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Immigration and Nationality Law

MARK R. VON STERNBERG*

I. Introduction

The year 2003 illustrated the continuing tension between modern immigration law and existing policies since September 11, 2001. Statutory, regulatory, and case law developments alternate between advances that suggest the law will evolve along a rational developmental path, and initiatives that imply that immigration will continue to be shaped by the security concerns spawned by the September 11 terrorist attacks on the United States.

The duality of this approach was most apparent in attempts to create legislation. Although no major legislation passed during the year, several legislative initiatives of great magnitude were put forward. Some of these were ameliorative, and addressed long-standing immigration and social concerns. For example, the Development, Relief, and Education for Alien Minors (DREAM) Act, offers the prospect of lawful permanent residence to many undocumented students in the United States, helping to replenish the nation's diminishing human capital.¹ Similarly, the proposed Agricultural Job Opportunity, Benefits, and Security Act of 2003 (AgJOBS)² establishes a mechanism by which agricultural workers may acquire permanent status in the U.S., providing social protection to an historically vulnerable class.

The year 2003 also saw the appearance of highly restrictive measures. Among these was the Domestic Security Enhancement Act of 2003 (PATRIOT Act II), an initiative never

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1. Development, Relief, and Education for Alien Minors (DREAM) Act of 2003, S. 1545, 108th Cong. (2003).

2. Agricultural Job Opportunity Benefits and Security Act of 2003 (AgJOBS), S. 1645, 108th Cong. (2003).

introduced but widely discussed. The PATRIOT Act II would expand upon the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act by continuing the policy of secret mass detentions. The Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act)³, which would engage state officials in the enforcement of federal immigration statutes, was also introduced in 2003. Minor legislation regarding employment-based non-immigrant visas was also proposed, but had not been acted on at year's end. In addition, the religious worker provisions of the Immigration and Nationality Act pertaining to immigrant visas were extended five years.⁴

Also characterizing the year was growing criticism of the USA PATRIOT Act and the Attorney General's practice of mass detentions. To critics, the detentions reflect a policy of discrimination aimed at confessional Muslims. Chief among these criticisms was a Report of the Inspector General setting forth specific excesses under the detention program.⁵ In addition, many municipalities issued resolutions forbidding their employees from violating state and federal constitutional provisions in their enforcement of the PATRIOT Act. Also widely disparaged was the Attorney General's National Security Entry-Exit Registration System (NSEERS) program, which would have required port of entry and internal registration of foreign nationals from specified states. By the end of the year, the government announced a retreat from the NSEERS program.

In place of NSEERS, the United States has begun formulating the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program, which was announced by the Department of Homeland Security (DHS) Secretary Tom Ridge in April 2003.⁶ US-VISIT entails the collection of vital information, including biographic details and data concerning criminal, immigration, and security-related matters, of non-citizens seeking admission to the United States. Correspondingly, the Department of State has adopted regulations which substantially restrict the conditions upon which non-immigrants may have a personal consular interview waived prior to admission to the United States. The new regulations are expected to engender substantial delays. New regulations were also adopted in 2003 to clarify the distribution of responsibilities among the federal agencies charged under the Homeland Security Act with administering U.S. immigration laws.

The Supreme Court's decision in *Demore v. Kim*⁷ dominated the area of case law development. *Demore* marks an apparent retreat from the protections mapped out in *Zadvydas v. Davis*,⁸ in which the Court looked to constitutional controls to place limits on the plenary power doctrine, establishing a time period in which otherwise deportable non-citizens must be released if they cannot be removed. The Court declined to extend *Zadvydas* to the area of criminal non-citizens who must be statutorily detained while their removal cases are

3. Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act), H.R.2671, 108th Cong. (1st Sess. 2003).

4. Religious Worker Immigration Program Extension, 108 Pub. L. No. 108-99, 117 Stat. 1176 (Oct. 15, 2003).

5. U.S. Department of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (June 2003), available at <http://www.usdoj.gov/oig/special/0306/index.htm> (last visited May 20, 2004).

6. Press Release, Department of Homeland Security Announces Funding for States and Localities (Apr. 30, 2003), available at <http://www.dhs.gov/dhspublic/display?content=586>.

7. *Demore v. Kim*, 538 U.S. 510 (2003).

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

pending. In other developments, the Court declined to review a ruling of the Third Circuit upholding the constitutionality of secret removal proceedings; agreed to review whether the writ of habeas corpus extends to foreign nationals detained at Guantanamo Bay, Cuba as "unlawful combatants;" and upheld a determination of the Eleventh Circuit denying a stay of removal so that a petition for review could be heard.

