Nonimmigrant aliens in this group must report to a designated INS District Office for special registration no later than December 16, 2002. The requirement does not apply to lawful permanent residents, to non-immigrants who have applied for asylum before November 6, 2002 or who have been granted asylum, or to G (international organization) and A (diplomatic) non-immigrants.

Group I.c. [source: 67 Fed.Reg. 70525 (November 22, 2002)]
Any nonimmigrant except A (diplomatic) and G (international organization) non-immigrants who:
1.Is a male who was born on or before December 2, 1986;
2.Is a national or citizen (applicable to dual citizens as well) of **Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen**;
3.Was inspected by the Immigration and Naturalization Service and was last admitted to the United States as a nonimmigrant on or before September 30, 2002; and
4.Will remain in the United States at least until January 10, 2003.

Nonimmigrant aliens in this group must report to a designated INS District Office for special registration no later than January 10, 2003. This special registration requirement does not apply to lawful permanent residents, to individuals that have applied for asylum on or before November 22, 2002, or have been granted asylum, or to A and G non-immigrants.

Group I.d. [source: 67 Fed.Reg. 77135 (December 16, 2002)]
Any nonimmigrant except A (diplomatic) and G (international organization) non-immigrants who:
1.Is a male who was born on or before January 13, 1987 (i.e., is age 16 or older as of that date);
2.Is a national or citizen (applicable to dual citizens as well) of **Saudi Arabia and Pakistan**;
3.Was inspected by the Immigration and Naturalization Service and was last admitted to the United States as a nonimmigrant on or before September 30, 2002; and
4.Will remain in the United States after February 21, 2003.

Nonimmigrant aliens in this group must report to a designated INS District Office for special registration beginning on January 13, 2003, and no later than January 10, 2003. This special registration requirement does not apply to lawful permanent residents, to individuals that have applied for asylum on or before December 16, 2002, or have been granted asylum, or to A and G nonimmigrants.

2.Group II. Nonimmigrant aliens who 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

3.Group 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 or law enforcement interests of the United States.

Group I subjectivity requires notice to be published in the Federal Register. Group I.a. is processed immediately upon entry to the United States. Groups I.b., I.c., and I.d. are part of a "call-up" program to register certain groups already in the United States as of a certain date.

Group II allows a consular officer or an inspecting INS officer to process someone for special registration if the officer "has reason to believe" an individual may be in a group identified in a Federal Register notice. This group would be processed at the time of entry to the U.S.

Group III gives discretion to the Attorney General and the Secretary of State to establish pre-existing criteria that do not have to be published in the Federal Register, and which might not be made public. It is likely that the Attorney General has already established a set of Group III "pre-existing criteria," according to an internal INS memo dated September 5, 2002 circulated by some news agencies. Please note: this is not a "call-up" list like Groups I.b. and I.c. Aliens that fit these criteria may be registered by INS on a case-by-case basis, but only when they come into contact with INS either at the time of entry to the United States, or when they otherwise come into contact with INS. There is no affirmative obligation on the part of such aliens to report to INS, unless of course they also fall into Group I.b. or I.c.

The September 5 INS memo identified the following individuals who may be registered for special registration in NSEERS at the port of entry when they enter the U.S. Once again, this list is from an internal INS memo that INS has not made public. This list is reproduced here for informational purposes only.

September 5 INS memo list:

Male citizens of Pakistan, Saudi Arabia and Yemen, who are between the ages of 16 and 45.
Additional factors that INS officers might use to decide whether an alien from any country should be subject to special registration, regardless of citizenship.

