

THE VISA WAIVER PROGRAM

updated by Matthew I. Hirsch*

INTRODUCTION

The Immigration and Nationality Act (INA), as amended,¹ prohibits admission into the United States of a foreign national not in possession of a valid visa, with a few limited exceptions. One such exception is the Visa Waiver Program (VWP or Program)² which, for a number of years, was a pilot program (referred to in this Article by VWPP). On October 30, 2000, President Clinton signed the Visa Waiver Permanent Program Act, making the program permanent.³

First enacted in 1986, the original VWPP was designed to allow nationals from certain countries to enter the United States under limited conditions, for a short period of time, without first obtaining a visa from a U.S. consulate abroad. The VWP authorizes the Attorney General, in consultation with the Secretary of State,⁴ to waive the requirement of a valid

nonimmigrant visa for visitors for business (B-1) or pleasure (B-2) who are seeking to enter the United States from certain countries for not more than 90 days. In 2003, 13.5 million visitors entered the United States under this Program, constituting almost one-half of all visitors that year.⁵

The main advocates of the VWPP were the Department of State (DOS), the American tourist industry, and the business community. DOS advanced a two-fold incentive for the program: (1) eliminating the requirement for nationals of high volume application, low denial rate countries to apply for non-immigrant visitor and business visas at the consulates, thus also eliminating processing paperwork and freeing consular resources for other activities; and (2) fostering better relations with reciprocity countries that allow U.S. citizens to also enter without a visa. The U.S. tourist industry was enthusiastic in its support of the program, as it correctly envisioned that millions of tourists would take advantage of the opportunity to travel to the United States on the spur of the moment without the time-consuming inconvenience of having to obtain non-immigrant visas in advance of travel. The business community also welcomed the idea that people could enter the United States on short notice to conduct business without first applying for a non-immigrant visa.⁶

For the most part, while the VWPP had been enthusiastically received, the Program was also the subject of a critical report issued by the Justice Department's Office of Inspector General.⁷ Testifying before a House subcommittee on May 5, 1999, the Inspector General noted that the Pilot Program could facilitate illegal entry because visitors from VWPP-designated countries avoid the pre-screening that consular officers normally perform on visa appli-

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Note: An 8 CFR cite with a bracketed "1" (e.g., §[1]274a.1) indicates a section duplicated in both DHS's Chapter I (§274a.1) and EOIR's Chapter V (§1274a.1).

¹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*) (hereinafter INA).

² INA §217(a).

³ Visa Waiver Permanent Program Act, HR 3767, Pub. L. No. 106-396, 114 Stat. 1637 (VWP Act); *see also*, 77 *Interpreter Releases* 1562, 1563 (Nov. 6, 2000); 77 *Interpreter Releases* 1755 (Dec. 18, 2000). For an excellent summary of the provisions of the Visa Waiver Permanent Program Act *see* "Dep't of State Cable 210639: Changes in Visa Waiver Program," *reprinted in* 77 *Interpreter Releases* 1608-11 (Nov. 13, 2000).

⁴ The previous §217(a) of the INA provided for the Secretary of State and the Attorney General to act jointly. This was amended by §635 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L.

continued

No. 104-208, 110 Stat. 3009 (hereinafter IIRAIRA, the 1996 Immigration Reform Act, or the 1996 Act).

⁵ As reported in the Congressional Research Service report, "Visa Waiver Program" (updated Apr. 6, 2004), *posted on* AILA InfoNet at Doc. No. 04040765 (Apr. 7, 2004).

⁶ *See* H.R. Rep. No. 682, 99th Cong., 2d Sess. 50, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 5649, 5654.

⁷ *See* 76 *Interpreter Releases* 1117 (Aug. 2, 1999).

cants.⁸ It was also pointed out that some terrorists and criminals intercepted at the time of inspection were attempting to enter under the VWPP. Another problem, according to the Inspector General, was government employee corruption involving bribery and trafficking in fraudulent or blank passports and other documents.⁹

Moreover, despite its obvious advantages, those who use the Program's streamlined entry process give up certain rights and privileges.¹⁰ While the Program makes travel to the United States easier for nationals of countries participating in the Program, sometimes entering on the visa waiver presents unanticipated problems to the traveler. For example, VWP entrants are limited to a 90 period of admission and may not change or extend their status. In addition, potential VWP entrants may be summarily denied admission with no right to administrative or judicial review. A VWP entrant may not challenge a removal order or claim any form of relief from removal if USCIS finds he or she has violated the terms of his or her status except through an application for political asylum or for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹¹ Also, with the exception of "immediate relatives," VWP entrants cannot adjust status.¹²

Although these disadvantages may affect only a small percentage of the millions of entrants under the VWP, the inflexible nature of the provisions, and the virtual absence of administrative or judicial review of an adverse decision, led one commentator to counsel against use of the VWP.¹³ In any case, an attorney

⁸ *Id.*

⁹ *Id.*

¹⁰ For the rest of this Article, VWP will refer to the Program as made permanent by HR 3767 and amended §217 of the Act. VWPP will refer to the Program as it existed before the amendments.

¹¹ INA §217(b). The burden was eased considerably in 1994 by the enactment of INA §245(i), which removed the prohibition against adjustment of status to permanent residence for VWPP entrants.

¹² See Fiscal Year 1998 Commerce, Justice, State and Judiciary Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, §111 (CJS Act); INA §245(c); see also INS Central Office Memo on §245(i) of Paul Virtue, Acting Exec. Assoc. Comm'r. (Nov. 28, 1997), posted on AILA InfoNet on Dec. 2, 1997.

