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## Immigration and Naturalization Law

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# Immigration and Naturalization Law

MARGARET D. STOCK\*

## I. Introduction

For those tracking U.S. immigration law developments, this year was supposed to be the year in which Congress finally resolved the nation's serious immigration problems with a comprehensive law that would overhaul the complex immigration system, end long backlogs in the family immigration system, adjust the status of the millions of unauthorized immigrants whose numbers have grown year after year, and create a workable guest worker program to give U.S. employers a legal method to obtain workers. Instead, the year began with the rapid passage in the United States House of Representatives of one of the most draconian U.S. immigration bills in history, which would have, among other things, made it a federal felony offense for a person to violate the terms of his or her admission to the United States. As the year progressed, the U.S. Senate responded with a comprehensive reform bill that met President George W. Bush's request for a guestworker program, but the House and Senate remained so far apart on a basic approach to immigration reform that, with the exception of a bill authorizing additional border fencing, no significant immigration legislation was enacted into law. The onset of mid-term elections caused a flurry of election-related posturing on immigration issues by both Democrats and Republicans, but there was no serious progress on promised reforms. While President Bush continued to reiterate his desire for comprehensive immigration reform, including a guestworker program and a component to address the large numbers of undocumented migrants in the United States, his efforts were fruitless.

## II. Legislative Developments

The pending mid-term election overshadowed most legislative developments during 2006. Candidates aligned themselves with one of the two major political sides—the enforcement only or enforcement first position, favored by most Republicans in the U.S.

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House of Representatives, or the comprehensive immigration reform, favored by both Democrats and Republicans in the U.S. Senate.

The House of Representatives acted first in the debate, passing the Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437)<sup>1</sup> on a mostly party-line vote of 239 to 182 on December 16, 2005, after very little discussion.<sup>2</sup> The bill proposed an enforcement only approach to the nation's immigration problems. Among other notable provisions, the bill sought to make millions of unauthorized immigrants into federal felons<sup>3</sup> upon its passage. The bill also would have punished social service agencies and church groups who sought to assist illegal immigrants.<sup>4</sup>

The House bill sparked a remarkable set of nationwide protests, as immigrants and their supporters took to the streets to try to derail the bill's enactment.<sup>5</sup> The American Bar Association (ABA) also weighed in on the immigration debate when, in February 2006, the ABA House of Delegates adopted seven policy resolutions sponsored by the ABA's Commission on Immigration, including one supporting comprehensive immigration reform.<sup>6</sup>

A few months later, the U.S. Senate passed the Comprehensive Immigration Reform Act of 2006,<sup>7</sup> a bill that would have allowed millions of unauthorized immigrants to earn legal status. Sponsored by Senator Arlen Specter (R-PA) and closely related to similar bills authored by Senators William H. Frist (R-TN)<sup>8</sup> and Chuck Hagel (R-NE),<sup>9</sup> this bill was repeatedly and erroneously referred to as Reid-Kennedy by those who opposed it.<sup>10</sup>

The House and Senate never reconciled these conflicting bills but instead spent the summer holding an unprecedented set of field hearings on immigration issues.<sup>11</sup> The House ultimately held some twenty hearings in thirteen states,<sup>12</sup> and the Senate held sev-

1. Border Protection, Anti-Terrorism, & Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

2. H.R. Rep. No. 109-345, pt. 1; see also The Library of Congress, Summary, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04437:@@L&summ2=m&> (detailing the timeline of House passage of H.R. 4437).

3. Border Protection, Anti-Terrorism, & Illegal Immigration Control Act of 2005, *supra* note 1, § 203.

4. *Id.* §§ 201, 202.

5. See Alert Summary: Nationwide Immigration Protests, NC4 INCIDENT MONITORING CENTER, [http://www.nc4.us/nc4/documents/Nationwide\\_Immigration\\_Protests.pdf](http://www.nc4.us/nc4/documents/Nationwide_Immigration_Protests.pdf).

6. The ABA Resolutions also concerned aliens' right to counsel, due process and judicial review, administration of U.S. immigration laws, detention of aliens, asylum, and immigrant victims of crime. See COMMISSION ON IMMIGRATION, AMERICAN BAR ASSOCIATION, JAN. 2006, <http://www.abanet.org/publicserv/immigration/home.html> (providing links to the text of the Resolutions and related information).

7. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

8. Securing America's Borders Act, S. 2454, 109th Cong. (2006).

9. Comprehensive Immigration Reform Act of 2006, S. 2612, 109th Cong. (2006).

10. See, e.g., *Upcoming Hearings*, DALLAS MORNING NEWS, July 27, 2006, <http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/072806dnteximmhearings.ebf7bd.html> ("Seeking to make the case for their enforcement-only approach to immigration and against the Senate immigration bill they deride as 'Reid-Kennedy,' House Republicans will conduct 21 hearings in 13 states during their August recess."). Senator Edward M. Kennedy (D-MA) had previously co-sponsored a bill introduced by Senator John McCain (R-AZ); this bill was known formally as the Secure America and Orderly Immigration Act, S. 1033, but popularly called the McCain-Kennedy bill; Senator Kennedy was not the author of S. 2611; the bill ultimately passed by the Senate.

