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Immigration and Nationality Law

ROBERT CHARLES HILL AND DONALD KERWIN*

I. Introduction

The focus of developments in U.S. immigration law and policy during the year 2001 changed dramatically after the horrific terrorist attacks on New York and Washington on September 11. Prior to September 11, policy makers and legislators appeared to be heading toward a series of pro-immigration initiatives. Most notable among these was an ongoing series of migration-related discussions between senior level officials in the United States and Mexico that seemed to signal the willingness of both sides to make accommodations on traditional positions of fundamental concern to the other country. For its part, the Bush administration appeared poised to propose legislative initiatives for both a "guest worker" program for certain Mexican workers in the United States as well as an "earned amnesty" program that would offer immediate "regularization" of status for undocumented laborers. This ultimately would lead to permanent residence in the United States for those who would meet as yet unspecified eligibility criteria. In return for U.S. movement on these critical issues, Mexican President Vicente Fox assured his American counterpart that his government would focus serious attention on combating unlawful trafficking and migration to the United States from and through Mexico.

In addition, congressional and executive branch initiatives to implement legislation passed late in 2000. These initiatives, which appeared to have high priority on both ends of Pennsylvania Avenue, expanded the quota of temporary foreign technology workers on H-1B visas as well as extended legislatively an expired provision of the law, which offered relief to out-of-status aliens who had begun the process of obtaining permanent residence through Section 245(i) of the Immigration and Nationality Act (INA). A new Immigration and Naturalization Service (INS) Commissioner, with substantial management and legislative experience as well as the unanimous support of Senate, was named to spearhead efforts

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to correct long-standing management deficiencies and operational inefficiencies at the INS. Meanwhile, the Department of Labor (DOL), long viewed by the business immigration community as a bureaucratic morass, continued reform initiatives in both its permanent and temporary labor certification programs that effectively cut much of the red tape and facilitated adjudication processes long subject to some of the worst processing backlogs and delays in the federal government.

Immediately after September 11, 2001, these initiatives came to a sudden end. Virtually all immigration-related legislation and policy initiatives unconnected to national security and the government's response to terrorism were suspended if not derailed entirely. Instead, congressional and administrative efforts were redirected towards building support for legislation that expanded the categories of non-citizens barred from entering the United States or subject to mandatory detention and removal. The Department of Justice (DOJ) and federal law enforcement agencies used suspected immigration violations as a weapon in the legal arsenal to respond to the immediate attacks of September 11 and to gain time needed to deploy resources in homeland security efforts needed to protect and defend the country against further attack.

Despite this change in focus, by year end some efforts resumed that had a positive effect on business-related immigration policy. In particular, Congress passed two bills providing work authorization for spouses of international transferees, implementation of the INS's successful new Premium Processing Service program, and a cutting edge DOL program permitting the electronic filing of H-1B labor condition applications for temporary tech workers. In November, Attorney General Ashcroft and INS Commissioner Ziglar announced the Administration's restructuring plan to reorganize the agency into separate bureaus for service and enforcement, while maintaining the INS as an independent agency within the DOJ.

Finally, 2001 also witnessed a number of developments related to refugee protection, including a moratorium on refugee admissions in response to September 11, more aggressive migrant interception programs, new administrative practices regarding arriving asylum-seekers, and the extension of temporary protected status for nationals from various countries.

II. Legislative Developments

On October 26, 2001 President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act, or Act).¹ The Act attempts to strengthen immigration enforcement against suspected terrorists and their supporters through expansion of the relevant grounds of inadmissibility and removability, mandatory detention, and shared and improved information systems.

The Act increases the categories of non-citizens barred from entry and subject to removal for involvement in "terrorist activities," as defined therein. It expands the grounds of inadmissibility to include representatives of a "foreign terrorist organization" or "a political, social or other similar group whose public endorsement" of terrorist activity, as determined by the Secretary of State (Secretary), undermines U.S. efforts "to reduce or eliminate ter-

1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism [hereinafter USA PATRIOT Act], Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

rorist activities.”² It further extends this definition to include aliens who have used their “position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization,” so as to undermine U.S. efforts to “reduce or eliminate” terrorism.³ The Act extends this provision to the spouses and children of aliens inadmissible on these grounds if the underlying terrorist activity occurred within the previous five years,⁴ providing narrow exceptions only for a spouse or child who “did not know or should not reasonably have known” about or who “has renounced” the terrorist activity.⁵ The expanded definition of terrorist activity in the Act also includes acts that would be unlawful under the laws of the place where they were committed.⁶

The Act creates a new ground of inadmissibility for those who have been associated with terrorist organizations and who intend to engage in activities that could “endanger the welfare, safety or security” of the United States.⁷ It, likewise, provides for the removal of those engaged in “terrorist activity” after admission.⁸

The Act defines the term “engage in terrorist activity” expansively to include: inciting others to commit terrorist activity; preparing or planning such activity; gathering information on potential targets; soliciting funding or material support for a terrorist activity or organization;⁹ soliciting an individual to engage in proscribed “conduct” or to join a terrorist organization;¹⁰ and committing an act that the “actor knows, or reasonably should know, affords material support” to terrorist activity or terrorists.¹¹

It defines the term “terrorist organization” to encompass organizations: formally designated as such by the Secretary; otherwise designated by the Secretary after consultation with the Attorney General (AG); or a group of two or more aliens which commits or incites to commit terrorist activity, prepares or plans a terrorist activity, or gathers information on potential targets.¹² It also extends the definition of organizations that can be designated as terrorist organizations and revises procedures for doing this.¹³ It provides for a two-year re-designation period for such groups.¹⁴

The Act imposes mandatory detention on persons certified by the AG to be suspected terrorists or terrorist supporters. These include aliens who the AG has “reasonable grounds to believe” are inadmissible or removable for terrorist activity; for espionage and related activity; or for attempting to oppose, overthrow, or control the United States by force,

2. 8 U.S.C.A. § 1182(a)(3)(B)(i)(IV) (2002).

3. 8 U.S.C.A. § 1182(a)(3)(B)(i)(VI) (2002).

4. 8 U.S.C.A. § 1182(a)(3)(B)(i)(VII) (2002).

5. 8 U.S.C.A. § 1182(a)(3)(B)(ii) (2002).

6. 8 U.S.C.A. § 1182(a)(3)(B)(iii) (2002).

7. 8 U.S.C.A. § 1182(a)(3)(F) (2002).

8. 8 U.S.C.A. § 1227(o)(4)(B) (2002).

9. The USA PATRIOT Act provides a narrow exception to this definition for those who solicit funds for (undesignated) terrorist organizations, if the alien “did not know” and “should not reasonably have known, that the solicitation would further the organization’s terrorist activity.” 8 U.S.C.A. § 1182(a)(3)(iv)(IV)(cc).

10. A narrow exception exists for an alien who solicited members to join a terrorist organization, if he or she “did not know, and should not reasonably have known” that the solicitation would further the terrorist activity. 8 U.S.C.A. § 1182(a)(3)(iv)(V)(cc).

11. 8 U.S.C.A. § 1182(a)(3)(iv)(VI).

12. 8 U.S.C.A. § 1182(a)(3)(vi).

13. 8 U.S.C.A. § 219(a)(1), (2) (1999).