¹³ A. James Vázquez-Azpiri, "The Visa Waiver Pilot Program: A Guide to Benefits and Risks," 96-8 *Immigration Briefings* 17-18 n.67 (Aug. 1996).

should carefully analyze a client's immigration needs and goals before recommending entry under the VWP. Clients, especially those who may need flexibility with respect to duration or type of stay after entry, should be made aware of the program's limitations. Issues associated with the VWP can change quickly and dramatically based on legislation, regulation or the client's circumstances, so it is important to fully consider these with each inquiry.

VISA WAIVER PROGRAM COUNTRIES

In most cases, the individual must be a national of a participating country and must present a passport issued by that country.¹⁴ Alternatively, the individual may be a national of a country that extends reciprocal privileges to citizens and nationals of the United States on its own or in conjunction with one or more participating countries that have established with it a common area for immigration admissions.¹⁵ Presumably, this provision is intended to facilitate entry from the European Union countries.

At press time, 27 countries are designated participants.¹⁶ They include Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland,¹⁷ Italy, Japan, Liechtenstein, Luxembourg, Monaco, New Zealand, the Netherlands, Norway, Portugal,¹⁸ San Marino, Singapore,¹⁹

¹⁴ INA §217(a)(2).

¹⁵ *Id.*

¹⁶ 8 CFR §217.2(a).

¹⁷ On March 1, 1995, the INS and the Department of State published regulations implementing provisions of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (hereinafter INTCA) relating to the VWPP, and designated Ireland a probationary VWPP country until September 30, 1998. However, IIRAIRA eliminated the probationary status making Ireland a permanent participating country in the VWPP program. See 72 *Interpreter Releases* 454 (Mar. 31, 1995); Pub. L. No. 104-208 Update No. 4-INA 217, Visa Waiver Pilot Program, U.S. Dep't of State, Nov. 1, 1996, reprinted in *New Interpretations and Regulations Under the 1996 Immigration Reform Act*, 103 (AILA 1997).

¹⁸ Portugal, Singapore, and Uruguay were added to the list of countries effective Aug. 9, 1999. 64 Fed. Reg. 42006-07 (Aug. 3, 1999) (INS) and 64 Fed. Reg. 42032-33 (Aug. 3, 1999) (State), reproduced in 76 *Interpreter Releases* 1207-10 (Aug. 9, 1999). Uruguay was removed from the VWP as of April 15, 2003. See 68 Fed. Reg. 10954 (Mar. 7, 2003).

¹⁹ *Id.*

Slovenia,²⁰ Spain, Sweden, Switzerland, and the United Kingdom.²¹

A small number of countries that were once designated VWP countries have been disqualified from the VWP.²² Belgium is currently in provisional status because of concerns about the integrity of its non-machine-readable passports and issues associated with the reporting of lost or stolen passports.²³

Qualifying countries are designated by the Attorney General, in consultation with the Secretary of State, based upon that country's satisfaction of a number of requirements.²⁴

The Secretary of State and the Attorney General have the authority, under INA 212(d)(4), to waive the passport and/or visa requirements of INA §212(a)(7)(B)(i)(I) and (i)(II). It is under this authority, not the VWP, that visas are not required for nationals of Canada in most circumstances.²⁵ Aliens who are legal residents of in Canada or Bermuda having common nationality with nationals of Canada or with British subjects in Bermuda must obtain a visa to enter the United States unless entry is under the VWP.²⁶

Low Nonimmigrant Visa Refusal Rate

To participate in the VWP, a country must have a low nonimmigrant visa refusal rate for the two years prior to designation.²⁷ After designation, the Attorney General shall notify the Secretary of State upon

determination by the Attorney General that a VWP country's disqualification rate is two percent or more.²⁸

If the VWP country's disqualification rate is greater than 2 percent but less than 3.5 percent, the Attorney General shall place the Program country in probationary status for a period not to exceed two full fiscal years following the year in which such determination is made.²⁹

If the VWP country's disqualification rate is 3.5 percent or more, the Attorney General shall terminate the country's designation as a VWP country effective at the beginning of the second fiscal year following the fiscal year in which the Attorney General made this determination.³⁰ However, termination will only be imposed if more than one hundred nationals of a VWP country have been denied admission, have withdrawn an application for admission, or have violated the terms of their admission, during the preceding year.³¹

Nationals of the country remain eligible for a waiver until the effective date of termination.³²

Machine-Readable Passports

Eligibility for designation as a VWP country requires certification by the country that it issues its citizens machine-readable passports ("MRP") that satisfy the internationally accepted standard for machine readability.³³ When signed into law, the VWP required MRP by October 1, 2007, but that deadline was shortened to October 1, 2003, by the USA PATRIOT Act, which also authorized the Secretary of State to waive the requirement through the period ending September 30, 2007.³⁴

The full implementation of the MRP requirement for Visa Waiver countries was delayed for one year

²⁰ Slovenia was added to the list in 1997. See 74 *Interpreter Releases* 1522 (Oct. 7, 1997).

²¹ The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries. 8 CFR §217.2(a).

²² Argentina was removed from the VWP as of February 21, 2002, Dep't of Justice Press Release (Feb. 20, 2002). Uruguay was removed from the VWP as of April 15, 2003. See 68 Fed. Reg. 10954 (Mar. 7, 2003).

