for the inspecting officers to choose aliens who they believe to be a risk. Although the commenter noted that the Act authorizes any employee of the Department to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter, the commenter was concerned over the possibility of abuse.

Under 8 CFR 264.1(f)(2)(i), (ii), as added by this final rule, the authority to designate the classes of nonimmigrant aliens who will be subject to special registration requirements is retained by the Attorney General, in consultation with the Secretary of State. The final rule notes that such designation will apply to ''nationals'' or ''citizens'' of a specified country. The Act, moreover, permits the Attorney General to designate ''class[es]'' of aliens for special registration, not merely countries. INA section 263(a)(6) (8 U.S.C. 1303(a)(6)). In light of the fact that individual aliens involved in terrorist activity or other activity inimical to the interests of the United States may commit document fraud to gain admission to the United States for nefarious purposes, the rule allows immigration inspectors to conclude that an alien will be subject to special registration requirements if they have ''reason to believe'' that the individual alien actually does fall within the classes of nonimmigrant aliens subject to special registration.

This ''reason to believe'' phrase is used throughout the Act to refer to situations where there is a basis for believing in fact that a provision of the Act applies. *See, e.g.,* INA section 204(f)(2)(A) (8 U.S.C. 1154(f)(2)(A)) (procedure for granting immigrant status; certain aliens whom the Attorney General has reason to believe were born in certain countries and were fathered by a United States citizen); INA section 212(a)(2)(C) (8 U.S.C. 1182(a)(2)(C)) (alien inadmissible if consular or immigration officer has reason to believe alien is a controlled substance trafficker); INA section 214(n)(1) (8 U.S.C. 1184(n)(1)) (alien inadmissible if substantial reason to believe alien committed act of severe form of human trafficking); INA section 221(g)(3) (8 U.S.C. 1201(g)(3)) (non-issuance of visa if consular officer has reason to believe alien not eligible) of the Act. In the final rule, the ''reason to believe'' standard will not have such drastic consequences, but instead will merely require certain nonimmigrant aliens to provide more detailed information at regular intervals. Where information indicates that an alien is, in fact, a national or citizen of a designated country, or that other provisions of the rule apply, the inspecting officer must be authorized to make the special registration requirements applicable to that alien.

5. Notice of New Country Listings

One commenter was concerned that a specific country that is not currently listed might be listed in the future. The commenter believed that this would be antithetical to the relationship between the United States and that country and its citizens.

The listing of countries from which nonimmigrant aliens will be subject to special registration is determined by the Attorney General in consultation with the Secretary of State, thereby ensuring that foreign policy implications will be considered when evaluating the possible designation of any specific country. However, because the final rule only provides the framework for the special registration process, and does not make any specific designations, this comment is outside the scope of this final rule.

6. Reporting at 30-day and Annual Intervals

One commenter suggested that interval reporting is problematic. As the States are making it increasingly difficult, if not impossible, for some nonimmigrants to obtain driver's licenses or identification cards, some aliens may find that an alternative form of identification is not available. The commenter suggested proof of tenancy is often impossible because ''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''; in other cases aliens may not have established proof of tenancy in their names if they are staying with relatives or friends. Another commenter suggested that nonimmigrants sponsored by a charity, such as for a speaking tour, be permitted to use the charity's address.

A commenter also argued that interval reregistration will be burdensome, both in traveling to a specified office and in the process of scheduling and appearing at an overburdened office. This commenter also discussed, and discounted, the notion that nonimmigrants might be required to report to state or local police offices.

The rule continues to provide that an individual must reregister at a 30-day interval and annually. Neither of these requirements appears to the Department to be burdensome. However, if an individual nonimmigrant alien subject to special registration can show a specific burden, that nonimmigrant alien subject to special registration may seek relief from the appropriate district director.

7. Relief

Several commenters stated that the provision allowing a district director to grant relief from the provisions of the rule was insufficient. They were concerned that travel to a distant office was still required, that some offices would not grant dispensation, and that officials would not be available by telephone. One commenter specifically noted that the provision does not include any provision regarding failure to register due to a serious illness or other emergency circumstance that would prevent the nonimmigrant from complying.