14. 8 U.S.C.A. § 219(a)(4) (1999).

violence, or unlawful means.¹⁵ More broadly, the AG can certify (for mandatory detention) aliens “engaged in any other activity that endangers the national security of the United States.”¹⁶

The Act requires the AG either to charge a “certified” person with an immigration violation or a crime within seven days or release him or her.¹⁷ Persons detained under this provision cannot be released prior to their removal, regardless of any relief from removal they may be granted.¹⁸ An alien ordered to be removed may be detained beyond the ninety-day statutory removal period if his or her removal is “unlikely in the reasonably foreseeable future.”¹⁹ If so, he or she may be detained “for additional periods of up to six months,” but “only if” his or her release would threaten national security or the safety of an individual or community.²⁰ The Act provides for AG review of his own certification decisions every six months²¹ and *habeas* review of certification and detention determinations, with an appeal to the D.C. Court of Appeals.²²

The Act directs the AG to take specific steps to prevent the admission of terrorists and to assure compliance with U.S. immigration laws. It requires the Federal Bureau of Investigation (FBI) to provide criminal history information maintained by the National Crime Information Center to the INS and the Department of State (DOS) so that these agencies can determine whether a visa applicant or applicant for admission has a criminal history.²³ This information will be placed in the automated visa lookout database.²⁴ The Act directs the AG and the Secretary to develop and certify, within two years, a “technology standard” to be used to verify the identity of those seeking a visa or to enter.²⁵ It requires that the resulting electronic system be accessible to all consular officers who issue visas, federal inspection agents, and law enforcement and intelligence officers who are responsible for the “investigation or identification” of aliens admitted to the United States.²⁶ It seeks to allow the AG to implement quickly a data system²⁷ to track alien entries and departures.²⁸ This system should interface with federal law enforcement databases.²⁹ The Act particularly commends the use of biometric technology.³⁰ It calls for full implementation of a program to monitor foreign students,³¹ and an audit to make sure that countries whose nationals can enter the United States without visas have developed tamper-resistant passports.³²

15. 8 U.S.C.A. § 1226a(a)(3)(A) (2002).

16. 8 U.S.C.A. § 1226a(a)(3)(B) (2002).

17. 8 U.S.C.A. § 1226a(a)(5) (2002).

18. 8 U.S.C.A. § 1226a(a)(2) (2002).

19. 8 U.S.C.A. § 1226a(a)(6) (2002).

20. *Id.*

21. 8 U.S.C.A. § 1226a(a)(7) (2002).

22. 8 U.S.C.A. § 1226a(b) (2002).

23. USA PATRIOT Act, *supra* note 1, § 403(b)(1).

24. *Id.* § 403(b)(2).

25. *Id.* § 403(c)(1).

26. *Id.* §§ 403(c)(2) and (3).

27. See Illegal Immigration Reform and Immigrant Responsibility Act [hereinafter IIRAIRA], Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.). This law from IIRAIRA has sparked an enormous amount of controversy.

28. *Id.* § 414(a).

29. *Id.* § 414(c).

30. *Id.* § 414(b).

31. *Id.* § 416.

32. *Id.* § 417(b).

The Act prohibits grants of political asylum to those inadmissible or removable for terrorist activity, with a narrow exception for members of terrorist organizations or others who have endorsed terrorist activity, if the AG determines they are not security risks.³³ The Act also authorizes a tripling of Border Patrol personnel, Customs Service officials, and INS inspectors on the U.S. northern border.³⁴

Perhaps the most significant legislative non-development of 2001 was the failure of congressional efforts to extend Section 245(i),³⁵ a measure that seemed virtually certain of passage as late as September 6. Section 245(i)³⁶ allowed certain individuals who were in the process of becoming permanent residents, but who were not currently in lawful status, to complete the final phase of the permanent residence application process without leaving the United States by paying a \$1,000 user fee or penalty. Section 245(i) eligibility sunset effective January 14, 1998, but was extended through April 30, 2001 by the Legal Immigration and Family Equity (LIFE) Act of 2000.³⁷

In response to complaints that this window extension of time was too narrow for those out of status to take full advantage of the measure, an extension provision was to have been included in H.R. 3525, the Enhanced Border Security and Visa Entry Reform Act of 2001.³⁸ This second extension was a compromise to a measure the House and Senate agreed upon in early September. The House scheduled a vote on the bill for September 11, but that vote never took place. The House later passed H.R. 3525 on December 19, 2001, but without Section 245(i). The measure would have extended Section 245(i) eligibility until April 30, 2002 under the stipulation that the qualifying family relationship existed, or the application for labor certification had been filed, before August 15, 2001. Supporters of the bill contend that further extension of Section 245(i) would benefit both intending immigrants and citizen communities, arguing that those immigrants who are eligible to file under 245(i) and who live now on the "fringes of society" would be subject to thorough screening. Additionally, the INS would earn significant revenue from the increase in filings and resulting fees. Equity and security concerns have fueled significant opposition to the proposal.

As a result, the only significant immigration legislation passed by Congress during 2001 were the relatively non-controversial bills that would provide work authorization for spouses of international transferees and extend an INS employment verification pilot program for two more years. The President signed three bills, H.R. 2277,³⁹ H.R. 2278,⁴⁰ and H.R. 3030,⁴¹ on January 16, 2002. H.R. 2277 and H.R. 2278 authorize spouses of E and L visa holders, respectively, to work in the United States. E visas are granted to traders and

33. INA § 208(b)(2)(A)(v).

34. USA PATRIOT Act, *supra* note 1, § 402.

35. Subsection (i) was originally enacted by Congress in Sec. 506(b), Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-317, 108 Stat. 1724 (1994).

36. See also INA § 245(i), 8 U.S.C.A. § 1255 (1999).

37. The LIFE Act is codified as Title XI of H.R. 5548, enacted by reference in H.R. 4942, Pub. L. No. 106-553; 114 Stat. 2762 A-142 (2000).

38. Introduced by Representative Bilirakis (R-FL) on October 30, 2001. Referred to the Committee on the Judiciary.

39. This bill was introduced by Representative Gekas (R-PA) and co-sponsored by Representative Sheila Jackson-Lee (D-TX).

40. This bill was introduced by Representative Gekas (R-PA) and eight co-sponsors.

41. This bill, H.R. 3030, was introduced by Representative Tom Latham (R-IA).

investors from countries that generally have bilateral trade agreements with the United States.⁴² L visas are granted to intracompany transferees on qualifying temporary assignments in the United States. Under current law, spouses may accompany qualifying E or L visa holders for the length of the employee's assignment in the United States, but may not undertake employment. Spouses must often put their own careers on hold for the duration of the principal U.S. assignment.

In addition, H.R. 2278 reduces the amount of time a qualifying transferee must be employed by a related overseas entity of a company before being eligible for a visa under an INS-approved blanket L visa program. Known as the "pre-employment blanket requirement," existing law currently requires a minimum of one year of employment with the overseas entity during the preceding three years before being eligible. Under the new legislation, the pre-employment blanket requirement would be reduced to six months making it easier and faster for companies to transfer employees to their U.S. subsidiaries, affiliates, or branch offices on L-1 visas.

The House and Senate in December 2001 extended the employment verification pilot program in the Basic Pilot Extension Act, H.R. 3030. Under this voluntary program, participating employers receive software that allows them to access INS and Social Security Administration databases to check employees' I-9 documents to determine whether they are eligible to work. Originally enacted as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), the employment verification program is extended for an additional two years under this legislation.⁴³ The program would have expired November 30, 2001 were it not renewed.