²³ See 68 Fed. Reg. 10954-57 (Mar. 7, 2003); Congressional Research Service report, "Visa Waiver Program" (updated Apr. 6, 2004), posted on AILA InfoNet at Doc. No. 0404765 (Apr. 7, 2004).

²⁴ INA §217(c)(1).

²⁵ 22 CFR §41.2(a).

²⁶ Canadian Landed Immigrants, 2003 State 29504 (Feb. 1, 2003), <http://travel.state.gov/state029504.html>.

²⁷ INA §217(c)(2)(A).

²⁸ INA §217(f)(1)(A), (formerly designated (g); redesignated as (f) by §101(a)(6), VWP Act), as amended by IIRAIRA §635(c)(i).

²⁹ INA §217(f)(1)(B).

³⁰ INA §217(f)(1)(C).

³¹ INA §217(f)(3).

³² INA §217(f)(2)(B).

³³ INA §217(c)(2)(B).

³⁴ INA §217(a)(3), added by §202(a)(3) of the VWP Act and amended by §417 of Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (USA PATRIOT Act).

following an announcement by the DOS in September 2003.³⁵ According to the announcement, by October 26, 2004, travelers applying for admission under the Visa Waiver Program were required to be in possession of a machine-readable passport. As an option, travelers not in possession of an MRP could obtain and present a valid U.S. non-immigrant visa.

The announcement also stated that, after October 26, 2004, a Visa Waiver Program national not in possession of an MRP or non-immigrant visa could present him or herself for admission to the U.S. and be granted a one time exemption from the requirement by the Customs and Border Protection (CBP) Inspector. A traveler receiving an exemption is supposed to be given a letter explaining the U.S. entry requirements and an annotation is to be made in the passport that a one-time exemption has been granted. If a traveler fails to obtain a machine-readable passport or a nonimmigrant visa for subsequent visits, she or he may be refused entry under the VWP.

Passports with Biometric Identifiers

In addition to the MRP requirement of INA Section 217, legislation passed in May 2002 added the further requirement that any passport used for VWP purposes issued on or after October 26, 2004, must incorporate a biometric identifier.³⁶ In April 2004, DHS and DOS announced that the Administration had asked Congress to pass legislation that would extend the deadline for biometric identifiers by two years.³⁷ Subsequently, in August 2004, legislation was enacted to delay the enactment of the biometrics requirement until October 26, 2005.³⁸ As that date approaches, a debate between the U.S. Congress and VWP countries is heating up as to whether or not the

implementation of the biometric requirement should be further postponed.³⁹

To mitigate security concerns related to this extension of the biometric requirement, the DHS announced that, on or about September 30, 2004, it would begin enrolling travelers from Visa Waiver countries in its automated identification verification system, the U.S. Visitor and Immigrant Status Indicator Technology, known as US-VISIT.

Practice Pointer: It is important to note that a biometric identifier is required for VWP admissions only for passports issued on or after October 26, 2005 (unless that date is again extended by Congress), whereas machine-readability is required for all passports used for VWP admission beginning on October 26, 2004, whether issued before or after that date.

Reporting Passport Thefts

An additional requirement added in 2003 is that the government of a Visa Waiver country must certify to the U.S. government that it will make timely reports to the U.S. government of the theft of blank passports issued by that country.⁴⁰ If the Attorney General and Secretary of State jointly determine that such reports are not being made, the Attorney General shall terminate the country's designation as a VWP participant.⁴¹

Law Enforcement and Other Issues

The Attorney General, in consultation with the Secretary of State, may, for any reason, *e.g.*, national security, refrain from waiving visa requirements for nationals of Visa Waiver countries or he may rescind a country's previously granted designation.⁴²

Since the enactment of the Patriot Act, the Secretary of State has been required to perform annual audits of the designation of countries participating in the VWP.⁴³ Periodic evaluations must be performed, determinations made and reports submitted not less than once every two years by the Attorney

³⁵ Postponement of Deadline for Machine Readable Passports for Travellers from Certain Visa Waiver Countries, 2003 State 272460 (2003), <http://travel.state.gov/state272460.html>; also posted on AILA InfoNet at Doc. No. 03100741 (Oct. 7, 2003).

³⁶ The Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (Border Security Act), posted on AILA InfoNet at Doc. No. 02052445 (May 24, 2002).

³⁷ Posted on AILA InfoNet at Doc. No. 04042264 (Apr. 22, 2004).

³⁸ See, House Bill 4417, enacted as Pub. L. 108-299

³⁹ See, letter dated March 31, 2005 from James Sensenbrenner, Chair of the House Judiciary Committee to Franco Frattini, Vice President of the European Commission warning that a further extension is "unlikely."

⁴⁰ INA §217(c)(2)(D).

⁴¹ INA §217(f)(5).

⁴² INA §217(d).

⁴³ USA PATRIOT Act, *supra* note 34, §417.