- "The nonimmigrant alien has made unexplained trips to Iran, Iraq, Libya, Sudan, Syria, North Korea, Cuba, Saudi Arabia, Afghanistan, Yemen, Egypt, Somalia, Pakistan, Indonesia or Malaysia, or the alien's explanation of such trips lacks credibility."
- "The nonimmigrant alien has engaged in other travel, not well explained by the alien's job or other legitimate circumstances."
- "The nonimmigrant alien has previously overstayed in the United States on a nonimmigrant visa, and monitoring is now appropriate in the interest of national security."
- "The nonimmigrant alien meets characteristics established by current intelligence updates and advisories."
- "The nonimmigrant alien is identified by local, state or federal law enforcement as requiring monitoring in the interest of national security."
- "The nonimmigrant alien's behavior, demeanor or answers indicate that [the] alien should be monitored in the interest of national security."
- "The nonimmigrant alien provides information that causes the immigration officer to reasonably determine that the individual requires monitoring in the interest of national security."

What are the special registration requirements? Individuals subject to special registration requirements must:

- Register with INS, which includes INS taking the individual's fingerprints and photograph;
- Be interviewed by INS within 30 . 40 days of entering the United States;
- Be interviewed again by INS one year after entering the United States;
- Continue to be interviewed by INS on the annul anniversary date of their last admission to the United States
- Inform INS within 10 days of any change of address, change of employer or change of school, using Form AR-11SR.
- Depart the United States from an officially-designated port of departure only and report to an INS officer at such airport prior to departure.

INS special registration information Web site:

INS has made detailed information regarding the special registration requirements available on its Web site at:
http://www.ins.usdoj.gov/graphics/lawenfor/specialreg/index.htm

January 7, 2003

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[AG Order No. 2636–2002]

Registration of Certain Nonimmigrant Aliens from Designated Countries

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice.

SUMMARY: This Notice requires certain nonimmigrant aliens to appear before, register with, and provide requested information to the Immigration and Naturalization Service on or before February 21, 2003. It applies to certain nonimmigrant aliens from one of the countries designated in this Notice who were last admitted to the United States on or before September 30, 2002, and who will remain in the United States after February 21, 2003. The specific requirements are set forth in the Notice. This is the third such Notice that the Attorney General has published. This Notice is applicable to certain nationals and citizens of Armenia, Pakistan, and Saudi Arabia who entered the United States on or before September 30, 2002, and who will remain in the United States after February 21, 2003. Aliens described in this Notice are required to register and provide additional information to the Immigration and Naturalization Service between January 13, 2003, and February 21, 2003, inclusive.

EFFECTIVE DATES: This Notice is effective on January 13, 2003. Aliens described in this Notice are required to register and provide additional information to the Immigration and Naturalization Service on or before February 21, 2003.

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: Section 265(b) of the Immigration and Nationality Act ("Act"), as amended, 8 U.S.C. 1305(b), provides that

> [t]he Attorney General may in his discretion, upon ten days notice, require the natives of any one or more foreign states, or any class or group thereof, who are within the United States and who are required to be registered under this subchapter, to notify the Attorney General of their current addresses and furnish such additional information as the Attorney General may require.

Additionally, section 263(a) of the Act, 8 U.S.C. 1303(a), provides that the Attorney General may "prescribe special regulations and forms for the registration and fingerprinting of * * * aliens of any other class not lawfully admitted to the United States for permanent residence." The Attorney General has previously exercised his authority under these and other provisions of the Act to establish special registration procedures under 8 CFR 264.1(f). 67 FR 52584 (Aug. 12, 2002). These requirements are known as the National Security Entry—Exit Registration System ("NSEERS"). In accordance with the authority set forth in 8 CFR 264.1(f)(4), the Attorney General has determined that certain nonimmigrant aliens specified in this Notice shall be registered and required to provide specific information. The Attorney General has the sole discretion to make this determination. Under this Notice certain nonimmigrant nationals or citizens of Armenia, Pakistan, and Saudi Arabia are required to appear at an Immigration and Naturalization Service ("Service") office to register under NSEERS and provide additional information. This is the third Notice that the Attorney General has published. *See* 67 FR 67766 (Nov. 6, 2002); 67 FR 70526 (Nov. 22, 2002). Previous Notices have applied to certain nonimmigrant nationals or citizens of Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Qatar, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

