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TRENDS

The Impact of the New Immigration Law on International Education

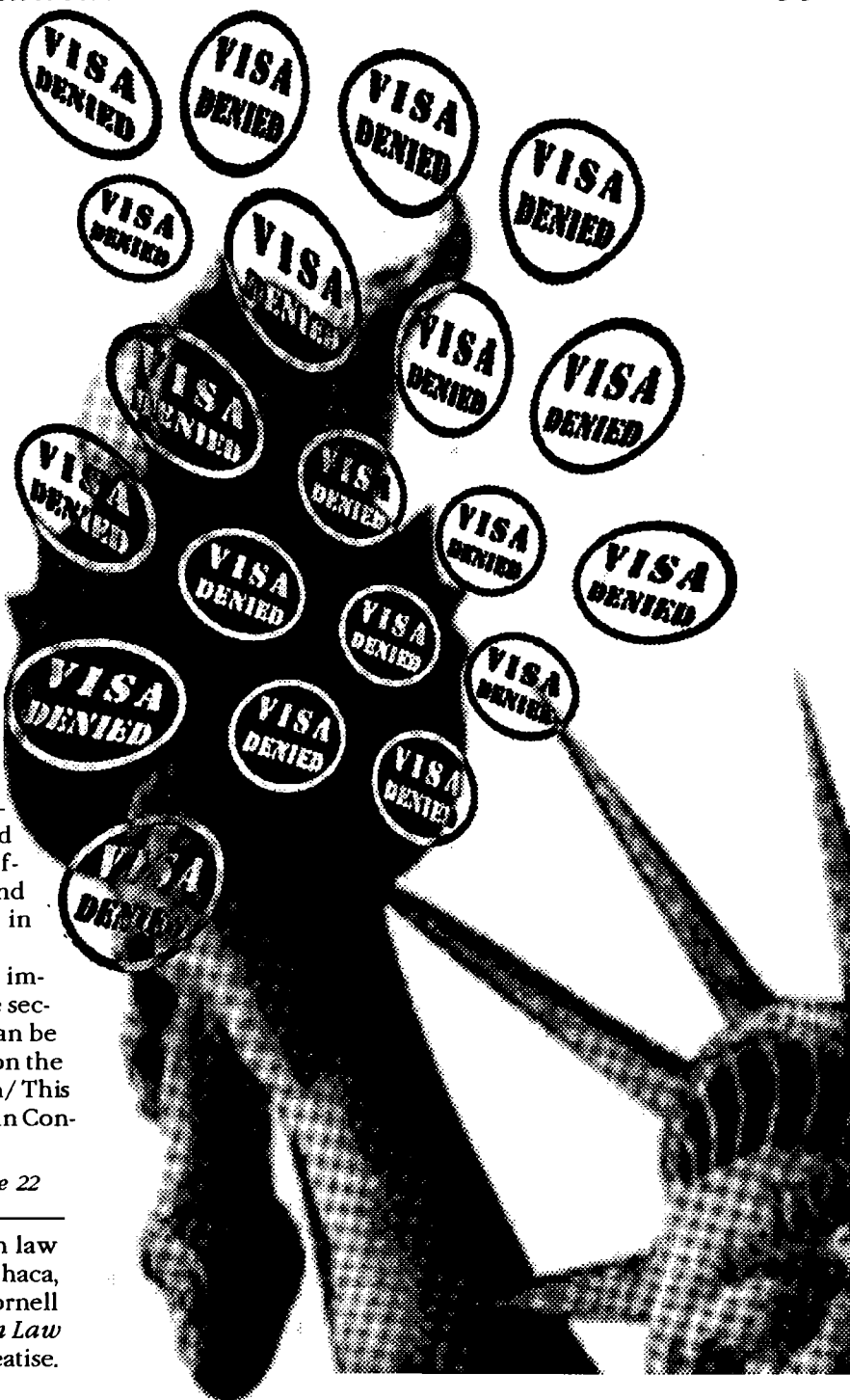
By Stephen Yale-Loehr

President Clinton recently signed into law one of the most comprehensive immigration laws in years. The new law, called the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is targeted primarily at illegal immigrants, but also affects legal immigrants, foreign students and other nonimmigrants, refugees and others in surprisingly many ways.

This article summarizes the new law's impact on international education. A complete section-by-section summary of the new law can be found at the True, Walsh & Miller Web site on the Internet, which is <http://www.twmlaw.com/> This article also surveys possible developments in Congress on immigration issues next year.

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Impact of New Immigration Law

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Summary Exclusion

Section 301 of the new law grants Immigration and Naturalization Service (INS) inspectors at the border power to remove a foreign national if the inspector decides that the individual does not have the proper visa or has made a misrepresentation in attempting entry. There is no appeal or recourse from such an order, and imposition of a removal order will result in the foreign national being barred from the United States for five years.

While many people think that summary exclusion affects only people entering the country illegally, its scope is actually wider. For example, someone from overseas may be entering the United States to speak at a university. If the INS inspector finds that the individual lied about his intentions, or merely failed to get the right visa, the inspector can order the foreign national removed. Your visitor is now barred from entering the United States for the next five years.