III. Administrative and Regulatory Developments

A. DEPARTMENT OF JUSTICE

1. *Post-September 11 Regulations*

Following the September 11th attacks, the DOJ issued a series of interim regulations, which went immediately into effect, that expanded the period of pre-trial detention without a charge, permitted administrative authorization to monitor attorney-client communications, extended the automatic stay of release decisions by Immigration Judges (IJ), and tightened the procedures for the release of "non-removable" detainees. Shortly after September 11, the DOJ issued a rule related to the detention of non-citizens prior to charging them with an immigration violation or a crime.⁴⁴ The rule increased the period of pre-charge detention from twenty-four to forty-eight hours. It allows detention beyond forty-eight hours for "a reasonable period of time" in "an emergency or other extraordinary circumstances." In practice, this has meant pre-charge detention for several weeks for some of the non-citizens arrested in the post-September 11th investigation.⁴⁵ In addition, this open-ended time period is not triggered solely by a terrorist threat. As discussed above, the Act subsequently limited to seven days the pre-charge detention of those certified by the AG as national security risks or suspected terrorists.

42. Citizens of Canada, Australia, and Sweden are exceptions, eligible for E visas on the basis of multilateral agreements or legislative exceptions rather than bilateral trade or investment treaties.

43. See IIRAIRA, *supra* note 27.

44. 66 Fed. Reg. 48,334 (Sept. 20, 2001).

45. Dan Eggen, *Delays Cited in Charging Detainees*, WASH POST, Jan. 15, 2002, at A01.

In late October, the DOJ issued a regulation that provides for increased restrictions on detainees who pose a national security risk, and monitoring of attorney-client communications without a prior court order to prevent acts of violence and terrorism.⁴⁶ By regulation, the AG can impose administrative restrictions—like segregation, limitations on visits, telephone use, and media access—on detainees possessing information that, if disclosed, would pose a national security risk.⁴⁷ The October 31 rule lengthens the maximum period of these restrictions from 120 days to up to one year and allows extensions in “increments” of a year.⁴⁸ It also extends the authority to authorize these restrictions, at the AG’s direction, beyond the Director of the Bureau of Prisons (BOP), to INS and other DOJ officials with custody of the detainees.⁴⁹

Under the regulations, the AG has parallel authority to place special restrictions on detainees to prevent violence and acts of terrorism.⁵⁰ The new rule, likewise, increases the maximum initial period and subsequent extensions of “special” restrictions from 120 days to one year.⁵¹ Similarly, it extends the authority to authorize these restrictions to appropriate INS and other DOJ officials.⁵²

Finally, the rule also allows for monitoring of attorney-client communications “for the purpose of deterring future acts that could result in death or serious bodily injury . . . or substantial damage to property” if the AG orders that, “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.”⁵³ Absent court authorization, prior written notification of the monitoring must be provided to the detainee and his or her attorneys.⁵⁴ The regulation creates “privilege teams” to be comprised of government officials not involved in the underlying investigation, who will be charged with safeguarding monitored information against disclosure unless “acts of violence or terrorism are imminent” or a federal judge approves.⁵⁵

In late October, the DOJ issued an interim rule that allows the INS to stay IJ release decisions in cases in which the INS originally decided against release on bond or set a bond of \$10,000 or more.⁵⁶ Under prior regulations, IJ release decisions were automatically stayed only in mandatory detention cases based on criminal, national security, or terrorist grounds, in which the INS denied release or set a bond of \$10,000 or more.⁵⁷ To stay release in these cases, the INS needed to file notice of its intent to appeal the custody decision on the day of the IJ’s release order.⁵⁸ It then needed to file a notice of appeal to the BIA within thirty

46. 66 Fed. Reg. 55,062 (Oct. 31, 2001).

47. 28 C.F.R. § 501.2(a) (2001).

48. 28 C.F.R. § 501.2(c) (2002).

49. 28 C.F.R. § 501.2(a) (2002).

50. *Id.*

51. 28 C.F.R. § 501.3(c) (2002).

52. 28 C.F.R. § 501.2(e) (2002).

53. 28 C.F.R. § 501.3(d) (2002).

54. 28 C.F.R. § 501.3(d)(2) (2002).

55. 28 C.F.R. § 501.3(d)(3) (2002).

56. 66 Fed. Reg. 54,909 (Oct. 31, 2001).

57. Former 8 C.F.R. § 3.19(i)(2) (2001).

58. *Id.*

days, or the stay lapsed.⁵⁹ If it filed a notice of appeal, the stay remained in effect until the BIA ruled on the appeal.⁶⁰

The new rule allows the INS to invoke the automatic stay provisions "in any case" (not just mandatory detention cases) in which it previously determined the alien should not be released or set a bond of \$10,000 or more.⁶¹ To invoke the automatic stay, the INS must file a notice of intent to appeal the custody decision "within one business day" of the release decision, and must file a notice of appeal within ten days, or the stay lapses.⁶² After the notice of appeal is filed, the stay remains in effect (and the alien remains in detention) until the BIA decides on the appeal's merits. If the BIA eventually orders release, the stay remains in effect for another five days.⁶³ However, the INS commissioner can still certify the BIA's decision for review by the AG. If this occurs, the stay remains in effect until the AG makes a custody determination.⁶⁴

On November 14, 2001, DOJ issued an interim rule to implement the Supreme Court's decision in *Zadvydas v. Davis*, related to persons ordered deported but who cannot be removed because their countries of origin will not accept their return.⁶⁵ Shortly after the decision came out in June, the AG issued an instruction on the case's implementation. The AG suggested that the court had made it clear that the decision did not apply to detainees caught at the border.⁶⁶ The AG's instruction also required that a non-removable detainee request release affirmatively and demonstrate that his or her removal was not "reasonably foreseeable."⁶⁷ It provided for continued detention on the basis of unspecified "special circumstances" for certain detainees whose removal was not "reasonably foreseeable." According to reports in the media, as of August 29, 2001, the INS had considered 1,660 (of an estimated 3,399) indefinite detention cases, had released 799 detainees, held 429 for deportation within the "foreseeable future," removed 402, and released twenty-one because courts had dismissed their cases.⁶⁸

The interim rule largely tracked the AG's earlier instruction, creating strict custody review procedures, excluding several categories of indefinite detainees from the process, and placing new requirements on those seeking release.⁶⁹ In its preamble, the rule affirmed the earlier DOJ interpretation that *Zadvydas* did not apply to "arriving aliens."⁷⁰ It provides that the INS need not release a detainee until the six-month period ends (following a removal order),⁷¹ thus treating the six-month period, which the Supreme Court identified as "presumptively reasonable," as a floor. During this period, the INS determines whether there is "a significant likelihood of removal in the reasonably foreseeable future,"⁷² and if so, detention continues.

59. *Id.*

60. *Id.*

61. 8 C.F.R. § 3.19(i)(2) (2002).

62. *Id.*

63. *Id.*

64. *Id.*

65. See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

66. 66 Fed. Reg. 38,433 (July 24, 2001).

67. 66 Fed. Reg. 38,434 (July 24, 2001).

68. Caryl Clarke, *Detainee Release Slowly Progresses*, YORK DAILY REC., Sept. 4, 2001.

69. 66 Fed. Reg. 56,967 (Nov. 14, 2001).

70. 66 Fed. Reg. 56,968-69 (Nov. 14, 2001).

71. 8 C.F.R. § 241.13(b)(2) (2002).