11. Rachel L. Swarns, *Critics Say Politics Driving Immigration Hearings*, N.Y. TIMES, Aug. 7, 2006, at A10.

12. See House and Senate Immigration Hearings—Summer 2006, American Friends Service Committee, <http://www.afsc.org/immigrants-rights/hearing-dates-2006.htm> (listing scheduled hearings by both the House and Senate).

eral of its own,<sup>13</sup> including such unusual ones as a Senate Armed Services Committee hearing in Miami, Florida, that featured the contributions of immigrants to the U.S. military.<sup>14</sup> By the time legislators reconvened after Labor Day weekend, it appeared certain that no comprehensive bill would pass before the election. Congressman R. James Sensenbrenner (R-WI), one of the leading proponents of enforcement only and a key architect of H.R. 4437, continued to press for passage of tougher immigration laws, introducing three bills;<sup>15</sup> and Congressman Peter King (R-NY) introduced the Secure Fence Act of 2006, which provided for 700 miles of new fencing along the U.S.-Mexico border. Despite great controversy over a lack of funding for border fences, this bill ultimately passed both the House and Senate and was signed into law by President Bush on October 26, 2006.<sup>16</sup>

In other significant immigration-related legislation, Congress passed and the President signed the Military Commissions Act of 2006,<sup>17</sup> a bill that would deny to all aliens, even legal aliens residing within the United States, the right of habeas corpus if the President determined that they were enemy combatants. This bill alarmed many immigration attorneys because the broad definition of enemy combatant appeared to include many aliens who have been traditionally afforded, before their deportation, an administrative law hearing and a series of appeals through the Board of Immigration Appeals and the federal courts. The law was seen by many immigration lawyers as continuing the trend of limiting or eliminating relief to all aliens accused of terrorism-related activities.

### III. Administrative and Regulatory Developments

#### A. ESTIMATES OF NUMBERS OF UNAUTHORIZED IMMIGRANTS

In August 2006, the U.S. Department of Homeland Security (DHS) released a report estimating that about eleven million unauthorized immigrants were living in the United States at the beginning of 2006.<sup>18</sup> The report estimated that the majority of these illegal migrants were from Mexico, which accounted for about six million of the total in 2005.<sup>19</sup> Other countries supplying large numbers of illegal migrants included El Salvador, Guatemala, India, and China. Experts opined that it is extremely difficult to estimate the num-

13. *Id.*

14. General Speaks of Immigrant Father: Congressional Hearing Turns Personal, WASHINGTON POST, July 11, 2006, at A3.

15. Representative Sensenbrenner introduced the Border Tunnel Prevention Act, H.R. 4830, 109th Cong. (2006); the Community Protection Act, H.R. 6094, 109th Cong. (2006); and the Immigrant Law Enforcement Act, H.R. 6095, 109th Cong. (2006).

16. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

17. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

18. Michael Hoefer, Nancy Rytkina & Christopher Campbell, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005*, Dep't of Homeland Sec., Office of Immigration Statistics, Aug. 2006, [http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL\\_PE\\_2005.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf).

19. *Id.* at 1.

bers accurately,<sup>20</sup> but the Government's estimate was similar to an estimate made by the Pew Hispanic Center reported earlier in the year.<sup>21</sup>

## B. SECURE BORDER INITIATIVE AND JOINT VISION FOR BORDER SECURITY

On November 2, 2005, DHS Secretary Michael Chertoff announced the Secure Border Initiative (SBI), a new plan to reduce illegal immigration.<sup>22</sup> Under SBI, DHS would allocate more resources to detention and removal of illegal immigrants and would work with both state and foreign governments to increase interior enforcement and expedite deportations. Announcement of SBI was followed by many high-profile raids on workplaces throughout 2006; interior enforcement efforts were even credited with having caused millions of dollars in losses to American farmers after DHS enforcement efforts prevented farmers from hiring undocumented workers to harvest crops and, subsequently, few authorized workers were willing to apply for this work.<sup>23</sup>

On January 17, 2006, Secretary Chertoff and U.S. Secretary of State Condoleezza Rice jointly announced a three-part "Joint Vision" for border security.<sup>24</sup> The three parts of the vision include a plan to use technology to improve border processing, a plan for updated travel documents, and, finally, better security screening of international travelers.

## C. THE WESTERN HEMISPHERE TRAVEL INITIATIVE

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)<sup>25</sup> had previously mandated that U.S. officials develop a plan to require a passport or other secure identity document from all persons entering the United States no later than January 1, 2008.<sup>26</sup> While the passport requirement had long been in effect for persons entering the United States from most parts of the world, many travelers arriving from countries in the Western Hemisphere were able to cross U.S. borders with just a driver's license or birth certificate. To comply fully with the IRTPA, U.S. officials developed the Western Hemisphere Travel Initiative (WHTI), which would require U.S. citizens, as well as Canadians, Mexicans, and citizens of Caribbean countries, to present a passport to enter or re-enter the United States when traveling in the Western Hemisphere. WHTI was originally

20. See Carl Bialik, *Fuzzy Math on Illegal Immigration*, WALL STREET JOURNAL ONLINE, Apr. 6, 2006, <http://online.wsj.com/public/article/SB114417580940516769.html> (citing various estimates ranging from eight to twenty million unauthorized migrants).