In light of recent events, and based on intelligence information available to the Attorney General, the Attorney General has determined that the aliens described in paragraph (a) of this Notice must appear before the Service and provide certain information. This Notice applies only to certain nonimmigrant aliens from one of the countries designated in this Notice who were last admitted to the United States on or before September 30, 2002, and who will remain after February 21, 2003. Based on intelligence information available to the Attorney General, the Attorney General has determined that registering all nonimmigrant aliens from the covered countries would not enhance national security. Moreover, the Attorney General has determined that it would not be administratively feasible at the present time to register all of the nonimmigrants from the specific countries covered by this Notice, and that the delay occasioned by registering all nonimmigrants from the countries covered by this Notice would jeopardize the national security. Accordingly, the Attorney General has determined that only males aged 16 years or older need to be registered at this time.

Furthermore, the Attorney General has determined that an alien who has an application for asylum pending on the date of publication of this Notice has already provided sufficient information in the application for asylum, along with fingerprints, to warrant exclusion from this Notice.

Although section 265(b) of the Act, 8 U.S.C. 1305(b), provides a minimum period of 10 days notice for covered aliens to provide their current address and other required information, this Notice allows an alien described by the Notice a period of more than 30 days to register. The Attorney General has determined that such additional time to register is in the best interests of the United States and has extended this time to register solely as a matter of discretion.

Finally, until further notice, once enrolled within NSEERS by registration under this Notice, an alien described in paragraph (a) of this Notice is required to register annually with the Service. All aliens described in paragraph (a) shall comply with all other provisions of 8 CFR 264.1(f)(5) through (f)(9).

A willful failure to comply with the requirements of this Notice 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). See 8 CFR 214.1(f). Pursuant to section 237(a)(3)(A) of the Act, 8 U.S.C. 1227(a)(3)(A), an alien who fails to comply with the provisions of this Notice is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful. Finally, if an alien subject to this Notice fails, without good cause, to comply with the requirement in 8 CFR 264.1(f)(8) that the alien must report to an inspecting officer of the Service when departing the United States, the alien 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). See 8 CFR 264.1(f)(8).

Notice of Requirements for Registration of Certain Nonimmigrant Aliens From Designated Countries

Pursuant to sections 261 through 266 of the Immigration and Nationality Act ("Act"), as amended, 8 U.S.C. 1302 through 1306, and particularly sections 263(a) and 265(b) of the Act, 8 U.S.C. 1303(a) and 8 U.S.C. 1305(b), and 8 CFR 264.1(f), I hereby order as follows:

(a) *Scope.* Except as provided in paragraph (g), an alien is required to register pursuant to this Notice if the alien:

(1) Is a male who was born on or before January 13, 1987;

(2) Is a national or citizen of Armenia, Pakistan, or Saudi Arabia, who was inspected by the Immigration and Naturalization Service and was last admitted to the United States as a nonimmigrant on or before September 30, 2002; and

(3) Will remain in the United States after February 21, 2003.

(b) *Dual citizens.* This Notice is applicable to any alien who is a national or citizen of a designated country, notwithstanding any dual nationality or citizenship.

(c) *Requirement to appear before an immigration officer.* All aliens described in paragraph (a) shall, between January 13, 2003, and February 21, 2003, inclusive, appear before an immigration officer at any of the locations listed in the appendix to this Notice.

(d) *Information to be provided.* All aliens described in paragraph (a) shall:

(1) Answer questions under oath before an immigration officer, which answers shall be recorded by the immigration officer;

(2) Present to such immigration officer:

(i) The alien's travel documents, including passport and the Form I–94 issued upon admission, and any other forms of government-issued identification;

(ii) Proof of residence, such as, but not limited to, title to land or a lease or a rental agreement, and, if applicable, proof of matriculation at an educational institution, and, if applicable, proof of employment; and

(iii) Such other information as is requested by the immigration officer; and

(3) Shall be fingerprinted and photographed by the immigration officer.