72. *Id.*

If the INS decides that the detainee has not made "reasonable efforts to comply with the removal order," it will provide notice to this effect and of the actions the detainee must take to come into compliance.⁷³ Until the detainee responds, the INS will not consider the release request. The rule excludes from this process entirely those: (1) with highly contagious diseases, (2) whose release would raise "serious adverse foreign policy consequences," (3) who implicate "national security and terrorism concerns," and (4) who are "specially dangerous due to a mental condition or personality disorder."⁷⁴ Detainees denied release can make a new request after six months or on a showing of "materially changed circumstances."⁷⁵

2. Enforcement Initiatives

The DOJ further responded to the September 11th attacks with a series of initiatives designed to investigate the attacks and to disrupt future terrorist activity.⁷⁶ Immediately, federal officials began apprehending and detaining hundreds of primarily Arab and Muslim men who are not U.S. citizens. Those arrested included aliens who had violated immigration laws such as overstaying a visa, who had been charged with criminal offenses, and a smaller number of material witnesses in the terrorist investigation.

According to press reports, by early November 1,147 persons had been arrested, with roughly 60 percent held on immigration charges.⁷⁷ In mid-December, the DOJ reported that 548 foreign-born persons remained in detention.⁷⁸ Citing security as well as privacy concerns, the DOJ resisted advocacy and media pressure to disclose the names and other basic information about these detainees and ultimately discontinued providing a regular tally of those detained.⁷⁹ Attorneys for the detainees reported difficulties in finding potential clients, high IJ bonds, the INS's refusal to release even those the FBI had no further interest in investigating, and a lengthy clearance process at DOJ headquarters for IJ release decisions.⁸⁰ The INS also kept in detention and refused to deport some nationals from terrorist-producing countries that had been in detention prior to September 11.⁸¹

On November 9, the AG instructed U.S. attorneys to interview on a voluntary basis more than 5,000 men, ages eighteen to thirty-three, admitted to the United States after January 1, 2000 on non-immigrant visas from countries where al Qaeda operatives had attempted

73. 8 C.F.R. § 241.13(e)(2) (2002).

74. 8 C.F.R. §§ 241.14(a)-(d) (2002).

75. 8 C.F.R. § 241.13(j) (2002).

76. Amy Goldstein, *Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A01.

77. *Id.*

78. Mae M. Cheng, *Questions Raised About Detainees*, NEWSDAY, Dec. 17, 2001.

79. In an October 12 memorandum, the AG warned that "any discretionary decision . . . to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information" and after consultation with the relevant DOJ offices. The memorandum concluded, "When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact." Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments (Oct. 12, 2001), available at <http://www.usdoj.gov/04foia/011012.htm>.

80. J. Edwards, *Attorneys Face Hidden Hurdles in September 11 Detainee Cases*, NEW JERSEY L.J., Nov. 30, 2001.

81. A. Elsner, *Arab Detainee in U.S. Faces Kafkaesque Situation*, REUTERS, Dec. 18, 2001; Tamar Lewin, *Deported Immigrants With Nowhere to Go Wait in Jail*, N.Y. TIMES, Dec. 10, 2001.

to infiltrate the United States.⁸² By year-end, the DOJ had developed plans to apprehend and deport non-citizens from these same nations who had been ordered removed by an IJ. The INS also targeted visa overstays. In San Diego, for example, the INS began an initiative to arrest students who had violated the terms of their student visas, with a focus on nationals from Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen.⁸³ Finally, the INS announced plans to send the names of 314,000 non-citizens who had been ordered removed but had not left the country to the National Crime Information Center,⁸⁴ thereby permitting arrest by state and local police departments throughout the country.

Apart from increased arrests, the DOJ began to refer to IJs growing numbers of cases that required special security procedures. On September 21, the Chief Immigration Judge notified IJs about these cases.⁸⁵ Subsequent instructions stipulated that such cases be handled only by judges with security clearances, that courtrooms be closed with "no visitors, no family, no press," and that court personnel not confirm whether such cases were on the docket nor discuss the case "with anyone."⁸⁶

3. INS: Business-Related Regulatory Developments

In June, the INS implemented its Premium Processing Service (PPS),⁸⁷ a successful program that has resulted in quicker processing of employment-based nonimmigrant or temporary visa petitions, and applications for those employers willing to pay an extra filing fee of \$1,000. The INS designated Premium Processing initially in the following categories: E-1 Treaty Trader, E-2 Treaty Investor, H-2A Agricultural Worker, H-2B Temporary Worker, H-3 Trainee, L-1 Intra-company Transferees, O-1 and O-2 Aliens of Extraordinary Ability or Achievement, P-1, P-2 and P-3 Athletes and Entertainers, and Q-1 International Cultural Exchange Aliens. On July 30, 2001, however, the INS added additional categories to the Premium Processing program: H-1B Temporary Workers in Specialty Occupations, R-1 Temporary Workers in Religious Occupations, and TN NAFTA Professionals. The INS has stated that it will continue to review the program and assess its ability to incorporate other employment-based petitions and applications into the program.

Under its PPS program, the INS guarantees that within fifteen calendar days it will issue an approval notice, a notice of intent to deny, a request for evidence, or a notice of investigation for fraud or misrepresentation. If the INS fails to meet its fifteen-calendar-day guarantee, it will refund the \$1,000 to the petitioner but will also continue to process the petition in an expedient manner. Participants in the program may also use a special phone number and e-mail address to check the status of the case. The INS has estimated that beginning in FY 2002, it will collect approximately \$80 million annually from the program. The revenue generated from the program is earmarked for hiring additional staff and to make infrastructure improvements.

82. Thomas Farragher & Kevin Cullen, *Plan to Question 5,000 Raises Issue of Profiling*, BOSTON GLOBE, Nov. 11, 2001.

83. James Sterngold & Diana Jean Scheme, *10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001.

84. J. Peterson, *INS Adds 314,000 Immigrant Names to FBI National Crime Computer*, L.A. TIMES, Dec. 6, 2001.

85. Memorandum from Michael Creppy, Chief Immigration Judge, to All Immigration Judges, on *Cases Requiring Special Procedures*, Sept. 21, 2001.

86. Instructions for cases requiring additional security, DETREQ-00314 (undated).

87. See 66 Fed. Reg. 29,682-86 (June 1, 2001).

In October 2001, the INS announced plans for developing a system for checking case status information via the Internet.⁸⁸ The INS hopes to initiate the first stage of the program in February 2002. The online system would provide the same information as that which is currently available on the automated TIERS telephone line at each Service Center. The INS anticipates that the online system will include both a specific case inquiry function, for entering a receipt number and obtaining case status information, and an account function, which will enable attorneys to inquire about multiple cases for which they have G-28s on file. One significant feature for which planning is underway is a trigger for emailing representatives to advise when benchmark events have occurred in their cases, such as the sending of a request for evidence or an approval notice.

On November 14, 2001, INS Commissioner James W. Ziglar and Attorney General John Ashcroft announced a plan for restructuring the INS to be fully implemented by the end of FY 2003.⁸⁹ The plan calls for separating the agency into two divisions:⁹⁰ one responsible for enforcement and security issues and the other for managing immigration services and adjudications. One focus of the INS plan is to create a more direct chain of command by addressing accountability issues and establishing clearly defined functions for INS executives. There would be one General Counsel, Chief Financial Officer, and Chief Information Officer (CIO) reporting directly to the Commissioner. Its own Executive Commissioner would head each of the two divisions. The CIO would manage information systems for both divisions to ensure that the services division maintains access to relevant enforcement data for adjudications, and that the enforcement division maintains access to data collected by the services arm of the INS.