21. Jeffrey S. Passel, *Size & Characteristics of the Unauthorized Migrant Population in the U.S.*, PEW HISPANIC CENTER (Mar. 7, 2006), <http://pewhispanic.org/files/reports/61.pdf>.

22. Press Release, Dep't of Homeland Security, DHS Announces Long-Term Border and Immigration Strategy (Nov. 2, 2005), [http://www.dhs.gov/xnews/releases/press\\_release\\_0795.shtm](http://www.dhs.gov/xnews/releases/press_release_0795.shtm); see also Dep't of Homeland Security, Fact Sheet: Secure Border Initiative, Nov. 2, 2005, [http://www.dhs.gov/xnews/releases/press\\_release\\_0794.shtm](http://www.dhs.gov/xnews/releases/press_release_0794.shtm).

23. Julia Preston, *Pickers Are Few, and Growers Blame Congress*, N.Y. TIMES, Sept. 22, 2006, at A1.

24. Media Note, Dep't of State, Rice-Chertoff Joint Vision: Secure Borders and Open Doors in the Information Age (Jan. 17, 2006), <http://www.state.gov/r/pa/prs/ps/2006/59242.htm>.

25. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

26. *Id.* § 7209.

scheduled to go into effect at air and seaports on December 31, 2005,<sup>27</sup> but now has two upcoming effective dates. Beginning January 23, 2007, anyone, including US citizens, traveling by air or sea between the United States, Canada, Mexico, Central and South America, the Caribbean, and Bermuda will be required to present a valid passport to enter or re-enter the United States.<sup>28</sup> Beginning as early as January 1, 2008, the same requirements will apply to persons entering or re-entering at a land border.<sup>29</sup> Although Congress officially extended the deadline for the land portion of WHTI until June 1, 2009,<sup>30</sup> the State Department and DHS have announced that they plan earlier implementation of this rule.<sup>31</sup> Communities along the borders are worried that WHTI will lead to serious economic harm in their communities by deterring casual travelers.<sup>32</sup>

#### D. REAL ID ACT

The REAL ID Act of 2005 mandated that all states must comply with its requirements regarding state-issued driver's licenses no later than May 11, 2008.<sup>33</sup> Throughout 2006, states began to evaluate the cost of compliance with REAL ID's licensing provisions, and many began to balk at the law, which they viewed as yet another unfunded mandate from the federal government.<sup>34</sup> On September 21, 2006, the National Governors Association, National Conference of State Legislatures, and the American Association of Motor Vehicle Administrators released a report that judged the cost to the states of implementing REAL ID to be more than \$11 billion over five years.<sup>35</sup> At the same time, no regulations have been forthcoming from DHS, so states continue to face a situation of uncertainty. Drivers across the nation have reported significant problems with obtaining new and renewed driver's licenses as states seek to implement new licensing rules. In New Hampshire, immigrants prevailed in a class action against the New Hampshire Department of Motor Vehicles when that agency began treating legal immigrants differently from U.S. citizens in the issuance of licenses.<sup>36</sup>

27. Special Briefing, U.S. Dep't of State, Western Hemisphere Travel Initiative (Apr. 5, 2005), <http://www.state.gov/r/pa/prs/ps/2005/44286.htm>.

28. Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere, 71 Fed. Reg. 68412 (Nov. 24, 2006).

29. Press Release, Dep't of Homeland Sec., Western Hemisphere Travel Initiative Rule Outlines New Document Requirements for Air Travel (Nov. 22, 2006), [http://www.dhs.gov/xnews/releases/pr\\_1164209628449.shtm](http://www.dhs.gov/xnews/releases/pr_1164209628449.shtm).

30. Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 546, 120 Stat. 1355 (2006).

31. Press Release, Dep't of Homeland Sec., Western Hemisphere Travel Initiative Rule Outlines New Document Requirements for Air Travel (Nov. 22, 2006), [http://www.dhs.gov/xnews/releases/pr\\_1164209628449.shtm](http://www.dhs.gov/xnews/releases/pr_1164209628449.shtm).

32. Rachel L. Swarns, *Travel Industry Seeks Delay on New Passport Rules at U.S. Borders*, N.Y. TIMES, Aug. 21, 2006, at A13.

33. Title II of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

34. Pam Belluck, *Mandate for ID Meets Resistance From States*, N.Y. TIMES, May 6, 2006, at A1.

35. *The Real ID Act: National Impact Analysis*, National Governors Association, National Conference of State Legislatures, and the American Association of Motor Vehicle Administrators, Sept. 21, 2006, <http://www.nga.org/Files/pdf/0609REALID.PDF>.

36. *Fahy v. Comm'r*, N.H. Dep't of Safety, 2006 DNH 74, 2006 U.S. Dist. LEXIS 43135 (June 26, 2006).