(e) Annual reporting obligations. All aliens described in paragraph

(a) shall appear, within 10 days of each anniversary of the date on which they were registered under this Notice, before an immigration officer at any of the locations listed in the appendix to this Notice and answer questions under oath. All aliens described in paragraph (a) shall comply with all other provisions of 8 CFR 264.1(f)(5)–(9).

(f) *Notice of Change of Address.* All aliens described in paragraph (a) shall advise the Immigration and Naturalization Service, through the filing of Form AR–11, of any change of address within 10 days of such change of address. If an alien fails to notify the Immigration and Naturalization Service in writing of a change of address and the new address, as required by section 265(a) of the Act, 8 U.S.C. 1305(a), the alien may be subject to prosecution under section 266(b) of the Act, 8 U.S.C. 1306(b), and may be deportable as provided in section 237(a)(3)(A) of the Act, 8 U.S.C. 1227(a)(3)(A). If it becomes necessary to place the alien in removal proceedings, the Immigration and Naturalization Service may use the most recent address provided by the alien for service of the Notice to Appear.

(g) *Inapplicability.* The requirements of this Notice do not apply to any alien who:

(1) Is presently in a nonimmigrant classification under section 101(a)(15)(A) or 101(a)(15)(G) of the Act, 8 U.S.C. 1101(a)(15)(A) or 8 U.S.C. 1101(a)(15)(G);

(2) Is lawfully admitted to the United States for permanent residence; or

(3) Has an application for asylum pending on December 16, 2002, or has been granted asylum, under section 208 of the Act, 8 U.S.C. 1158.

Dated: December 12, 2002.

John Ashcroft,

Attorney General.

Appendix: Immigration and Naturalization Service Offices for Registration of Certain Nonimmigrants Pursuant to Notice of December 16, 2002