General in consultation with the Secretary of State regarding the effect that each program country's continued participation has on U.S. law enforcement and security interests.⁴⁴ Termination of designation on this basis may be effective immediately,⁴⁵ and redesignation on this basis alone is available by the Attorney General in consultation with the Secretary of State.⁴⁶

The law also includes provisions for the immediate termination of a country's designation where the Attorney General and the Secretary of State determine that an emergency occurring in the Visa Waiver country threatens the law enforcement or security interests (including interests pertaining to enforcement of immigration laws) of the United States.⁴⁷ Amendments adopted in May 2002 define emergency (in the VWP country) as an overthrow of a democratic government, the outbreak of war, a severe breakdown in law and order, a severe economic collapse, or any extraordinary event that threatens the law enforcement or security of the United States.⁴⁸ The country in which such an emergency occurs may be redesignated as a VWP country when the emergency has ended, and at least six months have elapsed since the effective date of the termination, and the refusal rate of nonimmigrant visitor visas during the period of termination was less than 3 percent.⁴⁹

INDIVIDUAL REQUIREMENTS

To enter under the Visa Waiver Program, a national of a participating country must be seeking entry as a temporary visitor for business or pleasure under INA §101(a)(15)(B).⁵⁰

Practice Pointer: Sometimes a VWP entrant may misunderstand the limitations of the B-1/B-2 classification. Since the proposed activity in the United States has not been screened by the consulate overseas, it is important to review the purpose of the trip *prior* to the traveler's application for admission at the port of entry. It is especially important for the attorney to consult the Department of State's *For-*

eign Affairs Manual (FAM) to ensure that the proposed activities are within the bounds of the B-1 classification.

9 FAM §41.31(b)(1) defines "business" activities as excluding "local employment or labor for hire," yet the manual sets forth a number of exceptions to that rule which present traps for the unwary. While it is not within the scope of this Article to enumerate all the permissible activities in the B-1/B-2 category, the practitioner would be well advised to consult the FAM before advising a client to enter under the VWP, particularly when it involves special exceptions to the prohibition against employment in the United States. In some instances, where the entrant is employed overseas and will be providing services in the United States, it may be prudent to provide the client with an attorney letter referencing the FAM to avoid misunderstandings at the port of entry. In some cases, obtaining the visa overseas may be the best option.

Sometimes consular officers are reluctant to issue B-1 or B-2 visas where the applicant is able to enter using the VWP. As a reaction to this reluctance, in May 1995 the DOS issued the following cable:

Issuing Visas to VWPP [Visa Waiver Pilot Program] Beneficiaries

Some posts have been approached by nationals of VWPP countries who wish to apply for an NIV [nonimmigrant visa], in order to avoid alleged delays at port[s]-of-entry by INS inspectors scrutinizing their visa-less passports. Posts ask if they must issue an NIV in such instances.

Posts must issue an NIV to such applicants (if they are otherwise qualified) if they insist. However, posts should point out that participation in VWPP does not mean entry into United States without inspection. The primary value to the traveler is the elimination of the inconvenience of having to apply for a visa and the payment of any fee.

Three years later, in an April 1998 cable, the DOS again underscored that a traveler might have legitimate reasons to apply for a visa rather than entering the U.S. on the VWPP. According to the cable, the fact that a foreign national is entitled to enter without a visa should not be considered a negative factor in an application for a visitor visa.⁵¹

⁴⁴ INA §217(c)(5)(A).

⁴⁵ INA §217(c)(5)(A)(ii).

⁴⁶ INA §217(c)(5)(A)(iii).

⁴⁷ INA §217(c)(5)(B).

⁴⁸ INA §217(c)(5)(B)(ii).

⁴⁹ INA §217(c)(5)(B)(iii).

⁵⁰ INA §217(a)(1)

⁵¹ See "Congress Extends Visa Waiver Pilot Program," 98 State 076596 (ALDAC) (Apr. 29, 1998), reprinted in 17 *AILA Monthly Mailing* 590 (June 1998).

Another requirement for the individual applicant, and an important limitation of the VWP, is that the period of admission sought must be for 90 days or less.⁵²

Practice Pointer: In addition to the strict limit on the period of authorized admission, a foreign national admitted under the VWP is not eligible for an extension of stay.⁵³ Therefore, if the traveler knows or believes that purpose of the trip cannot be accomplished within 90 days, he/she should apply for a nonimmigrant visa at a U.S. consulate before traveling to the United States.

Entry to the United States may be by land,⁵⁴ sea or air.⁵⁵ If by sea or air, it may be by certain commercial carriers.⁵⁶ Noncommercial aircraft meeting specific requirements may also be used. All applicants must arrive on a carrier that is signatory to a Visa Waiver Program Agreement.⁵⁷

The applicant for admission must not be a threat to the welfare, health, safety, or security of the U.S.⁵⁸ and must have no previous violation of a admission under the VWP.⁵⁹

Practice Pointer: A traveler admitted to the U.S. on the VWP is issued Form I-94W, rather than Form I-94. The I-94W notes that surrender of the I-94W (to the transportation line if by sea or air, Canadian officials if by land to Canada, or U.S. officials if by land to Mexico) is required upon departure. However, at the current time surrender is not common for departures by land or to contiguous foreign territories or adjacent islands. This may result in the traveler remaining in possession of the I-94W after crossing out of the U.S. This places the individual at risk of being identified as an overstay and, therefore, of being prohibited from the future use of the VWP to enter the U.S. To prevent this problem, clients should be advised to surrender the I-94W at the time of final departure from the United States and, if surrendering the document is not possible, then to return the I-94W to DHS along with documentation to establish a timely departure. The address to which

⁵² INA §217(a)(1).

⁵³ 8 CFR §214.1(c)(3)(i).

⁵⁴ 8 CFR §217.2(c)(2).

⁵⁵ INA §217(a)(5); 8 CFR §217.2(c)(1).

⁵⁶ INA §§217(a)(5) and 217(e); 8 CFR §217.2(c)(1).

⁵⁷ *Id.*

⁵⁸ INA §217(a)(6).

⁵⁹ INA §217(a)(7).

the information should be sent is ACS-CBP SBU, P.O. Box 7125, London, KY 40742-7125.