Visa Overstayers

In addition to creating summary exclusion, section 301 of the new law punishes foreign nationals who are "unlawfully present" in the United States. A foreign national unlawfully present for more than 180 days but less than one year is ineligible for admission or reentry to the United States for three years; a foreign national unlawfully present for one year or more is inadmissible for ten years.

Section 301 defines "unlawfully present" as being present in the United States after the expiration of the period of stay authorized by the Attorney General or being present in the United States without being admitted or paroled. This could affect a lot of people. For example, a foreign student from India may have overstayed his visa and then found a job with an employer. The employer sponsors the foreign national for permanent resident status, and the foreign national goes overseas to the U.S. embassy in New Delhi to obtain the green card. By leaving the United States, the foreign national will not be able to return to the United States for three or ten years!

Another example is an individual who enters the United States on a one-year visa, but the INS inspector accidentally issues an I-94 card at the border that is valid for only one day. If the individual does not notice the error and stays for six months and one day, he would not be able to return to the United States for three years once he leaves the country. Under the language of the statute, it would appear that there is no exception to the three- and ten-year bars for *de minimis* overstays or for errors that are not the fault of the

individual. However, this problem might be fixed by regulation.

The definition of "unlawfully present" in section 301 does not indicate whether individuals who are present in the United States in a variety of quasi-immigration statuses, such as voluntary departure, are in a status "authorized by the Attorney General" and thus are not subject to the three- or ten-year bars. Much will depend on how the INS interprets "unlawfully present" in its implementing regulations. Enforcing a bar to admission to individuals who are in the United States under a grant of voluntary departure would be unduly harsh. Many individuals in voluntary departure have presented themselves to the INS, and the INS has determined that while no other status is immediately available to them, these individuals nonetheless should be able to remain in the United States. Frequently, voluntary departure is granted to individuals because they have a reasonable likelihood of qualifying for immigrant status in the future. Granting voluntary departure would be mean-

ingless to these individuals if they are subject to the bar to admission contained in the new law. Much the same can be said for foreign nationals permitted to remain under provisions for temporary protected status, deferred enforced departure, or deferred action.

Section 301 contains certain limited exceptions for minors, asylees, family unity beneficiaries, and battered spouses and children. In addition, the bars can be waived for an im-

migrant who is the spouse or son or daughter of a U.S. citizen or lawful permanent resident if extreme hardship would result to the qualifying relative. These exceptions will be hard to obtain, however.

A separate provision (section 632) penalizes people who stay too long in the United States by even just one day. Nonimmigrants who overstay their period of admission for any length of time will have their visa automatically voided. Moreover, they must go back to their home country to obtain a new nonimmigrant visa, absent "extraordinary circumstances." Unlike the three- and ten-year bars discussed above, which take effect April 1, 1997, section 632 is already in effect. Thus, individuals who have already accidentally overstayed their period of authorized stay in the United States may now hold invalid visas.

This section is more draconian than it may seem at first blush. For example, if a person with a five-year multiple entry tourist visa is admitted for six months, and then overstays the date noted on the I-94 card and seeks to reenter the United States on the original visa, the INS may deny him readmission.

Moreover, while the statutory language is unclear, the State Department takes the position that once individuals have overstayed their authorized period of stay, they must

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Section 632

always obtain their nonimmigrant visa stamps in their country of nationality, absent "extraordinary circumstances." Thus, this provision could affect foreign nationals the rest of their lives.

As a practical matter, many people may not know about this change, and may reenter on what are actually void visas. The INS will not necessarily catch them upon reentry, because there is no immediate way to know that they overstayed their prior period of authorized stay, especially if they have multiple entry visas. However, the INS may catch the foreign nationals later, for example, if they apply for permanent resident status. Then the INS may deny them a green card, claiming that they are deportable for being excludable upon entry.

Section 632 contains many ambiguities. For example, is a student who has fallen out of status but who then is reinstated nevertheless subject to section 632? Presumably not. Until the INS clarifies this issue, however, foreign student advisors should warn reinstated students that their visas might not be honored at the port of entry upon return to the United States.

As noted above, section 632 contains an exception for "extraordinary circumstances." A recent State Department cable lists "extraordinary circumstances" as including certain doctors practicing in medically underserved areas of the United States, foreign nationals with a residence in a third country, foreign nationals filing for a change of status when INS has been unable to approve the petition, foreign nationals with certain diplomatic visas, and foreign nationals without a country of nationality ("homeless" foreign nationals). Foreign nationals who meet these criteria do not have to go to their home country to receive a new nonimmigrant visa, even if they overstay their period of admission in the United States. Instead, they can go to a U.S. consular post in a third country, such as Canada or Mexico.

Foreign Student/Exchange Participant Data Collection

Section 641 of the new immigration law requires the Attorney General, in consultation with the Secretary of State and the Secretary of Education, to develop by January 1, 1998 a program to collect information pertaining to F, J and M nonimmigrant students from at least five designated countries.