ALASKA—Anchorage, 620 East 10th Avenue, Anchorage, Alaska 99501
ARIZONA—Phoenix, 2035 North Central Avenue, Phoenix, Arizona 85004
ARIZONA—Tucson, 6431 South Country Club Road, Tucson, Arizona 85706–5907
ARKANSAS—Fort Smith, 4991 Old Greenwood Road, Fort Smith, Arkansas 72903
CALIFORNIA—Fresno, 865 Fulton Mall, Fresno, California 93721
CALIFORNIA—Los Angeles, 300 North Los Angeles Street, Room 2024, Los Angeles, California 90012
CALIFORNIA—Sacramento, 650 Capitol Mall, Sacramento, CA 95814
CALIFORNIA—San Bernardino, 655 West Rialto Avenue, San Bernardino, California 92410
CALIFORNIA—San Diego, 880 Front Street, Suite 1209, San Diego, California 92101
CALIFORNIA—San Francisco, 444 Washington Street, San Francisco, California 94111
CALIFORNIA—San Jose, 1887 Monterey Road, San Jose, California 95112
CALIFORNIA—Santa Ana, 34 Civic Center Plaza, Santa Ana, California 92701
COLORADO—Denver, 4730 Paris Street, Denver, CO 80239
CONNECTICUT—Hartford, 450 Main Street, 4th Floor, Hartford, Connecticut 06103
FLORIDA—Jacksonville, 4121 Southpoint Boulevard, Jacksonville, Florida 32216
FLORIDA—Miami, 7880 Biscayne Boulevard, Miami, Florida 33138
FLORIDA—Orlando, 9403 Tradeport Drive Orlando, Florida 32827
FLORIDA—Tampa, 5524 West Cypress Street, Tampa, Florida 33607–1708
FLORIDA—West Palm Beach, 326 Fern Street, Riviera Beach, Florida 33401
GEORGIA—Atlanta, 77 Forsyth Street, SW., Atlanta, Georgia 30303
GUAM—Agana, Sirena Plaza, Suite 100, 108 Hernan Cortez Avenue, Hagatna, Guam 96910
HAWAII—Honolulu, 595 Ala Moana Boulevard, Honolulu, Hawaii 96813
IDAHO—Boise, 1185 South Vinnell Way Boise, Idaho 83709
ILLINOIS—Chicago, 230 South Dearborn, 2nd Floor Chicago, Illinois 60604
INDIANA—Indianapolis, 950 N. Meridian Street, Room 400, Indianapolis, Indiana 46204
IOWA—Des Moines, 210 Walnut Street, Room 369, Des Moines, Iowa 50309
KANSAS—Wichita, 271 West 3rd Street North, Suite 1050, Wichita, Kansas 67202–1212
KENTUCKY—Louisville, 601 West Broadway, Room 390, Louisville, Kentucky 40202
LOUISIANA—New Orleans, 701 Loyola Avenue, New Orleans, Louisiana 70113
MAINE—Portland, 176 Gannet Drive, South Portland, Maine 04106
MARYLAND—Baltimore, 31 Hopkins Place, Baltimore, Maryland 21201
MASSACHUSETTS—Boston, Government Center, JFK Federal Building, Boston, Massachusetts 02203
MICHIGAN—Detroit 333, Mount Elliot Street, Detroit, Michigan 48207–4381
MINNESOTA—Minneapolis, 2901 Metro Drive, Suite 100, Bloomington, Minnesota 55425
MISSOURI—Kansas City, 9747 Northwest Conant Avenue, Kansas City, Missouri 64153
MISSOURI—St. Louis, 1222 Spruce Street, St. Louis, Missouri 63103
MONTANA—Helena, 2800 Skyway Drive, Helena, Montana 59601
NEBRASKA—Omaha, 3736 South 132nd Street, Omaha, Nebraska 68144
NEVADA—Las Vegas, 3373 Pepper Lane, Las Vegas, NV 89120–2739
NEVADA—Reno, 1352 Corporate Boulevard, Reno, Nevada 85902
NEW HAMPSHIRE—Manchester, 803 Canal Street, Manchester, New Hampshire 03101
NEW JERSEY—Cherry Hill, 1886 Greentree Road, Cherry Hill, New Jersey 08003
NEW JERSEY—Newark, 970 Broad Street, Newark, New Jersey 07102
NEW MEXICO—Albuquerque, 1720 Randolph Road SE, Albuquerque, New Mexico 87106
NEW YORK—Albany, 1086 Troy-Schenectady Road, Latham, New York 12110
NEW YORK—Buffalo, 130 Delaware Avenue, Buffalo, New York 14202
NEW YORK—New York City, 26 Federal Plaza, New York, New York 10278
NORTH CAROLINA—Charlotte, 210 E. Woodlawn Road, Building 6, Suite 138, Charlotte, North Carolina 28217
OHIO—Cincinnati, 550 Main Street, Room 4001, Cincinnati, Ohio 45202
OHIO—Cleveland, 1240 East Ninth Street, Cleveland, Ohio 44199
OHIO—Columbus, 50 West Broad Street, Suite 304D, Columbus, Ohio 43215

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 09 2007

LIN-05-211-52210

In re: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center ("director"), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner operates a computer consulting business, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's March 2, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 27, 2001. The proffered wage as stated on Form ETA 750 is $60,000.00 per year, based on 40 hour work week. The labor certification was approved on April 14, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 29, 2005. On the I-140, the petitioner listed the following information: date established: August 2, 1986; gross annual income: see attached; net annual income: see attached; current number of employees: three.

On August 29, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: proof that the beneficiary complied with National Security Entry-Exit Registration System ("NSEERS") registration;[2] and to submit additional evidence related to the petitioner's ability to pay the proffered wage, including evidence beyond the petitioner's federal tax returns, and copies of any and all paystubs issued to the beneficiary in 2005. The petitioner responded.[3] Following consideration of the petitioner's response, on March 2, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, as well as for failure to pay the proffered wage listed on Form ETA 750A. The petitioner appealed, and the matter is now before the AAO.