Individuals who have been deported or removed after having been determined deportable must obtain the consent of the Attorney General pursuant to INA §212(a)(9)(A)(iii) and may still require a visa for admission.⁶⁰

Documentary Requirements

In most cases, an individual who seeks admission under the VWP must be in possession of a passport valid for a minimum of six months beyond the 90-day period of admission.⁶¹

As described *infra*, as of October 2004, all passports used by persons seeking to enter on the VWP must be machine readable, although the CBP has the authority to waive the requirement under specified circumstances.⁶²

In addition, unless the date is again extended, passports issued on or after October 26, 2005, and used for entry under the VWP must not only be machine-readable but also contain a “biometric” or “biometric identifier.”⁶³ A biometric is an objective measurement of a physical characteristic of an individual, such as a fingerprint or iris scan, that can be captured in a database and used to verify identity or check against other entries in the database. A passport issued on or before October 25, 2005, which does not have biometric identifiers, will continue to be valid for VWP entry to the United States on and after October 26, 2004, as long as it is machine readable.

It is important to note that the separate requirements of a machine-readable passport and biometric requirements apply only for entries sought under the VWP. The requirements of a machine-readable passport and biometric requirements *do not* apply to

⁶⁰ 8 CFR §217.2(b)(2).

⁶¹ INA §212(a)(7)(B)(i)(I). The governments of certain countries have agreed that their passports will be recognized as valid for the return of the bearer for a period of six months *beyond* the expiration date specified in the passport, thereby effectively extending the validity period of the foreign passport an additional six months beyond its expiration date. (67 Fed. Reg. 65625, Oct. 25, 2002.) As of press time, the VWP countries of Andorra, Brunei, and San Marino have not agreed to this extended recognition.

⁶² See, FN 35, *supra*.

⁶³ See, FN 37, *supra*.

a VWP national seeking admission to the U.S. with a non-immigrant visa.⁶⁴

Practice Pointer: Families with young children should be advised to seek individual passports for each person planning to use the VWP after the MRP and biometric requirements take effect. A single “family” passport which includes mother or father and children is not expected to comply with the MRP and biometric requirements.

A further explicit requirement of INA Section 217 is that the applicant must, in most cases, be in possession of a round-trip ticket if arrival is by sea or air.⁶⁵ The ticket must transport the person out of the U.S. and may not terminate in contiguous territory or an adjacent island except in cases in which the traveler is a resident of the country of final destination.⁶⁶ A round trip ticket is defined to include any of the following:

- A round trip, nontransferable transportation ticket which is valid for a period of not less than one year;
- Airline employee passes indicating return passage;
- Individual vouchers;
- Group vouchers for charter flights only; or
- Military travel orders, which include military dependents for return to duty stations outside the United States on U.S. military flights.⁶⁷

The individual must complete any immigration form as the Attorney General shall establish.⁶⁸ At present, the required document is the Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form. A fee, currently \$6.00 USD, will be charged for the issuance of the Form I-94W at a land border port-of-entry.⁶⁹ The Form I-94W may be annotated “WB” for business entries and “WT” for tourism entries.

In part due to the delay in implementing the biometric requirement, in April 2004, DHS and DOS announced that, beginning on September 30, 2004, all

visitors using the VWP at air and sea ports of entry would be required to enroll in the CBP’s US-VISIT system.⁷⁰ US-VISIT requires those arriving at designated ports of entry to have their two index fingers scanned and a digital photograph taken to verify their identity. At present, US-VISIT is in place and required for entry registrations at 115 international airports and 15 seaports. As of December 29, 2004, US VISIT entry procedures were implemented at secondary screening at the country’s fifty busiest land border crossings. The DHS has announced that U.S. VISIT entry procedures will be deployed to the remaining land ports of entry by December 31, 2005.⁷¹

In the past year, DHS has implemented exit registration requirements in a considerable number of high-volume international airports.⁷² Exit registration procedures require travelers to verify departure by going through a similar two-index finger plus photo biometric identification process.

Practice Pointer: Watch the Federal Register for announcements of the addition of exit registration ports and advise clients to look for and comply with US-VISIT exit requirements if departure is from one of those ports.

Those individuals arriving at a land border port-of-entry do not need a round-trip ticket, but must provide evidence of financial solvency and domicile abroad to which return is intended.⁷³

A determination by a consular officer or inspecting officer that an individual is a “citizen or national” of certain countries, or if there is a “reason to believe” the person meets “pre-existing criteria,” despite also being a national of a VWP designated

⁶⁴ DOS Cable re Visa Applications, Machine-readable passports and Biometrics, posted on AILA InfoNet at Doc. No. 04022563 (Feb. 25, 2004).

⁶⁵ INA §217(a)(8); 8 CFR §217.2(c)(1).

⁶⁶ 8 CFR §217.2(c)(1).

⁶⁷ 8 CFR §217.2(a).

⁶⁸ INA §217(a)(4).

⁶⁹ 8 CFR §217.2(c)(2).