The Second Circuit ruled that the President did not have the independent power to detain a U.S. citizen as an "enemy combatant." Merely hours later, the Ninth Circuit concluded that federal courts have habeas jurisdiction to review issues arising out of the detention of non-citizens at the Guantanamo Naval Base in Cuba. The Supreme Court is likely to resolve the questions presented in the two cases.

Lower courts also made important pronouncements in the areas of collateral immigration consequences of a criminal conviction and federal review of applications for lasting immigration relief, which contain a discretionary element. The year included several administrative decisions of note, including a significant determination by the Board of Immigration Appeals (BIA or Board) that victims of coercive family planning programs could still benefit from the presumption of future persecution even though they had suffered a non-repeatable form of harm.

Delays continued to plague administration of the refugee program, resulting in final admission numbers that remain below authorized limits. The adjustment of status for asylees continued to experience lengthy delays. In addition, a class action against the Attorney General alleging mismanagement of asylum visa numbers remained pending. Nevertheless, the Temporary Protected Status (TPS) program remained active with the Bureau of Citizenship and Immigration Services (CIS) extending TPS status for several countries.

II. Legislative Developments

Although 2003 was not a year of significant statutory enactments, there were substantial legislative initiatives during the period. For the most part, the nature of these initiatives mirrored the divisions in immigration law and policy that have predominated since the September 11 attacks.

A. THE PATRIOT ACT II

In the early part of the year, information leaked concerning draft legislation which would further expand the already-controversial broad powers of the government to control terrorism under the USA PATRIOT Act.⁹ The PATRIOT Act II, which was never introduced as proposed legislation contains provisions which raise substantial due process concerns about the rights of non-citizens. The draft measure would prohibit the release of the names of individuals detained during a terrorism investigation.¹⁰ Since this would include those confined for minor immigration violations, the provision seeks to codify the practice of keeping secret the names of non-citizens arrested solely because of their lack of immigration status. In another area already engulfed in controversy, the PATRIOT II Act would open the immigration files of non-citizens to local police immigration law enforcement.¹¹ The

9. Patriot Act II—Draft Legislation, *available at* <http://www.thenewamerican.com/focus/patriotact/patriotact2.pdf> (last visited May 20, 2004).

10. *Id.* § 201.

11. *Id.* § 311.

draft legislation also provides for the expatriation of citizens who supply "material support," which includes the giving of donations to terrorist organizations.¹²

The legislation adds criminal penalties for minor immigration infractions, such as failure to carry an alien registration card or to report a change of address.¹³ The Attorney General is authorized to summarily remove any non-citizen the Attorney General has "reason to believe" constitutes a security threat to the United States.¹⁴ The "reason to believe" standard, based on an untested assessment by the Attorney General, parallels a pre-existing procedure under the USA PATRIOT Act for the detention of suspected terrorists.¹⁵ The PATRIOT Act II would, for the first time, subject lawful permanent residents to expedited removal, thus excluding them from the protections of quasi-judicial proceedings before an immigration judge and from judicial review of the removal process.¹⁶ Other provisions would reduce the time to depart after the entry of a removal order¹⁷ and authorize removal to non-recognized countries.¹⁸ At year's end, the proposed measure seemed to enjoy little support among legislators.

B. THE CLEAR ACT

In the middle of the year, Representative Charles Norwood (R-GA) and others introduced a bill in the House of Representatives known as the CLEAR Act.¹⁹ By using the carrot and stick approach, the CLEAR Act seeks to accomplish through more discrete means many of the provisions contemplated by PATRIOT Act II. The CLEAR Act reposes in State and local authorities the power to "investigate, apprehend, detain or remove aliens in the United States (including the transportation of such aliens across State lines to detention centers)."²⁰ The CLEAR Act would require states and municipalities to provide background information about apprehended undocumented aliens to the Department of Homeland Security within ten days under the threat of ineligibility for future federal funding for failure to implement appropriate enforcement policies.²¹ Corresponding draft legislation would require the withdrawal of federal funding to states that fail to implement statutes authorizing the enforcement of immigration laws within two years after enactment.²²

At the same time, the CLEAR Act provides substantial economic incentives for those States and localities which adopt enforcement measures, including participation in collected civil penalties and forfeitures²³ and compensation for the costs of incarcerating non-citizens.²⁴ The CLEAR Act also requires the Attorney General or the DHS to develop a training program in which state and local officials can learn about immigration enforcement

12. *Id.* § 501.