## E. US VISIT

The U.S. Visitor and Immigrant Status Indicator Technology (US VISIT) system, an integrated, automated entry-exit security system introduced in January 2004 aimed at tracking the arrival and departure of aliens, verifying their identities, and authenticating their travel documents using biometric identifiers, continued to make headlines. DHS continued to expand the program's coverage throughout 2006,<sup>37</sup> but admitted that the exit component of the system was years from being realized.<sup>38</sup> DHS also announced its plans to convert the US VISIT system from a two-fingerprint system to a ten-fingerprint system that would be integrated with the system used by the Federal Bureau of Investigations.<sup>39</sup> In early December 2006, the media reported that only one terrorist suspect had been caught by the system since its inception.<sup>40</sup>

## F. BIOMETRIC PASSPORT DEADLINE

Most affected countries have met a Congressionally-mandated,<sup>41</sup> October 26, 2005, deadline for Visa Waiver Program (VWP) countries to have biometric features, such as digital photographs or fingerprints in all new passports. A notable exception was France, whose citizens were required for several months to apply for visas in their home country, leading to travel disruptions and long lines at the American consulate in Paris.<sup>42</sup>

## G. ADJUSTMENT OF STATUS OF "ARRIVING ALIENS"

On May 12, 2006, DHS amended its regulations to reverse a longstanding regulatory bar that prohibited many immigrants from adjusting their status to lawful permanent residence. Prior to the change, DHS's regulation implementing the bar had led to significant litigation and a split in the circuit courts of appeal, which had interpreted the regulation differently.<sup>43</sup> In a move applauded by most immigration attorneys, DHS decided that

37. For example, DHS announced that US-VISIT would be expanded to include almost all aliens, except certain Canadians, as well as additional land border ports of entry along the U.S.-Canadian border. See United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT): Enrollment of Additional Aliens in US-VISIT, 71 Fed. Reg. 42,605 (July 27, 2006).

38. Marisa Taylor, *\$900 Million Later, U.S. Can't Track Foreign Visitors*, ORLANDO SENTINEL, Sept. 17, 2006, at A8.

39. Stephen Losey, *US-VISIT Seeks Upgrade To 10-Fingerprint System*, FEDERAL TIMES, Aug. 24, 2006, <http://www.federaltimes.com/index.php?S=2044350>.

40. David Morgan, *Border Security System Posts Just 1 Terror Case*, REUTERS, Nov. 29, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112901308.html>.

41. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (setting the original deadline). Early in 2004, the Bush administration requested that Congress extend the deadline, and on August 9, 2004, President Bush signed H.R. 4417, which extended the deadline by one year to October 26, 2005. See Pub. L. No. 108-299, 118 Stat. 1100 (2004).

42. Doreen Carvajal, *Another Blow to U.S.-French Ties: A Visa Bottleneck*, N.Y. TIMES, Feb. 2, 2006, at A13.

43. Several courts of appeals held that the regulations, as applied to paroled aliens, were impermissible in view of the statutory language at section 245(a) of the Act, 8 U.S.C. § 1255(a), allowing for an application for discretionary adjustment of status by any alien who was "inspected and admitted or paroled." See Scheerer v. U.S. Att'y Gen'l, 445 F.3d 1311 (11th Cir. 2006); Bona v. Gonzales, 425 F.3d 663 (9th Cir. 2005); Zheng v. Gonzales, 422 F.3d 98 (3d Cir. 2005); Succar v. Ashcroft, 394 F.3d 8 (1st Cir. 2005). In contrast, the United States Courts of Appeals for the Fifth and Eighth Circuits had rejected challenges to the regulations, holding that the regulations were a valid exercise of the discretionary authority to grant or deny adjustment of status.

aliens who have been "paroled"<sup>44</sup> into the United States would be eligible to adjust status in the United States and would not be required to process for immigration visas in overseas consulates.<sup>45</sup>

#### H. VISA QUOTA PROBLEMS

Visa quota problems continued to plague the U.S. immigration system. As a result of legislation, the quota for the popular H-1B temporary professional worker visas was lowered from 195,000 to 65,000 on October 1, 2003;<sup>46</sup> separate laws had provided that 6,800 of the available visas were to be reserved for nationals of Chile and Singapore.<sup>47</sup> With this substantial reduction in available visas, the H-1B quota for Fiscal Year (FY) 2006 was reached on August 12, 2005,<sup>48</sup> and a bonus cap of 20,000 H-1B visas for those with U.S. graduate degrees was reached on January 18, 2006.<sup>49</sup> Following announcements that these caps had been reached, DHS again advised that it would reject any new applications for H-1B employment filed after the caps were reached and would not accept future applications until April 1, 2006. Petitions filed on or after April 1, 2006, had to request a start date of October 1, 2007, or later. On June 1, 2006, U.S. Citizenship and Immigration Services (USCIS) announced that the FY 2007 cap for regular H-1B visas had been reached, and, thus, no more cap-subject H-1B visas would be available until October 1, 2007.<sup>50</sup> The graduate degree H-1B cap for FY 2007 was reached on July 28, 2006.<sup>51</sup> Many immigration lawyers engaged in the usual scramble to find alternatives to the H-1B

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*See Momin v. Gonzales*, 447 F.3d 447 (5th Cir. 2006) (concluding that the "Attorney General did not act arbitrarily, capriciously, or manifestly contrary to the statute in opting to decline to exercise his discretion favorably for parolees that are subject to removal proceedings."); *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir.), petition for reh'g en banc denied (2005), petition for cert. filed No. 05-1092 (February 23, 2006).