The Department does not believe that these situations require any amendment to the rule. The rule is specific that reregistration must be in person and, therefore, telephone communication is irrelevant. Moreover, the reregistration dates are intentionally established as windows before and after a specific date to accommodate such intervening events as illness. The second registration is required to be made between 30 and 40 days after admission, while annual reregistration may be made within 10 days—before or after—the anniversary of admission. The totality of this inconvenience must be kept in perspective with the scope of this rule: the rule applies only to the small number of nonimmigrant aliens subject to special registration, and the registrations are not so frequent or so rigid as to be burdensome in comparison with the national security or law enforcement interests of the United States.

8. Final Registration

The proposed rule provided that a nonimmigrant subject to special registration also report when leaving the United States. This final registration would occur through inspection at a port of entry. One commenter suggested that this final registration, like the entry process, would take substantial time to develop and implement with airports, even for the small number of aliens covered by this rule. The commenter noted that, for some period of time, nonimmigrant aliens subject to special registration would be permitted to depart the United States only through the limited number of ports with sufficient facilities. The commenter argued against such a provision because it would create a substantial inconvenience and expense to the alien, and, in some instances, a bar to departure.

The Department recognizes that a small number of persons presently in the United States who will become subject to the rule possess a return ticket, and some of these tickets are non-refundable and non-changeable without penalty. However, the Department is making every effort to ensure that there will be sufficient facilities to accommodate final registration at all ports at the time the rule becomes effective. Because special registration will be a paperless system, the Department will be establishing additional computer links to ensure that the system is available nationwide. Nevertheless, for a short period of time, because aliens will be permitted to depart from any port when the rule becomes effective, the Department expects that initially some inspectors will need to record information provided by nonimmigrant aliens subject to special registration on paper records that will not be entered into the system until shortly thereafter. If the Service determines that a port is inappropriate for the departure of nonimmigrant aliens subject to special registration, the Service will give appropriate notice by publication in the **Federal Register**. The Department agrees that individual aliens should not be inconvenienced during the ongoing development of the system. To provide sufficient time to procure equipment and provide training to all inspection personnel, paragraph (f)(8) of the final rule will not become applicable until October 1, 2002. Moreover, the final registration requirement of 8 CFR 264.1(f)(8) will apply only to those nonimmigrant aliens who have been registered under paragraph (f)(3), or who are or have been required to register pursuant to paragraph (f)(4).

Another commenter conceded that subjecting departing aliens to special registration requirements is not new, but is not often done. The commenter noted that departure will now be confirmed by actual presentation by the nonimmigrant alien subject to special registration, and that the alien's departure can then be confirmed by reference to other records, such as the electronic manifests provided by air carriers. The commenter suggested that INS and the air carriers use APIS to collect an alien's departure information. The commenter suggested a system by which an alien would proceed to the flight gate and the air carrier would electronically collect his departure information and then transmit it to the INS. The commenter suggested that, if prior to an alien's scheduled departure, the INS determined it must conduct a face-to-face interview, INS could arrange for the alien to meet a departure control officer in the federal inspection service (FIS) area before flight time. In all other cases, the air carrier's electronic transmission of the alien's departure would serve as confirmation to the INS.

The Department appreciates the thought given to this approach, but must decline to adopt it. Final registration, like inspection, requires a face-to-face confirmation of identity until such time as electronic verification of biometrics can ensure that the nonimmigrant alien subject to special registration actually is the individual departing the United States.

9. Future Inadmissibility

Another commenter stated that the proposed rule would effectively create a new ground of inadmissibility by characterizing failure to comply with the final registration provisions as ''unlawful activity.'' The commenter noted that 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.'' 8 U.S.C. 1182(a)(3)(A)(ii).

The commenter's analysis is faulty in that only Congress can establish grounds for removal and inadmissibility to the United States. Congress has made clear, however, that the Attorney General may find an alien inadmissible if he has ''a reasonable ground to believe [the alien] seeks to enter the United States to engage solely, principally, or *incidentally* in * * * any other unlawful activity * * *.'' INA section 212(a)(3)(A)(ii) (8 U.S.C. 1182(a)(3)(A)(ii)) (emphasis added). An alien is subject to special registration requirements because that alien meets pre-established criteria that the

Department found to be associated with national security risks. When such an alien violates the terms of his or her special registration by failing to register upon leaving the United States and then seeks to reenter the United States, the alien can reasonably be seen as attempting to reenter for the purpose of engaging in ''unlawful activity'' under section 212(a)(3)(A)(ii) of the Act. If an alien complies with the regulations, he or she will not, in the future, be presumed inadmissible under this provision.