13. *Id.* § 502.

14. *Id.* § 503.

15. *Id.* § 504.

16. *Id.* § 505.

17. *Id.* § 506.

18. CLEAR Act, H.R.2671, 108th Cong. (1st Sess. 2003).

19. *Id.* § 101.

20. *Id.* § 105.

21. *Id.* § 102.

22. *Id.* § 103(f).

23. *Id.* § 107.

techniques.²⁴ It also confers certain immunities upon state and local agencies arising from enforcement activities.²⁵ Similar to the disclosure of the PATRIOT Act II, the proposal of the CLEAR Act stimulated harsh criticism over the Act's effect of reposing federal functions in state and local officials who were not equipped to execute them. Critics also voiced concern over the negative public policy implications of discouraging undocumented aliens from seeking needed redress in criminal and humanitarian matters.

C. THE DREAM ACT

Contrasting with the above measures, which clearly have their provenance in the September 11 attacks, were the late summer proposals of the DREAM Act by Senators Orin Hatch (R-UT) and Richard Durban (D-IL) in the Senate,²⁶ and the Student Adjustment Act by Rep. Chris Cannon (R-UT) and fifteen co-sponsors in the House.²⁷ Taken together, these two bills would confer relief to undocumented non-citizens studying at United States educational institutions.

For instance, DREAM, provides that certain students who have not yet turned sixteen may apply for conditional permanent residence if they can show five years of continuous physical presence in the United States prior to the date of enactment and "good moral character" running from the date of application.²⁸ In addition, the applicant must not be inadmissible or deportable on criminal, security, or other grounds, and must not be subject to a final order of removal.²⁹ Qualifying students are those who have graduated from a U.S. high school, been accepted to college in the United States, or obtained a general equivalency diploma.³⁰ Conditional residence would be conferred for a six year period, after which a qualifying applicant could be granted permanent residence upon satisfying any one of the following conditions: graduation from a two-year or vocational college; service of at least two years in the U.S. armed forces; or performance of 910 hours of community service.³¹

Essentially, the DREAM Act would eliminate the restrictions established in § 505 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)³² which state that individuals must be in lawful immigration status to qualify for post-secondary educational benefits based on state residency.³³ DREAM would allow states to extend to non-citizens the same sharply reduced tuitions that currently exist for state residents, thus easing foreign nationals' access to U.S. educational opportunities.

The DREAM Act has attracted much support over the year. By October 2003, the bill had been passed by the Senate Judiciary Committee, but only after incorporation into a very damaging amendment sponsored by Senators Dianne Feinstein (D-CA) and Charles Grassley (R-IO). The amendment would render otherwise qualifying students ineligible for federal financial grants, such as Pell Grants.³⁴ Notwithstanding this development, the pro-

24. *Id.* § 109(c).

25. *Id.* § 110.

26. S. 1545, 108th Cong., 1st Sess.

27. H.R. 1684, 108th Cong., 1st Sess.

28. S. 1545 § 4(a).

29. *Id.*

30. *Id.*

31. *Id.* § 4(c).

32. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. No. 104-208, 110 Stat. 3009-587 (Sept. 30, 1996).

33. *Id.* § 3.

34. Congress Web, *Pass the DREAM Act and Student Adjustment Act*, at <http://www.congressweb.com/cweb4/index.cfm?orgcode=ACCT&issue=7&showheaderfooter=no> (last visited May 20, 2004).

posed legislation has been generally praised as expanding the United States' supply of needed human capital and as providing those who have benefited from U.S. educational institutions the right to make a contribution.³⁵

D. AgJOBS

Another significant development was the introduction in both the Senate and the House of AgJOBS. On September 23, 2003, Senators Edward M. Kennedy (D-MA) and Larry Craig (R-ID) introduced S. 1645 in the Senate,³⁶ while a similar bill was introduced in the House by Representative Howard L. Berman (D-CA) and Chris Cannon (R-UT).³⁷ Numerous co-sponsors have agreed to support the measure. Under the Senate bill, agricultural workers would be eligible for temporary residence in the United States if they could show that they had worked for at least 575 hours or 100 days (whichever is less) during any twelve consecutive months within an eighteen-month period ending August 31, 2003.³⁸ The applicant must establish eligibility by a preponderance of the evidence, which may consist of the employer's records or the production of sufficient evidence to demonstrate that eligibility standards have been met. Application may be made with the Secretary, with a qualified designated entity, or, outside the United States, at an appropriate consular office. Those qualifying for temporary residence are given travel rights and employment authorization. The temporary resident may not be fired so long as he was in status. Status does not come to an end unless the temporary resident engages in activity that renders him deportable.