44. Under U.S. law, an alien may be permitted to physically enter the United States temporarily without having been admitted, a concept known as parole. *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958) (quoting *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)). Although the term parole does have other common meanings, its immigration law meaning is a matter of statute. *See* 8 U.S.C. § 1182(d)(5)(A) (giving the Secretary authority to parole from custody "any alien applying for admission" who would otherwise be detained until the Secretary resolves whether to admit or remove the alien).

45. Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585 (May 12, 2006).

46. The American Competitiveness in the Twenty First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000), had temporarily increased the available H-1B visas for fiscal years 2001, 2002, and 2003.

47. On September 3, 2003, President Bush signed into law the United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003), and the United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003). Under certain provisions of these laws that went into effect on January 1, 2004, a new H-1B visa category was created that provides 1,400 visas annually for Chilean nationals and 5,400 visas annually for Singaporeans. These visas are counted against the total H-1B quota for the year.

48. It Is Official Now; USCIS Reaches H-1B Cap For FY 2006, VisaPro Global, Aug. 12, 2005, <http://www.visapro.com/Immigration-News/?a=300&z=10>.

49. Press Release, Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., USCIS Reaches H-1B Exemption Cap for Fiscal Year 2006 (Jan. 18, 2006), [http://www.uscis.gov/files/pressrelease/H1B\\_06Cap\\_011806PR.pdf](http://www.uscis.gov/files/pressrelease/H1B_06Cap_011806PR.pdf).

50. Press Release, Dep't of Homeland Sec., U.S. Citizenship & Immigration Services, USCIS Reaches H-1B Exemption Cap (June 1, 2006), [http://www.uscis.gov/files/pressrelease/FY07H1Bcap\\_060106PR.pdf](http://www.uscis.gov/files/pressrelease/FY07H1Bcap_060106PR.pdf).

51. Press Release, Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., USCIS Reaches H-1B Exemption Cap for Fiscal Year 2007 (July 28, 2006), <http://www.uscis.gov/files/pressrelease/H1BMasters072806PR.pdf>.



visas, but it was clear that only a Congressional fix could solve the underlying problem, and Congress passed no relief legislation.

On April 6, 2006, DHS also announced that it had reached the cap of 33,000 H-2B temporary nonagricultural workers for the second half of FY 2006 and would reject any petitions filed after April 4, 2006, unless they requested a start date after October 1, 2006.<sup>52</sup>

#### I. BACKLOG REDUCTION OF NATURALIZATION CASES

On September 15, 2006, USCIS announced that it had eliminated its infamous backlog of citizenship applications. In 2004, USCIS had a backlog of some 3.5 million citizenship cases; by July 2006, the gross backlog of these cases had been reduced to 1.1 million, of which only 140,000 cases had been pending for more than six months and were under USCIS control (USCIS counted as "outside [its] control" any cases where security checks were pending, judicial ceremonies were awaiting scheduling, or the applicant was responsible for the delay).<sup>53</sup> USCIS announced that its average processing time was about five months, representing a considerable improvement from a few years ago. At the same time, some applicants accused the government of delaying their background checks unreasonably, and some filed lawsuits.<sup>54</sup>

#### J. NATIONAL GUARD ON THE BORDER

On May 15, 2006, in a speech in which he asked for a comprehensive approach to immigration reform, President Bush announced that he would be ordering National Guard troops to the border as a stopgap measure to deter illegal migration until more Border Patrol agents could be hired.<sup>55</sup> By August 1, 2006, some six thousand troops were supposed to be in place.<sup>56</sup>

### IV. State and Local Law Developments

One of the more noted developments during 2006 was a rise in the number of state and local immigration-related laws. More than nine communities passed laws targeting illegal immigrants, such as laws punishing landlords who rent to illegal immigrants or businesses that employ them.<sup>57</sup> A few municipalities took the opposite approach, declaring them-

52. Press Release, Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2006 (April 6, 2006), [http://www.uscis.gov/files/pressrelease/H2BFY06cap\\_06Apr06PR.pdf](http://www.uscis.gov/files/pressrelease/H2BFY06cap_06Apr06PR.pdf).

53. Press Release, Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., USCIS Announces Elimination of Naturalization Applicant Backlog (Sept. 15, 2006), <http://www.uscis.gov/files/pressrelease/N400Bklg091506NR.pdf>.

54. H.G. Reza, *Seven Muslims Granted Citizenship after Years of Waiting*, LOS ANGELES TIMES, Oct. 5, 2006 (describing settlement of lawsuit filed by American Civil Liberties Union).

55. Cable News Network, *Bush Calls for 6,000 Troops Along Border*, May 16, 2006, <http://www.cnn.com/2006/POLITICS/05/15/immigration/>.

56. Jim Greenhill, *Guard Presence Making A Difference, President Claims*, National Guard Bureau, Aug. 4, 2006, [http://www.ngb.army.mil/news/archives/080406-POTUS\\_SWB.aspx](http://www.ngb.army.mil/news/archives/080406-POTUS_SWB.aspx).