The Department recognizes that there may be reasons why a departing alien may not be able personally to report for final registration when leaving the United States. The Department acknowledges that some failures to register upon leaving 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 United States. However, if the nonimmigrant alien subject to special registration violates the specific regulations relating to final registration at the time of exiting the United States, that nonimmigrant alien subject to special registration will be presumed to be inadmissible. The presumption may be overcome, but, despite the concerns of at least one commenter, it is not necessary for the Attorney General to provide a complete and exhaustive catalogue of the manner in which he will exercise his discretion.

D. Issues Not Raised in the Rule

Several commenters opposed the entry of violation information into the National Crime Information Center. The Attorney General's announcement of his direction to the Federal Bureau of Investigation and the INS to include this information is not covered by, and need not be covered by, this rule. Accordingly, these comments are not considered in developing the final rule.

Regulatory Procedures

Regulatory Flexibility Act

The Department of Justice, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule will affect individual nonimmigrant aliens who are not considered small entities as that term is defined in 5 U.S.C. 601(6).

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

Information collection associated with this regulation has been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The OMB control number for this collection is 1115–0254.

List of Subjects

8 CFR Part 214

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

8 CFR Part 264

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931 note, respectively; 8 CFR part 2.

2. Amend § 214.1 by revising paragraph (f) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(f) *Registration and false information.* A nonimmigrant's admission and continued stay in the United States is conditioned on compliance with any registration, photographing, and fingerprinting requirements under § 264.1(f) of this chapter that relate to the maintenance of nonimmigrant status and also on the full and truthful disclosure of all information requested by the Service. Willful failure by a nonimmigrant to register or to provide full and truthful information requested by the Service (regardless of whether or not the information requested was material) constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act (8 U.S.C. 1227(a)(1)(C)(i)).

* * * * *

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

3. The authority citation for part 264 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1184, 1201, 1301–1305.

4. Amend § 264.1 by revising paragraph (f) to read as follows:

§ 264.1 Registration and fingerprinting.

* * * * *

(f) *Registration, fingerprinting, and photographing of certain nonimmigrants.* (1) Notwithstanding the provisions in paragraph (e) of this section, nonimmigrant aliens identified in paragraph (f)(2) of this section are subject to special registration, fingerprinting, and photographing requirements upon arrival in the United States. This requirement shall not apply to those nonimmigrant aliens applying for admission to the United States under sections 101(a)(15)(A) (8 U.S.C. 1101(a)(15)(A)) or 101(a)(15)(G) (8 U.S.C. 1101(a)(15)(G)) of the Act. In addition, this requirement shall not apply to those classes of nonimmigrant aliens to whom the Attorney General and the Secretary of State jointly determine it shall not apply, or to any individual nonimmigrant alien to whom the Attorney General or the Secretary of State determines it shall not apply. Completion of special registration pursuant to this paragraph (f) is a condition of admission under section 214 of the Act (8 U.S.C. 1184) if the inspecting officer determines that the alien is subject to registration under this paragraph (f) (hereinafter ''nonimmigrant alien subject to special registration'').

(2) Nonimmigrant aliens in the following categories are subject to the requirements of paragraph (f)(3) of this section:

(i) Nonimmigrant aliens who are nationals or citizens of a country designated by the Attorney General, in consultation with the Secretary of State, by a notice in the **Federal Register**;

(ii) Nonimmigrant aliens who is a consular officer or an inspecting officer has reason to believe are nationals or citizens of a country designated by the Attorney General, in consultation with the Secretary of State, by a notice in the **Federal Register**; or

(iii) Nonimmigrant aliens who meet pre-existing criteria, or who is a consular officer or the inspecting officer has reason to believe meet pre-existing criteria, determined by the Attorney General or the Secretary of State to indicate that such aliens' presence in the United States warrants monitoring in the national security interests, as defined in section 219 of the Act (8 U.S.C. 1189), or law enforcement interests of the United States.