Temporary residents can then adjust their status to that of lawful permanent residence. The applicant must show that he/she has performed 2,060 hours or 360 work days (whichever is less) of agricultural labor during the period beginning September 1, 2003, and ending August 31, 2009.³⁹ Two-thirds of the required 360 days or 2,060 hours must be completed during the first two years.⁴⁰ Application must be made by August 31, 2010.⁴¹ Spouses and those who were minor children at the time the agricultural worker was granted temporary residence are included in the application and may thus be granted permanent residence along with the principal applicant. The applicant must be admissible, but waivers may be secured for most grounds based on public interest, family unity, and humanitarian concerns.⁴² The bill has been heralded by immigration advocates as constituting an extraordinary advance, whereby a group which has long suffered from exploitation at the hands of employers can be protected by U.S. labor policy and access much needed social protection.

35. U.S. Visa News, *DREAM Act of 2003 Moves to Senate With Amended Provisions*, available at: <http://www.usvisanews.com/memo2168.html> (last visited May 20, 2004).

36. S. 1645, 108th Cong., 1st Sess.

37. H.R. 3142, 108th Cong., 1st Sess.

38. S. 1645, § 101(a)(1)(A).

39. *Id.* § 101(c)(1)(A)(i).

40. *Id.* § 101(c)(1)(A)(ii).

41. *Id.* § 101(c)(1)(A)(iv).

42. *Id.* § 101(e)(2). The proposed legislation also contains provisions relating to reforming the H-2A program for non-immigrants. Among other things, the bill would strengthen U.S. labor standards by requiring that H-2A workers: (1) be reimbursed for certain types of transportation expenses; (2) receive either housing or a housing allowance at no cost to the worker; and (3) be paid either the prevailing wage or the wage paid to other U.S. workers similarly situated. *Id.* § 201, amending the INA §§ 218A(b)(1)(2)-(3), 8 USC §§ 118A(b)(1)-(3). Waivers for inadmissibility based on criminal, public charge, prior drug offenses, and security-related grounds are not available.

E. EMPLOYMENT-BASED IMMIGRATION

Significant activity also took place in the field of employment-based immigration law although the impending difficulties now posed by the annual 65,000 cap on H-1B non-immigrant visas remain unresolved. The H-1B classification applies to those non-immigrants coming to the United States to perform a Specialty Occupation.⁴³ The H-1B category remains the principal non-immigrant classification for U.S. employers seeking to access the international labor market to satisfy vital staffing needs.

In 1990, Congress placed, for the first time, numerical restrictions on the number of H-1B visas that could be issued annually. The 1990 cap was set at 65,000 visas. Subsequent legislation in 1998 raised the cap for fiscal years 1999 and 2001. In 2000, Congress acted again to raise the cap to 195,000 for the fiscal years 2001 through 2003. The 65,000 cap is to be reinstated for fiscal year 2004. Not counted against the cap are petitions for Specialty Occupation non-immigrants who are currently present in the United States in H-1B status. Certain occupations also are exempted specifically by legislation passed in 2000; these, include those coming to work at institutions of higher education and non-profit research organizations.⁴⁴

Although present statistics are inaccurate due to backlogs, they indicate that the current 195,000 H-1B cap was not reached in fiscal year 2003. This situation was clearly modified, in February 2004 when the USCIS announced that the agency had "received enough H-1B petitions to meet" the 65,000 cap for fiscal year 2004.⁴⁵ Influencing such change has undoubtedly been the adoption of the Chile and Singapore Free Trade Accords. These new agreements, implemented by the United States-Chile Free Trade Implementation Act⁴⁶ and the United States-Singapore Free Trade Implementation Act,⁴⁷ contain provisions that have a significant effect on numerous non-immigrant classes, including business visitors, intra-company transferees, treaty traders and investors, and H-1B's. With respect to non-immigrant admissions, the agreements mirror earlier free trade accords, with the following special restrictions applying to the Specialty Occupation class: (1) annual limits of 5,400 in Singapore and 1,400 in Chile, with admissions to count against the 65,000 annual cap now applicable in 2004; (2) the requirement that a labor condition application be approved prior to admission and that it indicates that the Specialty Occupation non-immigrant will be paid either the prevailing wage or the actual wage, whichever is higher; (3) an initial period of admission of one year with additional incremental periods of stay indefinitely thereafter; and (4) non-recognition of the doctrine of dual intent. Dual intent is otherwise applicable to the H-1B class, as well as to other non-immigrant categories, and allows, under stated conditions, a non-immigrant period of stay to be extended despite the fact that an immigrant visa petition remains pending.⁴⁸