57. Joyce Howard Price, *Towns Take a Local Approach to Blocking Illegal Aliens*, WASHINGTON TIMES, Sept. 22, 2006, at A3.

selves to be sanctuaries for the unauthorized.<sup>58</sup> Public interest groups sued to have most of the anti-immigrant ordinances overturned,<sup>59</sup> while some communities with heavy enforcement of immigration laws suffered rapid depopulation as immigrants quickly moved elsewhere.<sup>60</sup> Many communities also moved to set up agreements to allow state and local police to enforce immigration laws.<sup>61</sup>

## V. New Case Law Developments

During 2006, the federal courts continued to be inundated with record numbers of immigration appeals. At the same time, the circuit courts of appeal repeatedly commented on unprofessional behavior by U.S. immigration judges, the special administrative law judges who handle alien removal hearings and who report to the Executive Office for Immigration Review (EOIR).<sup>62</sup> In one particularly notable rebuke, Judge Richard A. Posner of the Seventh Circuit Court of Appeals opined in a published opinion that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."<sup>63</sup> In response to this and other criticisms of the immigration judges, Attorney General Alberto R. Gonzales announced that he was conducting a comprehensive review of the immigration courts. Gonzales wrote a memo to all immigration judges, dated January 9, 2006, in which he ordered them to treat aliens "with courtesy and respect."<sup>64</sup> At the same time, EOIR refuses to disclose publicly any disciplinary actions against immigration judges, although information about disciplinary actions against private attorneys is displayed prominently on their website.

### A. U.S. SUPREME COURT DECISIONS

The Supreme Court granted certiorari and decided two significant immigration cases during the year. In *Fernandez-Vargas v. Gonzales*,<sup>65</sup> the Court held that a law passed by Congress in 1996<sup>66</sup> could be applied retroactively to immigrants who had reentered the United States before the law was enacted, rejecting a contrary line of decisions by the Sixth<sup>67</sup> and Ninth<sup>68</sup> Circuit Courts of Appeal. At issue was the application of the Illegal

58. See, e.g., Yvonne Abraham, *City's Sanctuary Status Mocked*, BOSTON GLOBE, July 5, 2006 (discussing decision by Cambridge, Massachusetts, to declare itself a sanctuary for unauthorized aliens).

59. See, e.g., *U.S. Judge Issues Restraining Order Suspending Anti-Immigration Law*, Associated Press, Sept. 26, 2006 (describing lawsuits against Valley Park, Missouri, and Hazleton, Pennsylvania, ordinances).

60. Patrik Jonsson, *Crackdown on Immigrants Empties a Town and Hardens Views*, CHRISTIAN SCI. MONITOR, Oct. 3, 2006, at 1.

61. See, e.g., Michael Levenson & Jonathan Saltzman, *Troopers Can Arrest Illegal Immigrants in Romney Deal*, BOSTON GLOBE, Dec. 3, 2006, [http://www.boston.com/news/local/articles/2006/12/03/troopers\\_can\\_arrest\\_illegal\\_immigrants\\_in\\_romney\\_deal/](http://www.boston.com/news/local/articles/2006/12/03/troopers_can_arrest_illegal_immigrants_in_romney_deal/) (describing agreement between the State of Massachusetts and federal authorities that would allow Massachusetts state police to arrest unauthorized immigrants).

62. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

63. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

64. Alberto R. Gonzales, Memorandum to Immigration Judges (Jan. 9, 2006) (in possession of the author); see also U.S. Dep't of Justice, *Atty. Gen. Alberto R. Gonzales Outlines Reforms for Immigration Courts & Bd. of Immigration Appeals*, Aug. 9, 2006, [http://www.usdoj.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html).

65. *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (2006).

66. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996).

67. *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001).

Immigration Reform and Immigrant Responsibility Act of 1996, which limits the relief from removal available to immigrants who reenter the United States after having been previously ordered deported by allowing immigration authorities to reinstate the prior deportation order and deport the alien without a new hearing.<sup>69</sup> Fernandez-Vargas was a Mexican citizen who illegally reentered the United States in 1982 after previously having been deported in 1981. Following his 1982 reentry, he lived in the United States for over twenty years before filing an application to adjust his status to that of a lawful permanent resident. After he filed his application for permanent residency, the government reinstated his 1981 deportation order using the new law and deported him. He appealed his deportation to the Tenth Circuit Court of Appeals, claiming that because he had illegally reentered the country before the 1996 law's effective date, the new law did not bar his application for adjustment of status, and its application would be impermissibly retroactive.<sup>70</sup> The Tenth Circuit held that the new law did bar Fernandez-Vargas' application for adjustment of status, even though the Sixth and Ninth Circuits had disagreed with this view.<sup>71</sup> Rejecting Fernandez-Vargas' arguments, the Supreme Court held that the new law barred his application and followed *Landgraf v. USI Film Products*<sup>72</sup> in determining that the new law was not impermissibly retroactive. The decision affected thousands of illegal migrants who were, as a result of the Court's decision, barred from obtaining lawful permanent residence and banned from the United States for at least ten years, despite having qualified for immigration visas through family members or employers.