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[2] NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 CFR § 264.1(f)(2). The NSEERS requirement was expanded to include other groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate "call-in groups." Lebanon, the beneficiary's country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security ("DHS") suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* http://www.ice.gov/pi/specialregisration/index.htm, accessed April 5, 2007.

[3] The petitioner asserts in response to the NSEERS issue that the beneficiary entered the U.S. without inspection in 1999, and is eligible for 245(i) adjustment. As the beneficiary entered without inspection, counsel contends that the beneficiary is not a "nonimmigrant," and would not be subject to registration. Further, counsel provides that the registration requirements were discontinued, and the beneficiary's registration, or lack thereof, would not be relevant to the I-140's approval. Counsel further cites to HQOCC 70/6.22/04, Memorandum for William R. Yates, Associate Director for Operations from [redacted] Chief Counsel, Legal Opinion: Effect of failure to comply with NSEERS requirements, or other evidence of inadmissibility or deportability, on the adjudication of visa petitions, dated October 14, 2004, which provides that "an alien's willful and unexcused failure to comply with NSEERS, or any other ground of inadmissibility or deportability would not justify the denial of a visa petition filed on the alien's behalf."

Office of the Chief Counsel

U.S. Department of Homeland Security
20 Massachusetts Ave, N.W. Suite 4037
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQOCC 70/6.22/04

INTEROFFICE MEMORANDUM

MEMORANDUM FOR WILLIAM R. YATES
ASSOCIATE DIRECTOR FOR OPERATIONS

FROM: Robert C. Divine
Chief Counsel

SUBJECT: Legal opinion: Effect of failure to comply with NSEERS requirements, or other evidence of inadmissibility or deportability, on the adjudication of visa petitions

DATE: October 14, 2004

I. QUESTION PRESENTED

In an April 2, 2004, memorandum, you provided guidance to U.S. Citizenship and Immigration Services adjudicators concerning the impact of an individual's failure to comply with the registration and reporting requirements of the National Security Entry Exit Registration System (NSEERS) on the adjudication of the individual's application for immigration benefits. By its precise terms, the April 2, 2004, memorandum dealt with "benefit applications." The question has since arisen, whether an alien's willful and unexcused failure to comply with NSEERS, or other evidence of inadmissibility or deportability, would support the denial of a *visa petition* filed on the alien's behalf, separate from an application or request for a visa, for entry, or for an immigration status.

II. SUMMARY CONCLUSION

An alien's willful and unexcused failure to comply with NSEERS, or any other ground of inadmissibility or deportability as such, would not justify the denial of a visa petition filed on the alien's behalf, separate from a request for nonimmigrant or immigrant visa, admission or status. Evidence of inadmissibility or deportability, or evidence of violation of status, normally may support only the denial of a benefit actually granting status, such as extension of nonimmigrant stay, change of nonimmigrant status, adjustment of status, or naturalization. Nevertheless, visa petition approval may be accompanied by steps to notify the alien, petitioner and/or subsequent adjudicators of actual or possible inadmissibility. Evidence that might support inadmissibility may also justify further investigation leading to substantive denial of a petition.

III. ANALYSIS

As noted, the April 2, 2004, memo, by its terms, addressed the impact of a willful and unexcused NSEERS violation on the adjudication of *applications*. For many applications, a determination whether an alien is admissible or deportable, or whether the alien merits a favorable exercise of discretion, is a critical factor in the proper adjudication of the case.

In a visa petition proceeding, by contrast, the legal issues are narrower. In an alien relative (Form I-130) visa petition, the critical issue is whether the requisite relationship exists. INA § 204(a)(1)(A), (B), and (D), 8 U.S.C. § 1154(a)(1)(A), (B), and (D). For immigrant worker (Form I-140) petitions, the critical issue is whether the proposed employment meets the requirements of the relevant employment-based category. *Id.* § 204(a)(1)(E) and (F), 8 U.S.C. § 1154(a)(1)(E) and (F). The same principle applies to Form I-526 (alien entrepreneur)and Form I-360 (special immigrant) cases. The issue is whether the alien fits into the particular immigrant visa category, not whether the alien is admissible. Note that INA § 204(e), 8 U.S.C. § 1154(e), in conjunction with sections 221(h) and 245(a) of the INA, 8 U.S.C. §§ 1201(h) and 1255(a), respectively, clearly provides that approval of the visa petition does not conclusively establish that the alien is admissible. Rather, these statutory provisions contemplate that admissibility, including any waiver of inadmissibility, is to be determined later in the process.