Under the INS plan, enforcement and security functions would be channeled into a new Bureau of Immigration Enforcement, which would include Inspections, Border Patrol, Investigations, and Intelligence. A new Chief of the Border Patrol and Interior Enforcement Division and the Executive Commissioner would lead both domestic and overseas law enforcement programs. Detention and removal would also come under the Executive Commissioner for Enforcement. The proposed enforcement structure also establishes an Ombudsman Office that would handle complaints, attempt to resolve problems, and forward allegations about serious misconduct, fraud, and abuse to the Office of Professional Responsibility at the INS Headquarters for appropriate action.

As mentioned above, the INS plan also calls for an Executive Commissioner for Immigration Services. The three Regional Directors would be replaced by six Area Directors who would be responsible only for immigration services and who would have direct authority over the field offices⁹¹—currently organized as the district offices—under their jurisdiction. Field offices would be responsible for approximately 30 percent of the service workload that requires personal contact with INS personnel, including naturalization and adjustment of status interviews, fingerprinting, and other matters. The four Service Centers

88. This information was obtained through the American Immigration Lawyer's Association (AILA) Infonet, available at <http://www.aila.org>.

89. INS published a detailed, 42-page Restructuring Proposal on November 14, available at <http://www.ins.gov/graphics/aboutins/restruct/proposal.pdf>.

90. Cheryl W. Thompson, *Ashcroft Announces Reform Plan for INS Enforcement, Service Functions Would Be Split*, WASH. POST, Nov. 15, 2001, at A45.

91. Field offices would replace current District offices; however, some of these offices may be eliminated completely.

would continue to adjudicate approximately 70 percent of the service function workload, including immigrant and nonimmigrant visa petitions, applications for changes or extensions of status, and employment-based adjustment of status applications. An Office of Consumer Relations would be created to resolve problematic cases.

In November 2001, Representatives James Sensenbrenner (R-WI) and George Gekas (R-PA), the Chairmen of the House Judiciary Committee and its Immigration Subcommittee, respectively, introduced legislation (H.R. 3231)⁹² that addressed the INS restructuring. The Sensenbrenner-Gekas plan would make more significant changes, as it would supplant the currently existing INS with an Agency for Immigration Affairs divided into two bureaus: The Bureau of Immigration Services and Adjudications and a Bureau of Immigration Enforcement. The two bureaus would not share the financial or counsel's office. In many other respects the INS plan and the Sensenbrenner-Gekas bill follow the same general strategy, clarifying the chain of command and dividing functions to increase accountability. Funding for adjudications and services is a crucial issue for both plans, and both plans include provisions for customer service offices to assist with inquiries.

Congress may defer action on the Sensenbrenner-Gekas legislation and allow the Administration to move forward with its own plan if the INS can demonstrate early progress with its own restructuring. It will be interesting to monitor the developments of the restructuring issue as they occur in 2002.⁹³

In December, the INS published a final rule raising filing fees,⁹⁴ effective February 19, 2002, for certain immigration and naturalization applications and petitions, as well as fingerprinting services. The INS is increasing fees by an average of \$20 per application/petition, or 17 percent. The fees collected from the applications listed in this schedule are routed to the Immigration Examinations Fee Account. The INS then uses these funds to support processing and any services associated with processing.⁹⁵ The current fees, last increased in 1998, were based on a fee review that began in 1996 and was completed in 1997.

B. DEPARTMENT OF LABOR

The DOL issued a final rule⁹⁶ on August 3, allowing the conversion of pending standard labor certifications currently subject to lengthy processing delays and backlogs to more expeditious processing as Reduction in Recruitment (RIR) cases without loss of the priority date.⁹⁷ The rule states that an employer may file a request with a State Employment Security Agency (SESA) to have any traditional application that was filed before August 3, 2001, processed as an RIR case, unless a SESA-directed recruitment has already begun. The language of the final rule's preamble may be an indication of DOL's attitude regarding RIR

92. Introduced by Representative Sensenbrenner (R-WI) on November 6, 2001. Referred to the Committee on the Judiciary.

93. As of this writing, the White House Office of Homeland Security is developing a more radical restructuring plan that would create a new Agency for Border Security combining the border-related functions of INS, Customs and the Coast Guard.

94. 66 Fed. Reg. 65,811-16 (Dec. 21, 2001).

95. See INS Proposes Fee Increases, 78 INTERPRETER RELEASES 1303 (2001).

96. 66 Fed. Reg. 40,584-90 (Aug. 3, 2001).

97. See Labor Dept. Finalizes Rule Allowing Conversion to RIR Processing Without Loss of Priority Date, 78 INTERPRETER RELEASES 1301 (2001).

conversions. It states, "generally all requests for conversion to RIR processing will be granted. Only where the occupation listed in the application is on Schedule B, or the request is not timely, would the employer's request for conversion to RIR processing be denied."⁹⁸

The final rule does contain some changes to the proposed rule issued in July 2000.⁹⁹ In its proposed rule, the DOL stated only labor certifications filed prior to July 26, 2000, would be eligible for RIR conversion; however, business immigration advocates lobbied for the cut-off date to be the effective date of the final rule, and DOL accepted this suggestion. As a result, standard labor certifications filed before the 245(i) deadline of April 30 may now be converted to RIR processing and may result in unanticipated delays in the more expeditious RIR processing. In addition, the proposed rule would have only allowed RIR conversion for cases not yet sent to a regional office, thereby precluding RIR conversion for cases forwarded to regional offices for prevailing wage and other issues prior to recruitment. The final rule permits RIR conversion for any case for which the SESA has not yet placed a job order, including cases forwarded to a regional office prior to the initiation of recruitment.

In the situation where the labor certification (ETA 750) does not require an amendment, the DOL, under the final rule, allows the employer to make a written request to a SESA to convert a case. The employer may then provide evidence of good faith recruitment within the six months immediately preceding the date of the request. When a SESA receives a written request for RIR, the SESA should take the request and the supporting documentation, add it to the case file, remove the application from the regular labor certification application queue, and place it in the RIR queue. In the situation where the ETA 750 requires an amendment the conversion is still possible as long as the job opportunity remains basically the same.

On December 5, the DOL announced a final rule,¹⁰⁰ which establishes the electronic filing of labor condition applications (LCA). Utilized by employers seeking to employ H-1B specialty occupation workers, the LCA requires employers to make specific several attestations to the DOL before they are given permission by the INS to hire H-1B employees. Employers will now be able to fill out LCAs on a DOL Web site and submit them electronically to the Department's Employment and Training Administration (ETA), eliminating the need for hardcopy forms. The rule also creates a new Form ETA 9035E, and facilitates frequent filings by the same employer. The DOL acknowledges experiencing certain operational problems with the LCA faxback system throughout 2001, especially during the first few months of the faxback operation.

The DOL anticipates that the directions provided to employers in filling out the electronic LCAs will result in fewer incomplete or inaccurate entries and may improve efficiency and turnaround time in certification. The new LCA form is identical in all respects to the existing LCA (Form ETA 9035), except that the new form contains additional blocks to be marked by the employer to acknowledge that the submission is being made electronically and that the employer will be bound by the LCA obligations through the submission. This system requires that the new LCA form be printed and signed by the employer immediately after ETA certifies the form electronically. The signed form must then be main-

98. 66 Fed. Reg. 40,584-90 (Aug. 3, 2001).

99. 65 Fed. Reg. 46,081-84 (July 26, 2000).