In the second major Supreme Court case of the year, immigrants obtained a more favorable ruling. In *Lopez v. Gonzales*,<sup>73</sup> the Supreme Court held that a drug crime that is a felony under state law but only a misdemeanor under federal law is not necessarily an aggravated felony for purposes of U.S. immigration law. Jose Antonio Lopez, a lawful permanent resident, was convicted in South Dakota state court of aiding and abetting the possession of cocaine; under state law, this crime was a felony, but because the crime was the equivalent of mere possession, the federal Controlled Substances Act punished it only as a misdemeanor. DHS sought to deport Lopez as an aggravated felon, relying on South Dakota's characterization of the crime as a felony and arguing that Lopez's crime was a drug trafficking crime. The Supreme Court rejected this argument and held that the ordinary understanding of trafficking was that some commercial dealing, not mere possession, must be involved. As a result of the decision, Lopez and many other lawful permanent residents with similar convictions may now be entitled to apply for relief from deportation; as aggravated felons, they were barred from most relief and often subjected to mandatory detention and lifetime banishment from the United States.

68. *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001).

69. See 8 U.S.C. § 1255(a)(5).

70. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005).

71. *Bejjani*, 271 F.3d at 687 (holding that INA §241(a)(5) does not apply retroactively to illegal entries that occurred prior to the enactment of the 1996 immigration law); *Castro-Cortez*, 239 F.3d at 1051 (same).

72. *Landgraf v. USI Film Products*, 511 U. S. 244 (1994).

73. *Lopez v. Gonzales*, 127 S.Ct. 625, 166 L.Ed.2d 462; 75 U.S.L.W. 4013 (2006).

B. ADMINISTRATIVE COURT DECISIONS<sup>74</sup>

During 2006, the Board of Immigration Appeals (BIA) decided more than twenty precedential cases, more cases than in any single year since 1999. In *In Re V—F—D—*, the Board determined that a victim of sexual abuse who is under age eighteen is a minor for purposes of determining whether an alien has been convicted of sexual abuse of a minor and is thus an aggravated felon subject to mandatory detention and very little relief from deportation.<sup>75</sup> In *In Re Adamiak*, the BIA clarified that convictions vacated because of a defect in the underlying proceedings, in this case because of a failure to advise of the immigration consequences of a guilty plea, would not be considered convictions for immigration purposes while convictions vacated because of post-conviction events, such as rehabilitation, would still result in removal charges.<sup>76</sup> In two separate cases involving citizens of the People's Republic of China who feared coercive population control measures and thus sought asylum in the United States, the Board ruled that Chinese nationals with children born in the United States are not necessarily eligible for relief inasmuch as there is no evidence that they will be subjected to forced sterilization if they return to China with their foreign-born children,<sup>77</sup> and an unmarried partner of a Chinese woman forced to undergo sterilization or abortion cannot avail himself of the presumption of persecution granted to husbands of such women.<sup>78</sup>

In perhaps the most significant BIA precedential decision of the year, the Board in *In Re S—K—* decided that the "material support" to terrorism bar found in Section 212(a)(3)(B) of the Immigration and Nationality Act (INA) does not allow a totality of the circumstances test to be employed in determining whether an organization is engaged in terrorist activity nor may immigration judges consider the alien's intent or the intended use of a donation when considering whether an alien has provided such "material support."<sup>79</sup> The respondent in the case was a Burmese Christian and ethnic Chin who had provided financial and other support to the Chin National Front (CNF), a group that opposes the Burmese military dictatorship. The Board ruled that the CNF was, according to the INA definition, a "terrorist group" and that the immigration law did not allow relief, even in cases "involving the use of justifiable force to repel attacks by forces of an illegitimate regime."<sup>80</sup> Thus, even persons acting in self-defense could be denied asylum and withholding of removal under U.S. immigration law if they supported a terrorist group that fought against an established government. The fact that the United States, as a matter of foreign policy, also supports the group is irrelevant. Thus, if this decision is extended to other cases, it is possible that persons who fight on the side of U.S.-supported insurgent groups, such as the Nicaraguan Contras or the Northern Alliance in Afghanistan, may not be granted asylum or withholding of removal in the United States.

74. For summaries of other Board of Immigration Appeals' cases decided during 2006, see Juan P. Osuna & Jean C. King, *Update on Precedent Decisions of the Board of Immigration Appeals*, [http://www.usdoj.gov/eoir/vll/intdec/Precedent%20Decision%20Review%20final\\_FY2006.pdf](http://www.usdoj.gov/eoir/vll/intdec/Precedent%20Decision%20Review%20final_FY2006.pdf).

75. *In Re V—F—D—*, 23 I&N Dec. 859 (Board of Immigration Appeals 2006).

76. *In Re Adamiak*, 23 I&N Dec. 878 (Board of Immigration Appeals 2006).

77. *In Re C—C—*, 23 I&N Dec. 899 (Board of Immigration Appeals 2006).

78. *In Re S—L—L—*, 24 I&N Dec. 1 (Board of Immigration Appeals 2006).

79. *In Re S—K—*, 23 I&N Dec. 936 (Board of Immigration Appeals 2006).

80. *Id.* at 941.