Most importantly, section 204(b) of the INA, 8 U.S.C. § 1154(b), provides that if the adjudicator finds that the facts stated in the petition are true and that the beneficiary has met the requirements for the specific immigrant visa category, the adjudicator *shall* approve the petition. The Board has interpreted § 204(b) to mean that USCIS may not deny a visa petition based on the conclusion that the intended beneficiary is inadmissible. *Matter of O-*, 8 I & N Dec. 295 (BIA 1959). No statute, regulation or later precedent has undermined *Matter of O*, and it remains binding on USCIS. 8 C.F.R. § 1003.1(g). Under this precedent, whether the alien is admissible to the United States, strictly speaking, is not relevant to the adjudication of the immigrant visa petition.

It could perhaps be argued that *Matter of O-* does not apply to *nonimmigrant* visa petitions, as separate adjudications from change of status or extension of stay. Section 214, however, like § 204, makes substantive eligibility for certain employment-based nonimmigrant classifications an issue separate from actual admissibility or eligibility for status. *Compare* INA § 204(b) and (e), 8 U.S.C. § 1154(b) and (e), *with* INA § 214(c)(1), 8 U.S.C. § 1184(c)(1). The prudent course is to follow *Matter of O* for both immigrant and nonimmigrant petitions, unless extraordinary circumstances justify elevating consideration to USCIS managers and/or counsel. Thus, if an I-129 petition is made for H, L, O, P, or Q classification requesting only consular or port notification, then admissibility or other aspects of eligibility for nonimmigrant status is not normally at issue and will be determined by the consular officer in a nonimmigrant visa application or a CBP inspector at a port of entry.[1] If the petition requests change of status or extension or amendment of stay, then evidence of inadmissibility or deportability should be considered as such only in the determination of the request for the procedural status benefit, and not in the determination of eligibility for the classification. This is already a common practice relating to petitions for change or extension for aliens who may have violated their nonimmigrant status, in which case the petition can be approved for consular or port notification only and the status request is denied.

Failure to comply with NSEERS may be a significant factor in determining whether to grant a benefit of status to an alien. Failure to comply with the conditions of nonimmigrant admission makes an alien ineligible for nonimmigrant status benefits. 8 C.F.R. § 214.1(c)(4) (extension of stay) and § 248.1(a) (change of status). Compliance with NSEERS is a condition of nonimmigrant admission for those aliens who are subject to NSEERS. 8 C.F.R. § 264.1(f)(1). Failure to comply, therefore, would make the alien subject to removal as a deportable alien. INA § 237(a)(1)(C)(i), 8 U.S.C.

[1] Some may recall the prior practice of filing "split" petitions with applications for nonimmigrant change of status or extension of stay (e.g. a Form I-129 and a Form I-539). Collapsing those requests into one form did not collapse the separate determinations. This distinction does not exist for other classifications for which the I-129 is used, such as E, R and TN, because a USCIS petition approval is not required for visa application or admission.

§ 1227(a)(1)(C)(i). The violation of this condition of nonimmigrant admission would also make many aliens ineligible for adjustment of status. INA § 245(c)(2), 8 U.S.C. § 1255(c)(2). Even for immediate relatives and others who are exempt from this restriction. failure to comply with NSEERS could justify a denial of adjustment as a matter of discretion. Failure of an NSEERS registrant to report his or her departure establishes a presumption of inadmissibility. 8 CFR 264.1(f)(8)(2).