100. 66 Fed. Reg. 63,297-303 (Dec. 5, 2001).

tained in the employer's files with a copy of the signed form maintained in its public access file. Another copy of the signed form must be submitted to the INS to support the employer's non-immigrant visa petition.

C. DEPARTMENT OF STATE

In October 2001, under mandate of legislation signed into law a year earlier,¹⁰¹ DOS announced that it is reviewing six countries currently participating in the Visa Waiver Program. The six countries are Argentina, Belgium, Italy, Portugal, Slovenia, and Uruguay. According to sources outside the DOS, the countries are under review due to the fact that they may be experiencing domestic problems including economic crises and passport fraud and theft.¹⁰² The law stipulates that all twenty-nine countries participating in the Visa Waiver Program must be reviewed at least once every five years to ensure that they comply with all of the program's requirements. Although the DOS has explained that these first six countries have been chosen as part of the regular review process, the timing of reviews and focus on specific countries whose document issuance procedures are known to be of concern have led some observers to suggest these reviews be part of the government's comprehensive response to terrorism.

Congress created the Visa Waiver Program as a pilot program by Congress in 1986 to allow travelers from certain countries to enter the United States for ninety days or fewer without having first to obtain a visa.¹⁰³ To qualify for this program, each country must have a machine-readable passport system in place or be in the process of developing such a system. Each country must also meet other criteria, such as having a history of compliance with U.S. immigration laws, as well as a history of law enforcement cooperation, effective border controls, low visa refusal rates for its citizens, reciprocity for U.S. citizen travelers, and passport security. The program requires the DOS to submit a written report to Congress to explain each country's continued participation in or removal from the Visa Waiver Program.

In October 2001, in response to concerns that nearly all of the nineteen terrorists who hijacked the aircrafts on September 11 obtained visas lawfully at consular posts in Saudi Arabia and other Middle Eastern countries, the DOS implemented a new classified clearance program.¹⁰⁴ The program requires non-immigrant visa applications to be forwarded to the FBI for review when those applications are submitted by men between the ages of sixteen and forty-five from twenty-six designated countries.¹⁰⁵ Each FBI review takes up to twenty days to complete. Ironically, access to the FBI databases became available to the DOS only after the passage of the USA PATRIOT Act.

101. Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1637 (2000).

102. Mike Allen & Eric Pianin, *Bush Seeks Tighter Rules on Entry*, WASH. POST, Oct. 30, 2001, at A4.

103. The twenty-eight countries participating in the Visa Waiver Program are: Andorra, Argentina, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, The Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay.

104. As of this writing no official documentation about this new classified program has been published by the Department of State.

105. The complete list of countries included: Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen.

In addition to a mandatory waiting period of at least twenty days, affected applicants must also complete a supplemental questionnaire in addition to the standard non-immigrant visa application, Form DS-157.¹⁰⁶ The supplemental questionnaire includes questions about passport loss, military service or weapons training, and previous travel. Failure to provide truthful answers to these questions is another means the government will have at its disposal to prevent entry of suspected terrorists, to detain and remove them after arrival, or to charge them with criminal offenses, if the misrepresentations are discovered.

In another action responding to September 11, the DOS in November announced a temporary suspension of on-line and telephone non-immigrant visa appointment system for third-country nations at consular posts in Canada and Mexico. Third-country processing was restored with limitations in December.

IV. New Case Law

A. SUPREME COURT DECISIONS

The Supreme Court decided three significant immigration cases in 2001, all in five to four decisions. The three cases involved indefinite detention for "non-removable" aliens, judicial review, and retroactive application of two immigration laws passed in 1996, and an equal protection challenge to disparate naturalization requirements for out-of-wedlock children. Commentators widely viewed the first two decisions as expansive interpretations of immigrant rights.

*Zadvydas v. Davis*¹⁰⁷ concerned the indefinite detention of persons ordered deported, whose countries of origin do not accept their return. The INA provides that aliens ordered removed (deported) "may be detained" past ninety days if the AG determines that they are a flight risk or a danger.¹⁰⁸ In a five to four decision, the Court read this language to allow detention for only "a period reasonably necessary" to effect the detainee's removal from the country.¹⁰⁹ For the sake of uniform judicial administration, the Court found that six months (following a removal order) was a "presumptively reasonable period of detention."¹¹⁰ After six months, the detainee must offer "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."¹¹¹ If the detainee meets this burden, the government must either release the detainee, or continue the detainee's detention by showing that removal will occur in the "foreseeable future."¹¹²

The Supreme Court decided *Zadvydas* on statutory grounds to avoid finding it unconstitutional. In its analysis, it recognized that freedom from imprisonment lies at the heart of the Due Process Clause.¹¹³ In considering the possible "non-punitive" government interests served by detention, the Court judged the risk that an alien would flee (prior to removal) to be "weak or nonexistent" since removal could not be effected.¹¹⁴ In addition,

106. As we go to press the Department of State is now requiring all male applicants who fall within the target age group to file this supplemental form, regardless of country of nationality or origin.

107. 533 U.S. 678, 121 S. Ct. 2491 (2001).

108. INA § 241(a)(6).

109. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001).

110. *Id.* at 2504-05.

111. *Id.* at 2505.

112. *Id.*

113. *Id.* at 2498.

114. *Id.* at 2499.

while conceding that some detainees might be dangerous, the Court held that punitive detention could be upheld "only when limited to specially dangerous individuals and subject to strong procedural protections" and that the Constitution "may well" preclude affording an administrative body unreviewable authority on decisions involving fundamental rights.¹¹⁵

The Court recognized the longstanding distinction between aliens caught prior to entering the country (who have no constitutional rights as relate to immigration) and those who have legally entered the country (who do have constitutional rights), but rejected the government's argument that post-order detention was akin to the detention of arriving aliens.¹¹⁶ In addition, the Court found that indefinite detention would be a constitutionally impermissible way to implement the government's broad power over immigration.¹¹⁷ The Court distinguished the petitioners (lawful permanent residents with criminal records) from those in cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."¹¹⁸

In *INS v. St. Cyr*,¹¹⁹ Enrico St. Cyr, a lawful permanent resident, pled guilty to selling a controlled substance prior to passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹²⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA or the 1996 Immigration Act).¹²¹ At the time of his conviction, St. Cyr would have been eligible for discretionary relief from deportation. The INS interpreted AEDPA and IIRIRA to preclude this relief retroactively. In *St. Cyr*, the Court considered two questions: whether judicial review survived AEDPA and IIRIRA, and whether the statutes could be retroactively applied to deny relief.¹²²

As per *habeas* review, the Court found a "strong presumption in favor of judicial review of administrative action," that repeal could be accomplished only by an unambiguous statement of congressional intent, and that courts must adopt alternative constructions to those that raise "serious constitutional problems."¹²³ The Court also recognized that the protections of the habeas writ were "strongest" in "reviewing the legality of executive detention."¹²⁴ Combining these factors, the Court held that "the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions."¹²⁵

Likewise, the Court held that Congress could not apply a law retroactively without a clear and unmistakable indication (absent from the statute) of its intent to do so.¹²⁶ Applying the test set forth in *Landgraf v. USI Film Products*,¹²⁷ the Court held that the statute had

115. *Id.* at 2499–2500.

116. *Id.* at 2500–01.

117. *Id.* at 2501–02.

118. *Id.* at 2502.

119. *INS v. St. Cyr*, 121 S. Ct. 2271 (2001).

120. Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

121. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

122. *St. Cyr*, 121 S. Ct. at 2275.