(3)(i) Any nonimmigrant alien who is included in paragraph (f)(2) of this section, and who applies for admission to the United States, shall be specially registered by providing information required by the Service, shall be fingerprinted, and shall be photographed, by the Service, at the port-of-entry at such time the nonimmigrant alien applies for admission to the United States. The Service shall advise the nonimmigrant alien subject to special registration that, if the alien remains in the United States for 30 days or more, the nonimmigrant alien subject to special registration must appear at a Service office in person to complete registration by providing additional documentation confirming compliance with the requirements of his or her visa. The nonimmigrant alien subject to special registration must appear at such office between 30 and 40 days after the date on which the nonimmigrant alien subject to special registration was admitted into the United States.

(ii) At the time of verification of information for registration pursuant to paragraph (f)(3)(i) of this section, the nonimmigrant alien subject to special registration shall provide the Service with proof of compliance with the conditions of his or her nonimmigrant visa status and admission, including, but not limited to, proof of residence, employment, or registration and matriculation at an approved school or educational institution. The nonimmigrant alien subject to special registration shall provide any additional information required by the Service.

(4) The Attorney General, by publication of a notice in the **Federal Register**, also may impose such special registration, fingerprinting, and photographing requirements upon nonimmigrant aliens who are nationals, citizens, or residents of specified countries or territories (or a designated subset of such nationals, citizens, or residents) who have already been admitted to the United States or who are otherwise in the United States. A notice under this paragraph (f)(4) shall explain the procedures for appearing in person and providing the information required by the Service, providing fingerprints, photographs, or submitting supplemental information or documentation.

(5) A nonimmigrant alien subject to special registration shall annually reregister in person with the Service at the district office for the district in which the nonimmigrant alien subject to special registration's residence is located. Annual reregistration shall be in the same manner as provided in paragraph (f)(3) of this section, and shall occur within 10 days of the month and day of the anniversary of his or her original admission to the United States. Annual reregistration of a nonimmigrant alien subject to special registration under paragraph (f)(4) of this section shall be in the manner prescribed in the applicable notice, subject to any modifications or changes included in any applicable intervening notice.

(6) In addition to the 30-day and annual reregistrations pursuant to paragraphs (f)(3) and (f)(5) of this section, any nonimmigrant alien subject to special registration who remains in the United States for 30 days or more shall notify the Service by mail or other such means as determined by the Attorney General, using a notification form designated by the Service, of any change of address of residence, change of employment, or change of educational institution, within 10 days of such change.

(7) A nonimmigrant alien subject to special registration may apply to the district director, or such other official as the Attorney General may designate, at the Service's district office in which the nonimmigrant alien subject to special registration's residence address is located and registered, for relief from the requirements of this paragraph (f). The decision of the district director or such other official is final and not appealable.

(8) When a nonimmigrant alien subject to special registration departs from the United States, he or she shall report to an inspecting officer of the Service at any port of entry, unless the Service has, by publication in the **Federal Register**, specified that nonimmigrant aliens subject to special registration may not depart from specific ports. Any nonimmigrant alien subject to special registration who fails, without good cause, to be examined by an inspecting officer at the time of his or her departure, and to have his or her departure confirmed and recorded by the inspecting officer, shall thereafter be presumed to be inadmissible under, but not limited to, section 212(a)(3)(A)(ii) of the Act (8 U.S.C. 1182(a)(3)(A)(ii)), as an alien whom the Attorney General has reasonable grounds to believe, based on the alien's past failure to conform with the requirements for special registration, seeks to enter the United States to engage in unlawful activity. An alien may overcome this presumption by making a showing that he or she satisfies conditions set by the Attorney General and the Secretary of State. This paragraph (f)(8) applies only to those nonimmigrant aliens who have been registered under paragraph (f)(3) of this section, or who are or have been required to register pursuant to paragraph (f)(4) of this section. This paragraph (f)(8) will become applicable on October 1, 2002.

(9) Registration under this paragraph (f) is not deemed to be complete unless all of the information required by the Service, and all requested documents,

are provided in a timely manner. Each annual reregistration and each change of material fact is a registration that is required under sections 262 and 263 of the Act (8 U.S.C. 1302, 1303). Each change of address required under this paragraph (f) is a change of address required under section 265 of the Act (8 U.S.C. 1305).

* * * * *

Dated: August 9, 2002.

John Ashcroft,

Attorney General.

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