⁷⁰ See “DHS to Extend US-VISIT to VWP Travelers by September 30, 2004,” *supra* note 63. (The acronym stands for “U.S. Visitor and Immigrant Status Indicator Technology”)

⁷¹ See, DHS Press Release dated February 24, 2005, available at www.dhs.gov/dhspublic/display?content=4379

⁷² As of April 2005, exit registration requirements are in effect at international airports in Philadelphia, Baltimore/Washington International Airport, Chicago, Denver, Dallas/Fort Worth, Newark, San Juan, Puerto Rico, San Francisco, Atlanta and Detroit. In addition, exit registration is required at Los Angeles’ San Pedro and Long Beach Seaports and at the Miami International Cruise Terminal. See, U.S. VISIT Update dated April 6, 2005, available as AILA Document No. 05040771

⁷³ 8 CFR §217.2(c)(2).

country, subjects that individual to NSEERS entry and exit registration requirements. NSEERS imposes significant requirements for documentation of change of address while in the United States. (AR-11SR) and departure that are separate and apart from US-VISIT. **CHECK THIS**

ISSUES NOT WITHIN THE CONTROL OF THE INDIVIDUAL

An individual who fully qualifies for admission and agrees to all of the terms of the VWP is still not assured of admission without a visa.⁷⁴ DHS regulations requires all commercial air and sea carriers to electronically submit detailed data to the U.S. Customs Data Center within fifteen minutes of departure from the last foreign port or place (for arrivals) or from the United States (for departures).⁷⁵ This system, known as APIS for Advanced Passenger Information System, transmits data on all passengers, including names, dates of birth, gender, nationality and the number, type and country of issuance for their travel documents.⁷⁶ In order to be admitted under the VWP, the traveler must arrive on a carrier that has entered into an agreement as provided in 8 CFR §217.6, to comply with APIS and various other duties and responsibilities required by law.⁷⁷ On April 7, 2005, DHS published a final rule, entitled Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft, which sets forth additional details regarding the mandatory use of electronic manifests, which now includes even flights which fly over U.S. territory as part of their flight path.

WAIVER OF RIGHTS

The benefit of avoiding the cost and time required to obtain a visa for admission is not without

its burdens. Individuals should be aware of the disclosure of information and the waiver of rights that are a part of admission under the VWP.

In addition to limiting the period of authorized admission, barring changes and/or extensions and requiring round trip passage, the VWP also requires participants to waive any right to appeal a determination of inadmissibility made at the port of entry.⁷⁸ This absolute waiver of the right of appeal makes it essential that VWP travelers be aware of and understand the significance of events at the time of inspection.

An applicant who is determined to be inadmissible,⁷⁹ or who is in possession of and presents fraudulent or counterfeit travel documents, will be refused admission and removed⁸⁰ unless he or she expresses a desire to apply for asylum or shows a credible fear of persecution.⁸¹ A denial of admission does not constitute removal under the Act.⁸² However, there is no right to administrative or judicial review of that determination.⁸³ The provisions of INA §235(b) referred to as “expedited removal” do not apply to an applicant for admission under the VWP.⁸⁴ Removal may be deferred so as to allow parole into custody for criminal prosecution or punishment.⁸⁵

Practice Pointer: A VWP nonimmigrant who is deemed inadmissible by an immigration officer at the port of entry and who has no intention of claiming asylum should, if permitted by the inspecting officer, consider seeking withdrawal of his or her application for admission. The ability to withdraw an application for admission is at the discretion of the inspecting officer.⁸⁶ The withdrawal of an application for admission will result in the applicant’s return to his or her country of origin, but it avoids the imposition of an order of removal and a future

⁷⁴ 8 CFR §217.7(a).

⁷⁵ INA §§217(a)(5), 217(e); 8 CFR §§217.2(c)(1), 217.7(b).

⁷⁶ INA §§217(a)(5), 217(e); 8 CFR §§217.2(c)(1), 217.7(c). Further information on the electronic manifest and I-94 requirement for all passengers and crew onboard arriving and departing vessels and aircraft can be found at 8 C.F.R. §231.1 and at 19 C.F.R. §4.7b.

⁷⁷ For a list of participating carriers, refer to 9 U.S. Dep’t of State, *Foreign Affairs Manual*, Note to 22 CFR §41.2, Exhibit VII (hereinafter FAM). Requests for a list of carriers can also be submitted in writing to INS’s National Fines Office located at 1525 Wilson Blvd., Suite 425, Arlington, VA 22209.

⁷⁸ INA §217(b)(1).

⁷⁹ INA §212 (other than not in possession of a visa).

⁸⁰ 8 CFR §217.4(a)(1).

⁸¹ INA §235(b)(1)(A)(i).

⁸² 8 CFR §217.4(a)(3).

⁸³ INA §217(b).

⁸⁴ INA §235(a)(4); 8 CFR §235.3(b)(10).

⁸⁵ 8 CFR §217.4(a)(2).

⁸⁶ 8 CFR §[1]235.4.

finding of inadmissibility⁸⁷ on account of the removal.

An applicant who is refused admission under the VWP on the basis of INA §212(a) can apply for a nonimmigrant visa at a U.S. consulate if the person can demonstrate eligibility for a nonimmigrant visa.⁸⁸ This is the only way to challenge such a denial.⁸⁹ If a visa is refused, there is no other recourse.

Practice Pointer: A VWP applicant who failed to surrender an I-94W after a previous admission may be erroneously be charged with violating the conditions of a previous VWP admission and may, on that basis, be deemed ineligible for VWP admissions. See, INA §217(a)(7). Failure to correct the record of admission and departure may cause the denial of a request for VWP admission, in which case the traveler would be compelled to apply for a visa.

Application for VWP admission after a withdrawal or denial of admission is not prohibited. However, the I-94W form does ask about previously denied entry and does suggest that an affirmative response to that question warrants contact with “the American Embassy *before* you travel to the U.S. since you may be refused admission...”⁹⁰

Practice Pointer: Clients in this situation should be prepared for referral to secondary inspection to review the issue and make his/her case for admissibility. A good practice would be to provide a letter for the client to present when seeking VWP admission that sets forth relevant facts and applicable legal standards.