123. *Id.* at 2278–79.

124. *Id.* at 2280.

125. *Id.* at 2287.

126. *Id.* at 2288.

127. *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994).

"retroactive effect" because it attached a "new disability" (the loss of discretionary relief from removal) to a plea agreement.¹²⁸ The decision left open the issue of whether relief would be available to those: (1) convicted of a crime after a trial, (2) who committed a crime prior to the change in the law but had entered a plea agreement afterwards, or (3) who had pled between passage of AEDPA and IIRIRA.

Tuan Anh Nguyen v. INS:¹²⁹ Under the INA, a child born out-of-wedlock, outside the United States, to a U.S. citizen mother and non-citizen father, acquires citizenship at birth, provided his or her mother previously resided continuously in United States for one year.¹³⁰ A child in the same circumstances, but with a U.S. citizen father and non-citizen mother, must meet additional requirements to naturalize. There must be clear and convincing evidence of the blood relationship between father and child.¹³¹ Before the child reaches age eighteen he or she must be legitimated, the father must acknowledge paternity in writing under oath or paternity must be established by a competent court.¹³²

Tuan Anh Nguyen was born out-of-wedlock to a U.S. citizen father and a Vietnamese mother. At age six Nguyen was admitted to the United States as a refugee to live with his father. He became a lawful permanent resident, but his father did not legitimate or establish Nguyen's paternity before his eighteenth birthday. In 1996 an IJ ordered Nguyen deported as the result of a felony conviction. On appeal, Nguyen challenged the disparate naturalization requirements on constitutional grounds.

In its equal protection analysis the Court considered whether the different requirements served "important governmental objectives" and were "substantially related" to their achievement.¹³³ In a five to four decision it held that the statutory classification was based on the "significant difference between" a mother's and a father's relationship with a child "at the time of birth."¹³⁴ It identified two objectives served by the different requirements: (1) to assure that a biological parent-child relationship existed, and (2) to afford the child and U.S. citizen parent (father) the opportunity to develop a relationship consisting of "the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."¹³⁵ The Court held that the requirements substantially furthered these objectives.

B. LOWER COURTS

On May 3, 2001 a federal court in Washington, D.C. ruled that the INS could not automatically apply new rules retroactively to certain immigrant investors. Instead, the INS must allow investors a chance to prove that retroactive application of the new rules would hurt them. The decision by Federal District Judge George H. King in *Chang v. United States*¹³⁶ was widely perceived as a victory for immigrant investors.¹³⁷

128. St. Cyr, 121 S. Ct. at 2290-91.

129. *Tuan Anh Nguyen v. INS*, 121 S. Ct. 2053 (2001).

130. INA § 309(c), 8 U.S.C.A. § 1409(c) (2002).

131. INA § 309(a)(1).

132. INA § 309(a)(4).

133. *Tuan Anh Nguyen*, 121 S. Ct. at 2059.

134. *Id.* at 2060.

135. *Id.* at 2060-61.

136. *Chang v. United States*, No. CV-99-10518-GHK (AJWx) (C.D. Cal. May 3, 2001), available at <http://www.ilw.com/lawyers/immigdaily/cases/2001,0511-chang.pdf>.

137. Press Release, American Immigration Lawyer's Association, Federal Court Rules in Favor of Immigrant Investors (May 9, 2001), available at <http://www.aila.org>.

The *Chang* case was a class-action lawsuit involving more than 200 foreign investors, including their family members and twenty-eight limited partnerships,¹³⁸ who sued the U.S. government in federal court in San Francisco in 1999 alleging that the INS illegally changed its rules with regard to the Immigrant Investor Program. The case is the largest of almost a dozen lawsuits filed against the INS over its alleged mishandling of the immigrant investor visa program.

The investors all obtained conditional green cards by investing in U.S. companies. The plaintiffs allege that after the INS granted them conditional resident status, the INS abruptly changed its rules interpreting the immigrant investor program in mid-1998, and began applying the new restrictive rules retroactively. Due to these changes the plaintiffs could now be deported from the United States even though they complied with the rules in effect when they invested their money. The plaintiffs claimed that the INS actions violated their constitutional due process rights, the Administrative Procedure Act, and the INA.

Congress created the employment-based fifth preference (EB-5) immigrant visa category in 1990¹³⁹ for immigrants who invest in U.S. companies that benefit the U.S. economy and create at least ten full-time jobs. The basic amount required to invest is \$1 million, although that amount is reduced to \$500,000 if one invests in a high unemployment area or rural area. When investors first make their investment, they get a "conditional" green card valid for two years. At the end of that time they must prove that they have satisfied the requirements of the law before INS will remove the condition and make them regular green card holders.

The requirements to obtain permanent residence through the employment-creation or investor program are strict. Although 10,000 EB-5 green cards are available annually, at most only about 1,000 investors and their families have immigrated in this category each year. Worried that some investors were not investing the required capital up front, in 1998 the INS issued four precedent decisions that significantly restricted eligibility for EB-5 status. In addition, the INS began applying the new restrictions retroactively to terminate the conditional green cards granted to foreign investors who made their investments in good faith based on the rules in effect before the 1998 decisions. About 850 investors are caught in this predicament.

Judge King held that the INS could properly change its administration of the immigrant investor program by issuing administrative decisions rather than following the normal notice and comment rulemaking required by the Administrative Procedure Act.¹⁴⁰ But the judge held that the INS could not "change . . . the rules of the game" by automatically applying its new, more restrictive interpretations retroactively to investors who already had received conditional green cards and who are now trying to have those conditions removed.¹⁴¹ Instead, the agency must allow such investors an opportunity to show how such a retroactive application would hurt them.

138. See *New Immigrant Investor Rules Subject to Retroactivity Review*, District Court Says, 78 No. 21 INTERPRETER RELEASES 875 (2001).

139. See *Lincoln Stone*, INS Decisions Cloud Future of Investor Pilot Program, 6 BENDER'S IMMIGR. BULL. 231, 233 (2001).

140. See *Chang*, *supra* note 136.

141. *Id.*

V. Developments in Refugee and Asylum Law

The year 2001 also included a number of developments related to refugee protection, including a moratorium on refugee admissions, U.S.-funded migrant interception programs, new administrative practices making it more difficult for arriving aliens to seek asylum in the United States, and the extension of temporary protection to specific nationals from various countries.

A. REFUGEE ADMISSIONS

On October 1 the United States began a moratorium on refugee admissions during the pendency of a security review of refugee and asylum law. The review directly impacted roughly 22,000 refugees previously approved for admission. On November 21 President Bush signed a determination letter authorizing the resettlement of 70,000 refugees in FY 2002, down from 80,000 in FY 2001, and well below the historic high of 207,116 in FY 1980.¹⁴² Despite the 80,000-refugee ceiling, the United States actually admitted only 68,426 refugees in FY 2001.¹⁴³ This trend will certainly continue in 2002. Apart from admitting no refugees during the first two months of FY 2002, the 22,000 refugees approved prior to September 11 for resettlement must go through a new security review process. By year-end, the INS also had stopped sending "circuit rider" examiners to many sites, and was processing refugees only in Vienna and Havana. As a result of these factors, the United States likely will not come near its 70,000 ceiling for refugee admissions in FY 2002.