43. Generally those having a profession as manifested by a U.S. baccalaureate degree or its equivalent, and whose professional skills are needed to perform the proposed employment here. 8 U.S.C. § 1101 et seq. INA § 101(a)(15)(H)(1)(b).

44. For background information, see Austin T. Fragomen and Steven G. Bell, *Immigration Fundamentals* § 5.10.1 (2003).

45. U.S. Citizenship and Immigration Services, Press Release, USCIS Announces New H-1B Procedures—Reaches Cap (Rev. 2/19/04) (Feb. 17, 2004), available at <http://www.uscis.gov>.

46. See United States-Chile Free Trade Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003).

47. See United States-Singapore Free Trade Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003).

48. For a discussion of the H-1B cap and the manner in which it may be impacted by the Singapore and

During 2003, several bills were introduced which would both place substantial restrictions on the use of the L-1 non-immigrant classification and directly affect the H-1B class. Congress enacted the L-1 category in 1970 to facilitate the admission of managers, executives and those having specialized knowledge who are being transferred by a multinational concern maintaining a business presence in the United States.⁴⁹ At the end of the year, however, a far more limited Senate bill was introduced—the L-1 Visa (Intracompany Transferee) Reform Act of 2003.⁵⁰ The Act would render ineligible for L-1 classification non-citizens seeking admission on the basis of “specialized knowledge” where the alien will be stationed at a work site different from that of the petitioner if either of the following conditions are present: (1) the alien will be supervised by an employer other than the petitioner; or (2) placement of the alien is part of an arrangement to provide a product or service for which “specialized knowledge” specific to the petitioner is not required.⁵¹

Finally, on October 15, 2003, in a measure which was widely expected, President Bush signed into law an extension of the religious immigrant worker program for another five years.⁵² Although the law has been routinely extended since its initial adoption in the Immigration Act of 1990, this is the first time that the program has been extended for five years instead of the customary two-year period.

III. Administrative and Regulatory Developments

A. DEPARTMENT OF HOMELAND SECURITY

1. Enforcement Measures

Among the principal developments of 2003 was municipal governments' sustained resistance to enforcement of the USA PATRIOT Act adopted by the Congress in 2001 in the

Chile Free Trade Accords, *see generally* Austin T. Fragomen and Howard W. Gordon, *Legislative and Administrative Update*, 36th Annual Immigration & Naturalization Institute 11, 18–20 (2003).

49. For instance, on July 25, 2003, Senator Christopher Dodd (D-CT) and Representative Nancy Johnson (R-CT) introduced companion legislation in the Senate (S. 1452) and the House (H.R. 2849) which would subject all L-1 non-immigrants to the labor attestation and prevailing wage requirements which presently apply only to those seeking admission in the H-1B category. The bill also contained the following substantive restrictions: (1) a prohibition on outplacement where there were indications of employment with the second employer; (2) a reduction in the period of stay to 5 years in the case of intra-company managers and directors (L-1A's) and to 2 years in the case of those having specialized knowledge (L-1B's); (3) a requirement that the L-1 have two years of experience rather than one, as is the case under current law; (4) restrictions on the use of blanket petitions; (5) a showing that the petitioner is attempting to recruit U.S. workers; and (6) provisions restricting the layoffs of U.S. workers similar to those proposed for Specialty Occupation non-immigrants. This legislative initiative, insofar as it affects the L-1 class, would appear to go well beyond apprehensions regarding abuses in the outplacement context. Rather, it reflects a continuing concern relative to eliminating the L-1 class from U.S. labor policy and illustrate the need to subject multinational corporations to U.S. labor standards. The proposed legislation would also apply fresh restrictions on the H-1B category. Presently, H-1B employers are subject to numerous restrictions only if they are “H-1B dependent employers” (signifying generally that greater than 15 percent of the employer's work force is comprised of H-1B workers). These restrictions include a labor attestation requirement to the effect that the employer is continuing to recruit U.S. workers to fill the position covered by the petition and that there has been no displacement of U.S. workers for 90 days immediately preceding placement of the H-1B non-immigrant and for ninety days thereafter. The proposed legislation would extend this period to 180 days before and after placement.