Anyone admitted under the VWP who is determined deportable under any grounds listed in INA §237 shall be removed without referral to an immigration judge, except for applicants for asylum, who must be issued a Form I-863 for appropriate proceedings.⁹¹ Once a determination is made that a person is removable for violation of his or her VWP status, there is no appeal and the person is removed “by the first available means of transportation” se-

lected by the District Director.⁹² Removal on this basis constitutes removal under the Act.⁹³

A foreign national who is removed either at the border or later for an alleged violation of his or her VWP status is subject to the same bars to readmission as a foreign national who is ordered removed by the immigration judge, and will require a waiver to return to the United States.⁹⁴

PERIOD OF STAY, CHANGE OF STATUS, AND ADJUSTMENT

Admission under the VWP is for a specific, set period of 90 days. Extensions are not permitted.⁹⁵

A period of “satisfactory departure” not to exceed 30 days may be granted by the District Director if an emergency prevents departure within the period of authorized stay.⁹⁶ Departure within that period will mean that the individual has not overstayed the allotted time.⁹⁷

One commentator made a compelling case that grounds could be found to justify the granting of voluntary departure to a Visa Waiver Program en-

⁸⁷ *See* 75 *Interpreter Releases* 124, 141 (Jan. 26, 1998). Note that withdrawal of an application for admission is within the discretion of the inspecting officer. 8 CFR §[1]235.4.

⁸⁸ 22 CFR §41.2(l).

⁸⁹ INA §217(g), as added by §202(a)(3) of the VWP Act.

⁹⁰ Form I-94W (emphasis in original).

⁹¹ INA 217(b)(2); 8 CFR §217.4(b)(1).

⁹² 8 CFR §217.4(c)(2). Three federal courts have upheld the summary exclusion and deportation provisions of the VWPP from challenges that they violate due process and equal protection laws. In *Hawkins v. INS*, 1991 U.S. Dist. LEXIS 5602 at 1 (N.D. Cal. 1991) (unreported), the court held that since Congress had the right to regulate the admission of nonimmigrants and thus had the power to establish the VWPP, Congress therefore could limit the substantive and procedural rights of VWPP entrants. In *McGuire v. INS*, 804 F. Supp. 1229 (N.D. Cal. 1992), the court held that since a person entering under the VWPP signed a waiver of the right to “contest” deportation, their due process rights were voluntarily waived. The *McGuire* court also rejected an equal protection challenge to the summary deportation provisions on the grounds that Congress had a rational basis to limit the rights of VWPP entrants due to their large numbers and ease of entry. In *Nose v. Attorney General*, 993 F.2d 75 (5th Cir. 1993), upholding a summary deportation order under the VWPP, the court noted in dictum that based upon the rational basis analysis, a challenge to the VWPP’s summary provisions would fail on due process and equal protection grounds. For a more detailed analysis of these cases see Vázquez-Azpiri, *supra* note 13, at 17–18.

⁹³ 8 CFR §217.4(b)(2).

⁹⁴ INA §212(a)(9)(A), 8 CFR §217.4 (b)(2).

⁹⁵ 8 CFR §214.1(c)(3)(i).

⁹⁶ 8 CFR §217.3(a).

⁹⁷ *Id.*

trant, but the matter remains unsettled.⁹⁸ I need, there is little support in the INA or the regulations to permit DHS district directors to allow a person admitted under the VWP to leave the United States under a grant of voluntary departure to avoid the harsh consequences of violation of VWP status.

Practice Pointer: Many people familiar with the VWP, including many Customs and Border Protection (CBP) officers, are under the impression that a short departure to a contiguous foreign territory or adjacent island, followed by return during the period of the previous VWP admission, starts a new 90-day period of admission. They are wrong. A departure to such a place, followed by an application for admission during the period of most recent visa waiver admission, merely allows for readmission for the balance of the most recent admission, assuming all other conditions are met.⁹⁹ Individuals who make a timely departure to such a place and who then seek admission from that place within a short while after the expiration of the previously-approved waiver period may find that they cannot satisfy the normal requirements of VWP admission such as round-trip tickets, nonimmigrant intent, etc. and may be denied admission.

A person admitted under the VWP may not be granted a change of status to another nonimmigrant classification.¹⁰⁰

Practice Pointer: As tempting as it may be for a client to enter the United States without a visa, it is important to consider the client's needs prior to such entry. For example, a person who is interested in studying in the United States but has not made a final decision is entitled to enter the United States as a B-2 "prospective student," but only if the client obtains a visa. This may be important to the client. If the client is coming to visit a campus prior to making the final decision, but has no desire to return to the home country in advance of studies, it is advisable to apply for a B-2 visa with a notation of "prospective student," even though the client could enter on the Visa Waiver Program. There are other in-

stances in which an entrant might be best advised to seek a visa abroad, so as to allow for changes of status or extensions of stay.

A person admitted under the VWP is not eligible for adjustment of status to that of permanent resident pursuant to INA §245.¹⁰¹ An exception exists for "immediate relatives" of U.S. citizens.¹⁰²

AVAILABLE IMMIGRATION BENEFITS

A foreign national admitted under the VWP is issued a green Form I-94W Arrival/Departure Record upon arrival. However, he or she is admitted under the same conditions as a B-1/B-2 visitor, subject to the limitations specifically pertaining to VWP entrants.¹⁰³

Once admitted under the VWP, the foreign national may depart the United States to a contiguous country or adjacent island and be readmitted for the balance of his/her period of authorized admission.¹⁰⁴ This is similar to the benefit provided to any other nonimmigrant under 22 CFR §41.112(d). However, as noted previously, a VWP entrant who leaves the United States to a contiguous country or adjacent island and returns will not be granted a new 90-day period of admission.