## VI. Asylum and Refugee Law, Temporary Protected Status

Refugee resettlement continued to rebound slowly from the serious delays caused by post-September 11 background and security checks. Security concerns had contributed to a sharp decline in the number of resettlements in FYs 2002-2005. At the end of FY 2006, however, the number of refugees resettled increased to 41,500 from more than sixty countries.<sup>81</sup> For FY 2007, President Bush determined that the maximum number of refugees admitted should be no more than 70,000, marking a return to pre-September 11 levels of refugee admissions.<sup>82</sup>

A continuing issue for both Congress and the State Department has been the application of the material support bar to admission. Under Section 212(a)(3)(B) of the INA, a person cannot be admitted to the United States if the person has provided material support to a terrorist group;<sup>83</sup> and under the REAL ID Act of 2005 and other laws, such support can include food or money provided under threat of death or injury. This bar caused DHS to refuse admission to thousands of refugees and also resulted in the denial of asylum applications made by persons within the United States.<sup>84</sup> During 2006, the Secretary of State exercised her authority to exempt from this bar certain Karen refugees in camps in Thailand and certain Chin refugees from Burma.<sup>85</sup> The bar continued to affect thousands of other refugees and asylees who were not beneficiaries of the State Department's special exemptions, such as refugees from Colombia.<sup>86</sup>

During 2006, the citizens of several countries continued to benefit from Temporary Protected Status (TPS) in the United States. TPS is a temporary immigration status granted to eligible nationals of certain countries where the DHS<sup>87</sup> has determined that citizens of those countries are temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. During the period for which a country has been designated for TPS, TPS beneficiaries may remain in the United States and may obtain work authorization. TPS does not, however, ordinarily lead to lawful permanent resident status. During

81. Statement of Ellen Sauerbrey, Assistant Sec. for the Bureau of Population, Refugees, & Migration, Senate Judiciary Subcomm. on Immigration, Border Security and Citizenship (Sept. 27, 2006), <http://www.state.gov/g/prm/rls/2006/73264.htm>.

82. Presidential Determination on Fiscal Year 2007 Refugee Admissions Numbers & Authorizations of In-Country Refugee Status Pursuant to Sections 207 & 101(a)(42), Respectively, of the Immigration & Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration & Refugee Assistance Act, As Amended, 71 Fed. Reg. 64,435 (Nov. 1, 2006).

83. 8 U.S.C.A. § 1182(a)(3)(B) (West 2005).

84. Human Rights First, *Abandoning the Persecuted: Victims of Terrorism & Oppression Barred from Asylum* (2006), <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>.

85. Media Note, Dep't of State, Office of the Spokesman, The Department of State Decides Material Support Inapplicable to Chin Refugees from Burma (Oct. 19, 2006), <http://www.state.gov/r/pa/prs/ps/2006/74761.htm>.

86. Human Rights First, *supra* note 84.

87. In 1990, as part of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), Congress established a procedure by which the Attorney General may provide TPS to aliens in the United States. On March 1, 2003, pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), Congress transferred the authority to designate a country, or part thereof, for TPS and to extend and terminate TPS designations from the Attorney General to the Secretary of Homeland Security. At the same time, responsibility for administering the TPS program was transferred from the former Immigration and Naturalization Service to USCIS, a component of the DHS.

2006, DHS granted extensions of TPS to the following countries: Burundi,<sup>88</sup> El Salvador,<sup>89</sup> Honduras,<sup>90</sup> Liberia,<sup>91</sup> Nicaragua,<sup>92</sup> Somalia,<sup>93</sup> and Sudan.<sup>94</sup> DHS announced, however, that it was planning to end Liberia's designation on September 30, 2007.<sup>95</sup>

## VII. Conclusion

2006 drew to a close without the anticipated immigration reform that advocates had eagerly anticipated. At the same time, immigration reform issues had clearly taken center stage in the national political debate. The results of the midterm elections left many expecting action from the newly-elected Democratic Congress despite protestations to the contrary from some Democratic leaders. President Bush vowed to continue to press for reform and pledged a bipartisan effort to enact such reform early in 2007.

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88. Extension of the Designation of Burundi for TEMPORARY PROTECTED STATUS, 71 Fed. Reg. 54300 (Sep. 14, 2006).

89. Extension of the Designation of TEMPORARY PROTECTED STATUS for El Salvador, 71 Fed. Reg. 34637 (Jun. 15, 2006).

90. Extension of the Designation of TEMPORARY PROTECTED STATUS for Honduras, 71 Fed. Reg. 16328 (Mar. 31, 2006).

91. Termination of the Designation of Liberia for TEMPORARY PROTECTED STATUS, 71 Fed. Reg. 55,000 (Sept. 20, 2006) (extending TPS for Liberian nationals until September 30, 2007).

92. Extension of the Designation of TEMPORARY PROTECTED STATUS for Nicaragua, 71 Fed. Reg. 16,333 (Mar. 31, 2006).

93. Extension of the Designation of TEMPORARY PROTECTED STATUS for Somalia, 71 Fed. Reg. 42,653 (Jul. 27, 2006).

94. Extension of the Designation of Sudan for TEMPORARY PROTECTED STATUS, 70 Fed. Reg. 52,429 (Sept. 2, 2005).

95. Termination of the Designation of Liberia for TEMPORARY PROTECTED STATUS, 71 Fed. Reg. 55,000 (Sept. 20, 2006).