50. L-1 Visa (Intracompany Transferee) Reform Act of 2003, S. 1635, 108th Cong. (1st Sess. 2003).

51. *Id.* § 3(a).

52. H.R. 2152, Pub. L. No. 108–99, 117 Stat. 1176 (Oct. 15, 2003).

wake of the September 11 attacks. Among other things, the USA PATRIOT Act sought to involve state and local governments in immigration enforcement, an area where they had little or no experience. In the wake of highly unprecedented restrictions contained in the USA PATRIOT Act, approximately twenty municipal governments have undertaken counter-measures, such as the resolution adopted by the City of Oakland (California) in December 2003 ordering its employees not to cooperate with federal investigations which are believed to violate the Bill of Rights.⁵³ While maintaining a staunch resolve to fight terrorism by any legitimate means, such local initiatives have been based on the premise that weeding out terrorism should not be accomplished at the expense of fundamental human rights and liberties.

Reaction by local governments was accompanied at the federal level by a Report of the Inspector General issued under the USA PATRIOT Act substantially criticizing the detention policies of the Department of Justice.⁵⁴ The report concluded that the Federal Bureau of Investigation (FBI) failed to distinguish between aliens who were legitimately suspected of terrorism, and those who, at most, would have been culpable of relatively innocuous immigration violations. Many aliens who had been detained did not receive a Notice to Appear (the relevant charging document) within the normally required forty-eight hours, and often had to wait a month to be apprised of the charges against them.

Many of those detained were confined under highly restrictive conditions, usually based on the uninformed opinion of the FBI regarding the non-citizen's connection to terrorism. Such restrictive conditions could consist of a "lock-down" for at least 23 hours a day; escort procedures that included a 'four-man hold' with handcuffs, leg irons, and heavy chains any time the detainees were moved outside their cells; and a limit of one telephone call per week and one social call per month.⁵⁵ As a result of these procedures, many detainees were unable to communicate with counsel and thus gain legal representation. Moreover, the family and friends of detainees often were wholly ignorant of where they were, while even law enforcement officials were unable to determine their whereabouts. All of this was accompanied at some facilities by a pattern of continuing harassment, carried out by correctional officials and by the prison population with which the 9/11 detainees were often housed. The Inspector General's Report has obviously increased public anxieties regarding the enforcement measures adopted by the government to fight terrorism and has assisted in creating an environment of public resistance to the excesses fostered by those measures.⁵⁶

In apparent acquiescence to the emerging mood, DHS announced, towards the end of the year, a substantial dilution to its NSEERS program. Initially, NSEERS had been implemented in 2002 in an effort to track and monitor certain non-immigrants throughout their stay in the United States. Certain classes were exempt from registration, including U.S. citizens, lawful permanent residents, asylum applicants, asylum grantees, and non-immigrants in the A or G classes (relating for the most part to diplomats). NSEERS required registration at two critical junctures: (1) upon initial arrival in the United States; and (2) re-registration on an annual basis if the non-citizen is within a group of citizens or

53. ABC News, *War on Terrorism Walkouts: Oakland, Flagstaff City Councils to Vote on Opposition to Patriot Act Provisions* Dec. 17, 2002, available at http://abcnews.go.com/sections/us/DailyNews/usapatriot_oakland021217.html.

54. See *supra* note 5.

55. *Id.*

56. *Id.*

nationals of certain designated countries. To comply, many non-citizens residing in the United States who entered as non-immigrants before the commencement of the program were required to appear before the former Immigration and Naturalization Service (INS) and register under NSEERS.⁵⁷ For the most part, these foreign nationals were the citizens of predominantly Islamic states located in the Near East. Again, the NSEERS program, as implemented, has been perceived as seriously flawed and predicated on a policy of discrimination toward confessional Muslims.