The information collected must include: (1) the identity and address of the foreign national; (2) the nonimmigrant classification of the foreign national and the date the visa was issued or classification changed or extended; (3) the academic status of the foreign national; and (4) any disciplinary action taken against the foreign national as a result of his or her conviction for a crime. The information is to be collected electronically "where practicable."

Educational institutions must participate in the information collection program as a condition of the continued approval of the institution under the Immigration and Nationality Act's foreign student and exchange visitor provisions. Beginning on April 1, 1997, institutions are also required to collect a fee (not to exceed \$100) from each student with respect to whom the institution is required to collect information, and to remit those fees to the Attorney General. The fees are to be used to carry out the information collection program. INS officials indicate that they will not set a fee, however, until after they first conduct a pilot test of the new program.

Before the 1996 law was passed, the INS had already been considering a pilot data collection program for foreign students. The INS program was to be tested next summer at a limited number of schools, with those schools reporting on

all their foreign students, not just those from select countries. The new statute, however, seems to require reporting and fees of foreign students/scholars only if they come from one of the five selected countries, no matter which school they attend in the United States. The latest information from the INS is that it will still go ahead with its pilot program,

regardless of the apparent conflict in the statute.

As with other sections of the new law, section 641 raises a host of questions. For example, what are the obligations of institutions and exchange visitor programs to report crimes committed by a foreign student or exchange visitor? Institutions are not obligated to report criminal activity per se, but they must report disciplinary action by the institution as the result of a criminal conviction. For exchange visitor programs, the program sponsor must report a change in the J exchange visitor's participation in the program as a result of a criminal conviction. This reporting comes about only when there is a conviction (not an arrest or other action). In addition, the institution or exchange visitor program is not responsible for reporting all criminal convictions, but only those for which disciplinary action was taken by the institution (for F students) or whose program was affected by the conviction (for J exchange visitors).

"Parachute" Foreign Students

Sections 625 and 346 of the new immigration law bar F-1 status for foreign students seeking to attend a public elementary school or a public adult education program. The provisions also bar entry to attend a public secondary school unless the aggregate period of F-1 status does not exceed a year and the foreign national reimburses the school for the full unsubsidized costs.

Students in F-1 status at private schools will have violated status if they transfer to a public school, including publicly funded adult education programs or adult education language training programs. However, if the transfer is to secondary school and the above time limit and cost

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F-1s in private schools who violate their status will be inadmissible for five years.

These provisions are apparently designed to target "parachute kids," meaning foreign students who come to the United States to attend private schools but who end up in public schools. The two sections apply to individuals who obtained F-1 student status on or after November 29, 1996, or whose status is extended after that date. The provision is not retroactive, so as a practical matter it is unlikely that anyone will be affected by this until November 29, 1997. For example, if a student extended his stay after November 29, 1996, and is attending a secondary school, that student still has 12 months to be in that school.

Students who obtained F-1 status before the effective date and who do not need extensions can apparently continue without restrictions or payment. When the INS regulations are written, they presumably will deal with questions such as whether school transfers, reentry to the United States after vacation, or obtaining a new visa will trigger these provisions.

Prospects for Future Immigration Legislation

The 1996 immigration law will not quell the public's clamor for more restrictive immigration measures. To get the illegal immigration law enacted last year, members of Congress stripped out provisions that would have radically reformed legal immigration, claiming that those provisions were too controversial to deal with at the time. Now legal immigration reform is likely to be the top immigration issue for Congress in 1997. Expect to see proposals similar to those put forth last year to cut family immigration significantly, reduce employment-based immigration slightly, and overhaul the U.S. refugee system. A complete overhaul of

the legal immigration system, in the direction of a point system similar to the programs currently used in Canada and Australia, might also be proposed.

Much will depend on the makeup of the House and Senate immigration subcommittees. Sen. Alan K. Simpson (R-Wyo.), who used to chair the Senate immigration subcommittee, has retired. Sen. Jon Kyl (R-Ariz.) may replace him. Sen. Edward M. Kennedy (D-Mass.) is likely to remain the key Democrat on the Senate immigration subcommittee. He has already stated that he wants to restrict the ability

of employers to use temporary foreign workers to replace Americans.

Rep. Lamar Smith (R-Tex.) is likely to continue chairing the House immigration subcommittee. A variety of Democrats could emerge as the key Democratic voice on the subcommittee.

Given the controversial nature of immigration generally, especially legal immigration, it is unlikely that enact-

ment of legal immigration reform legislation will occur in 1997. Hearings and committee markups are sure to occur, however, setting the stage for a possible law in 1998.

Conclusion

The new immigration law is very complicated, and contains many ambiguities and possible problems of interpretation and legality. One thing is clear: now more than ever, remaining in status is key to avoid immigration difficulties. Foreign student advisors and others need to be more proactive than ever, to make sure that foreign nationals do not fall out of status.

Another thing is also clear: the immigration "issue" is far from over. Having gotten tough on illegal immigrants, Congress will now turn to legal immigration reform. One can only hope that legal immigrants will fare better in the next round of legislative activity than their illegal counterparts did in 1996.

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