B. PERSONS SEEKING ADMISSION

The 1996 Immigration Act created a system providing for the expedited removal of arriving aliens who lack adequate documents, unless they request asylum or express a fear of persecution.¹⁴⁴ Persons fleeing persecution often cannot secure travel documents. In addition, many lack the English-language proficiency, knowledge of U.S. laws, and trust in government officials, that would allow them to meet the threshold burden for non-removal. Thus, this system exacerbates risks that bona fide asylum-seekers will be returned to their persecutors.¹⁴⁵

Beyond interception programs, U.S. officials at ports-of-entry reportedly have forced some migrants to seek asylum outside the United States where they are subject to detention by Mexican officials.¹⁴⁶ In addition, aliens at certain ports-of-entry traditionally have been able to apply for asylum affirmatively (not in removal proceedings or as part of the expedited removal process), provided they remain in Mexico. Once these asylum-seekers received a "recommended" approval notice, they were paroled into the United States and, after they passed the security check, were granted asylum. After September 11 the INS suspended

142. Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Refugees by Nationality to the U.S. (FY 1975-2001)* (2001). Note that the refugee admission numbers in 1980 were largely affected by the "Mariel Boat Lift" from Cuba.

143. *Id.*

144. INA § 235(b)(1), 8 U.S.C.A. § 1225 (2002).

145. Eric Schmitt, *When Asylum Requests Are Overlooked*, N.Y. TIMES, Aug. 15, 2001, at A16.

146. Catholic Legal Immigration Network, Inc., CHAOS ON THE U.S.-MEXICAN BORDER: A REPORT ON MIGRANT CROSSING DEATHS, IMMIGRANT FAMILIES AND SUBSISTENCE-LEVEL LABORERS 35 (2001).

this practice. On September 12 a group of ninety-five Iraqi Chaldeans who had applied for asylum at a port-of-entry were arrested by Mexican officials and detained at a facility in Mexico City and at a Mexican army base near the border of Guatemala.

After September 11 local INS officials have also said that they would begin to refer aliens denied asylum for criminal prosecution for document fraud. Due to the chilling effect potential criminal prosecutions have on the right to seek asylum and the fact that many asylum-seekers cannot secure proper documents prior to their flight, prosecutions in these circumstances historically have occurred in only the most egregious cases.

In early December U.S. and Canadian officials signed a joint statement in which they agreed to discuss a safe third-country exception to the right to apply for asylum. If adopted, persons who do not receive asylum in one country will not be able to apply for it in the other. This rule may heavily impact asylum-seekers in transit through the United States to Canada.

C. MIGRANT INTERCEPTION PROGRAMS

U.S. interdiction efforts on the high seas and U.S.-funded migrant interception programs in Mexico and Central America also raise refugee protection concerns. In FY 2001, the Coast Guard intercepted 3,948 migrants, including 1,391 Haitians, 1,020 Ecuadorians, 777 Cubans, and 659 Dominicans.¹⁴⁷ In 1993, the Supreme Court held that the interdiction and repatriation of foreign-born nationals, without determining whether they were refugees, did not violate domestic or international law.¹⁴⁸ The Court held that the statutory language precluding return based on likelihood of harm applied only to deportation or exclusion procedures, and did not create extraterritorial obligations. The decision does not cover claims under the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which precludes return "regardless of whether the person is physically present in the United States."¹⁴⁹

U.S.-funded migrant interception in Mexico and Central America increased during the year. In June, the INS announced the arrest of 7,898 migrants from thirty-nine countries, along with seventy-five smugglers and illegal document vendors, in an effort led by national police and immigration officials of other countries.¹⁵⁰ These types of initiatives likely will increase in subsequent years. In the course of the U.S.-Mexico dialogue on immigration and economic development, Mexico reportedly offered to enforce its northern and southern borders more tightly, in return for an expansion of avenues to legal immigration for Mexican workers in the United States.¹⁵¹ Mexico now returns intercepted Central Americans to Guatemala, which with U.S. support repatriates them to their countries of origin.¹⁵² Mexico projected that it would intercept 250,000 migrants in 2001.¹⁵³ After September 11 President

147. U.S. Coast Guard, *FY 2001 Maritime Migration Interdiction and Flow Statistics*, Nov. 19, 2001, available at <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats01.htm>.

148. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

149. Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), Pub. L. No. 105-277, 112 Stat. 2681-822 repealed by 8 U.S.C.A. § 1231; see also 8 C.F.R. §§ 208.16, 208.17, 208.18 (2002).

150. News Release, INS, U.S. Dep't of Justice, *Largest Multinational Alien Smuggling Operation Results in 7,898 Arrests in Latin America and Caribbean* (June 27, 2001), available at <http://www.ins.gov>.

151. Mary Beth Sheridan, *Mexico Proposes Immigration Pact to Cut Down Third-Country Passage*, WASH. POST, Apr. 5, 2001, at A.

152. *Id.*

153. A. Solis, *Mexico's Plan Sure Illustrates Subservient Migration Policy*, BORDERLINES, July 13, 2001.

Fox championed the idea of a North American "security zone." If implemented such an initiative would significantly increase migrant interceptions. On November 30, 2001 Senator Kennedy introduced legislation to create a "perimeter national security" program to encompass the United States, Canada, and Mexico. This bill did not pass before Congress adjourned for the year. The INS ultimately hopes for a comprehensive agreement between the eleven nations who participate in the Regional Conference on Migration (i.e., the United States, Canada, Mexico, and Central American nations) to intercept and repatriate extra-regional migrants.¹⁵⁴

D. TEMPORARY PROTECTED STATUS

In 2001, the AG designated or extended periods of temporary protected status (TPS) for select nationals from Angola, Burundi, El Salvador, Honduras, Montserrat, Nicaragua, Sierra Leone, Somalia, and the Sudan. TPS can be granted, at the AG's discretion, to groups who cannot return to their countries of birth due to armed conflict, natural disaster, or other extraordinary circumstances.¹⁵⁵ President Bush also extended the period of deferred enforced departure—a temporary status that simply prevents removal—to select Liberian nationals. During the year, the AG let TPS lapse for previously designated nationals from Bosnia and Herzegovina, Guinea-Bissau, Kosovo Province, Kuwait, Lebanon, Liberia, and Rwanda.

VI. Conclusion

As in the year before, during the first three quarters of 2001 a combination of factors played a role in shaping developments impacting immigration and nationality law. Foremost among these were the political influences of a new administration coming to office in January, and its determination to solidify and expand on its relationship with the new government in Mexico City as well as to deliver on pro-immigration campaign promises from the fall. Looming as a potential spoiler to the thrust of initiatives planned early in the year, however, was the impact of what had now become a serious economic downturn as the economy fell into full recession.

One of the most tragic days in American history changed all of this—at least temporarily. Legislative and policy initiatives intended to reform both the substance and structure of the immigration system immediately ground to a halt following September 11. In their place, emergency measures to address pressing border and interior security deficiencies received bipartisan support in Congress, giving the Administration most if not all it asked for to combat the threat of further terrorism from within and outside the United States. The direction of immigration reforms will likely remain focused on security measures for much of the year to come, but as we complete this article there are signs of re-emerging attention to other pressing matters as well, including a resumption of bilateral discussions with Mexico, an end to the post-September 11th moratorium on refugee admissions, and the introduction of competing proposals for reorganization of the INS. These and other issues will all influence the direction of developments in immigration and nationality law in 2002.

154. Terms of Implementation for the Regional Conference on Migration's General Program of Cooperation for the Return of Extra-Regional Migrants (draft) (on file with author).

155. INA § 244(b), 8 U.S.C.A. § 1254a (2002).