On December 1, 2003, DHS announced that it would suspend two principal elements of the NSEERS program: (1) the annual re-registration requirement applicable to both "call-in" registrants and those registering at a port-of-entry (POE); and (2) a thirty-fourty day follow up interview applicable only to POE registrants.⁵⁸ The DHS statement accompanying the announcement of the new policy reflects that NSEERS has largely been a success, with more than 13,800 individuals with immigration violations referred to immigration courts for expulsion proceedings, and "several individuals" with possible terrorist links being entry.⁵⁹

2. Processing Issues

The new system, which will eventually absorb NSEERS, is the US-VISIT program. US-VISIT was announced by the Secretary of Homeland Security Tom Ridge on April 29, 2003, and further refined by Asa Hutchinson, Undersecretary for Border and Transportation Security on April 29, 2003.⁶⁰ An integrated entry-exit system was mandated by the Immigration Reform and Immigrant Responsibility Act of 1996, with deadlines set by subsequent legislation of December 31, 2003 for sea and air ports of entry and of December 31, 2004 for high-traffic land border ports of entry.⁶¹

Secretary Ridge describes US-VISIT as a "check-in/check-out" system. The system will collect information concerning foreign nationals, including elements of his or her background which may render the non-citizen ineligible to enter the United States. Such information consists of details regarding whether the applicant has a criminal past, has previously violated her period of stay, has terrorist connections, or otherwise presents a national security risk. Initial information gathering will take place at international sea or air ports of entry at which the foreign national's passport will be scanned and her photograph and fingerprints will be taken. Border officials will then collect data concerning the individual applicant including basic biographic information, country of nationality, passport number, alien registration number where applicable, and address in the United States. The information will then be checked against various databases maintained by national security and law enforcement agencies in the United States. The foreign national's identity will be re-verified upon departure. The system is intended to track extensions and changes in the applicant's period of stay. The information collected at POE's will be available to inspectors

57. This aspect of the program was designated "call-in" registration. *Id.*

58. 8 C.F.R. § 264.1 (2004).

59. U.S. Department of Homeland Security, *Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS)* (Dec. 1, 2003), available at <http://www.dhs.com>.

60. U.S. Department of Homeland Security, Press Release, *Fact Sheet: U.S.-VISIT PROGRAM* (May 19, 2003), reprinted in 8 Benders Immigration Bulletin 984-86 (June 1, 2003).

61. See generally Austin T. Fragomen and Howard W. Gordon, *Legislative and Administrative Update*, 36th Annual Immigration and Naturalization Institute 11, 16-17 (2003).

at the U.S. Bureau of Immigration and Customs Enforcement (ICE), other immigration adjudication offices, law enforcement agencies, and U.S. consular offices.⁶²

The Homeland Security Act mandates that all immigration-related function previously undertaken by the former INS be discharged by the newly-created DHS.⁶³ Formal transfer of power from the INS to the DHS took place on March 1, 2003. During the year, major modifications were made affecting the regulatory structure which administers the Immigration and Nationality Act.

In the HSA, Congress divided the former INS's enforcement functions into two distinct agencies within the DHS: one for service needs and the other for enforcement matters. The HSA further empowered the President to amend the statutory allocation of functions. The President, acting pursuant to this grant of authority, transformed two enforcement agencies into three. At present, two agencies serve enforcement objectives, while a third exists for service functions. The two enforcement agencies are the Bureau of Customs and Border Protection (CBP), which is headed by a Commissioner; and the Bureau of Immigration and Customs Enforcement which is headed by an Assistant Commissioner. Both enforcement agencies operate under the Undersecretary of Border and Transportation Security, who is directly responsible to the Secretary of Homeland Security.⁶⁴

The CBP assumed the responsibilities of the old INS Border Patrol as well as certain border inspections that were had been executed by a number of agencies, including the INS and the Customs Service. The border inspections are conducted at all POEs—land borders, airports, and seaports. For matters within the United States, the ICE is chiefly responsible for enforcing the Immigration and Nationality Act. ICE duties include conducting investigations, gathering intelligence, and registering non-citizens. The ICE will also assume certain important litigation responsibilities, including representing the government's interests in removal proceedings before the Executive Office of Immigration Review (EOIR).

The newly created Bureau of Citizenship and Immigration Services, which was renamed the U.S. Citizenship and Immigration Services (CIS), assumes the "benefits" functions of the old INS. For instance, the CIS is responsible for processing a variety of applications, including immigration petitions and applications for adjustment of status. As opposed to the new DHS agencies, the EOIR remains under the Department of Justice and has been largely unaffected by the HSA. One important development under the HSA, however, is the regulatory change adopted in February that makes decisions of the BIA binding on all DHS officers as well as on immigration judges.⁶⁵

B. DEPARTMENT OF STATE

In an important measure which will have a substantial effect on non-immigrant traffic to the United States, the Department of State issued an interim rule which significantly increases the number of non-immigrant applicants who must appear for a personal interview before a non-immigrant visa will be granted. A May 21, 2003 cable instructed consulates to implement the new restrictions as quickly as possible with full implementation to take

62. *Id.*

63. Homeland Security Act of 2002 § 471(a), Pub. L. No. 107-296, 116 Stat. 2135 (2002).

64. See *Border Reorganization Fact Sheet* (Jan. 20, 2003), cited in Steven Legomsky, *Immigration and Refugee Law and Policy* 3 (2003 Supp.).