Also, a VWP entrant, who departs the United States to a contiguous territory and applies for a visa at a U.S. consulate, may not return to the United States until the visa application is adjudicated even if the 90-day period on the I-94W has not expired.¹⁰⁵

The DOS has determined that people who enter the United States under the VWP are not subject to INA §222(g).¹⁰⁶ That provision requires that a nonimmigrant that remains beyond period of authorized admission obtain a new visa at a consulate in his or her home country. The basis for this interpretation is

⁹⁸ Vázquez-Azpiri, *supra* note 13; see also *Auguste v. Reno*, 140 F.3d 1373 (11th Cir. 1998), reprinted in 75 *Interpreter Releases* 1120 (Aug. 17, 1998).

⁹⁹ 8 CFR §217.3(b).

¹⁰⁰ INA §248(4).

¹⁰¹ 8 CFR §217.3(a), subsequently amended by 62 Fed. Reg. 10312, 10351 (Mar. 6, 1997).

¹⁰² INA §245(c)(4).

¹⁰³ INA §101(a)(15)(B).

¹⁰⁴ 8 CFR §217.3(b).

¹⁰⁵ See U.S. Dep't of State Telegram (SECSTATE WASHDC) (Mar. 14, 2002), posted on AILA InfoNet at Doc. No. 02040432 (Apr. 4, 2002).

¹⁰⁶ Added by IIRAIRA §632(a); see also Pub. L. No. 104-208 Update No. 35-Revised Guidance on §222(g), (ALDAC) (Mar. 23, 1998).

that VWP entrants are not “admitted on the basis of a nonimmigrant visa.”¹⁰⁷

VWP entrants who overstay the period of authorized admission by either six months or more are subject to the three- and ten-year bars imposed by INA §212(a)(9)(B),¹⁰⁸ as they are considered “unlawfully present” in the United States. This is due to the fact that, even though VWP visitors do not have visas, they do have I-94Ws which expire. For this reason, remaining in the United States beyond the date noted on the I-94W will begin a period of unlawful presence that will eventually trigger the 3/10 year bars to re-entry.

AUTHORITIES

Statutory and Regulatory Basis

INA §217 sets forth the statutory authority for the Visa Waiver Program. Enacted by the Immigration Reform and Control Act of 1986,¹⁰⁹ the VWPP has been amended several times: in 1988,¹¹⁰ 1990,¹¹¹ 1991,¹¹² 1994,¹¹³ 1996,¹¹⁴ 1997,¹¹⁵ 1998,¹¹⁶ 2000,¹¹⁷ 2001,¹¹⁸ and 2002.¹¹⁹ VWP regulations are found at 8 CFR Part 217.

¹⁰⁷ Pub. L. No. 104-208 Update No. 9-Further Guidance on INA §222(g), U.S. Dep’t of State, Nov. 8, 1996, *reprinted in New Interpretations and Regulations Under the 1996 Immigration Reform Act*, 122 (AILA 1997).

¹⁰⁸ INA §212(a)(9)(B)(i).

¹⁰⁹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (partially codified in scattered sections of the INA).

¹¹⁰ INCTA, *supra* note 17.

¹¹¹ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5012.

¹¹² Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1746.

¹¹³ INTCA, *supra* note 17, §§210–211.

¹¹⁴ IIRAIRA, *supra* note 4 §635(b).

¹¹⁵ CJS Act, *supra* note 12, §125.

¹¹⁶ Amendments to INA §217 by Pub. L. No. 105-73, §§1,3; 112 Stat. 56, *reprinted in 75 Interpreter Releases* 632, App. I (May 4, 1998).

¹¹⁷ Amendments to INA §217 by VWP Act, *supra* note 3.

¹¹⁸ INA §217 as amended by USA PATRIOT Act, *supra* note 34.

¹¹⁹ INA §217 by Pub. L. No. 107-173, §307(a)(1)-(3).

CONCLUSION

The VWP is the preferred means of entry for millions of foreign visitors because of its convenience. In 2003, of the 24.3 million temporary visitors to the U.S., more than half were Visa Waiver admissions.¹²⁰ However, the option should be evaluated carefully for anyone who may have a question of admissibility or whose plans may require a longer period of admission or change of status. The Program’s prohibition against extensions of stay and changes of status can create problems, and those who choose to enter under the VWP should recognize that they forfeit substantial due process rights should their plans change. Moreover, where there could be any confusion as to eligibility to participate in the activities planned, applying for and receiving a non-immigrant visa from a U.S. consulate may help to establish the acceptability of the contemplated activities and may be an important step to ensure that mistakes and misunderstandings do not occur at the port of entry.

In spite of its limitations, for most travelers from Visa Waiver countries, using the VWP is the best and most sensible approach for traveling to the U.S. Just as U.S. citizens appreciate the ability to visit scores of foreign countries without the burden of requesting visas in advance of the trip, so too do the vast majority of short-term visitors to our country appreciate the many benefits of the Visa Waiver Program.

¹²⁰ See, Yearbook of Immigration Statistics 2003, Table 24, Nonimmigrants admitted by class of admission: selected fiscal years 1981-2003