NSEERS compliance does not. however. directly affect whether an alien has a qualifying family relationship to a citizen or resident alien. Nor does NSEERS compliance relate directly to whether the alien's qualifications and the proposed employment offer fit within one of the employment categories or nonimmigrant classifications. Unless and until *Matter of O* is overruled. therefore, an alien's willful and unexcused failure to comply with NSEERS. or any other evidence of inadmissibility or deportability. would not justify the denial of an immigrant or nonimmigrant visa petition filed on the alien's behalf separate from the request for a status benefit. The proper course. therefore. would be for USCIS to approve a visa petition. if the evidence supports approval. even if the alien beneficiary has been found or suspected willfully to have violated the NSEERS requirements.

This does not mean that a USCIS examiner who approves a visa petition must do so without giving notice to the alien of possible inadmissibility or of actual deportability. or without taking other action designed to prevent a subsequent adjudicator of an application for visa. admission or status from overlooking a possible ground of inadmissibility. For instance. the law would not prevent inclusion in or accompanying a petition approval notice language indicating that the alien's apparent NSEERS violation may have an adverse impact on the alien's ability to obtain admission or adjustment of status in the future, and that the alien may contact U.S. Immigration and Customs Enforcement to come into compliance.[2] The law would not prevent an adjudicator who makes an actual and well-founded finding. preferably after giving the alien an opportunity to clarify any ambiguity. of willful NSEERS failure or other status violation from issuing to the alien a formal finding that a violation of status has occurred and that the alien thus begins to accrue unlawful presence. for purposes of future inadmissibility under § 212(a)(9)(B). from the date of the decision. *See* Adjudicators' Field Manual § 30.1(d)(1)(B); INS Memorandum, Section 212(a)(9)(B) Relating to Unlawful Presence (Acting EAC for Programs. Sept. 19. 1997). The law would also not prevent USCIS from making a notation in the petition file. in electronic systems or other records to alert a subsequent adjudicator (consular officer. and/or port inspector) of a possible ground of inadmissibility. but such notation should not suggest an actual finding of inadmissibility unless it has properly been made.

Finally. although a conclusion of inadmissibility or deportability would not justify denial of a petition. the evidence supporting such conclusion may also have relevance to petition eligibility or give rise to an investigation leading to petition denial. For instance. the extensive criminal history (including pedophilia) of the petitioner or beneficiary. unknown to the other party. may affect that party's interest in pursuing the petition if brought to his or her attention (Another counsel opinion will examine when. how and to whom such information can be disclosed). Past convictions of fraud may give rise to an investigation into the validity of the credentials of the beneficiary of an employment based petition. Such determinations must be made in light of all of the facts and circumstances.

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[2] I note that the visa petition approval notice commonly includes the statement that the approval notice is not a visa and may not be used in lieu of a visa. It may also be prudent to add a sentence such as: "Approval of this visa petition does not in itself grant any immigration status and does not guarantee that. when the alien beneficiary applies for a visa. for admission to the United States. or for an extension, change or adjustment of status. the alien beneficiary will be found to be admissible."

IV. CONCLUSION

An alien's willful and unexcused failure to comply with NSEERS, or any other ground of inadmissibility or deportability, would not justify the denial of a visa petition filed on the alien's behalf, separate from a request for nonimmigrant or immigrant visa, admission or status. Evidence of inadmissibility or deportability, or evidence of violation of status, normally may support only the denial of a benefit actually granting status, such as extension of nonimmigrant stay, change of nonimmigrant status, adjustment of status, or naturalization. Nevertheless, visa petition approval may be accompanied by steps to notify the petitioner, beneficiary and/or subsequent adjudicators of actual or possible inadmissibility. Evidence that might support inadmissibility may also justify further investigation leading to substantive denial of a petition.

V. ICE/CBP CONCURRENCE

This opinion has been circulated among the chief legal advisors of ICE and CBP and they have responded with no comment.

cc: Official file
HQOCC Log
Adjudications Division Log
M. Sheridan
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