65. See 68 Fed. Reg. 9831-32 (Feb. 28, 2003), amending 8 CFR § 1003.1(g).

place by no later than August 1, 2003. The State Department issued its interim rule on July 7, 2003.⁶⁶ While the new policy provides for limited exceptions, such as visa re-issuance, it is widely believed that most non-immigrants will be subject to the new procedures and that substantial delays will be involved.

In the past, consular officials were authorized to waive personal interviews in a variety of circumstances. Such instances have entailed applicants for admission who are visitors, specialty occupation non-immigrants, and certain exchange visitors. These classes will now be subject, for the most part, to an interview requirement. Furthermore, the exception previously existing for persons under the age of fourteen was raised to sixteen. In general, only the following categories of individuals will be exempt: (1) children under the age of 16; (2) persons who are older than 60; (3) certain non-immigrants covered by the A and G categories as well as those eligible for NATO visas, not including their servants and personal attendants; (4) diplomats who are heads of state or senior foreign officials, including their family members and support staffs; (5) applicants seeking visa re-issuance within twelve months at the post of their usual residence; and (6) those who are determined to merit a waiver in the national interests or by reason of unusual circumstances.⁶⁷

The Deputy Assistant Secretary for Visa Services may waive a personal interview for an individual if the Deputy Secretary finds that certain criteria are met and that national security interests do not require an interview. Natural disasters, political turmoil, or other developments with humanitarian implications which impede the foreign national's access to the consulate are clearly contemplated in this exception.⁶⁸ For instance, many French nationals seeking non-immigrant visas were excused from the interview process in 2003 because of the summer's excessive heat wave, which caused an unprecedented number of deaths.

The aforementioned exceptions are not compulsory, however, and the consulate may still require an interview in the exercise of discretion. Moreover, even if an exception applies, the following classes will be required to sit for an interview: (1) those who do not reside in the consular district in which the application is being made; (2) those previously denied a visa; (3) those requiring a security advisory opinion from the State Department; and (4) those identified as members of a group considered to be a high fraud risk, to have a high refusal rate, or to present national security concerns.⁶⁹

In August, the State Department, in conjunction with the DHS, announced the temporary suspension of two widely-used programs: the Transit Without Official Visa (TWOV) Program and the International to International (ITI) Program. These suspensions were effective as of August 2, 2003.⁷⁰ The TWOV Program allows passengers arriving in the United States to land here, provided that they undergo immigration and customs checks and are scheduled to leave on the same or a connecting plane within eight hours of their arrival. The ITI Program allows foreign nationals on their way to an alternative destination to "transit" in a U.S. airport. ITI passengers are subject to immigration inspection and, unlike TWOV passengers, must wait in a holding area pending the departure of their scheduled flights. Included in the limited exceptions to the suspension are those in

66. 68 Fed. Reg. 40127 (July 7, 2003), amending 22 CFR § 41.02.

67. *Id.*

68. *Id.*

69. *Id.*

70. 68 Fed. Reg. 46926 (Aug., 2003).

flight at the time the policy went into effect and those who have already purchased their tickets. The suspensions were adopted pursuant to intelligence received on possible terrorist activity and will be reviewed on a sixty-day basis.⁷¹

IV. New Case Law Developments

A. SUPREME COURT DECISIONS

The Supreme Court conveyed important signals concerning its stance on immigration law and policy not only in its holdings but also in the cases that it chose to accept—or reject—review. Its principal decision in *Demore v. Kim*⁷² is considered a retreat from the protections the Court had crafted in *Zadvydas v. Davis*.⁷³ In *Zadvydas*, the Court held that non-citizens could not be detained indefinitely where their removal had been frustrated by external circumstances such as the absence of repatriation agreements with their home state.⁷⁴

Alternatively, in *Demore*, the Supreme Court reversed the Ninth Circuit ruling and held that mandatory pre-trial detention did not offend the Fifth Amendment's Due Process Clause.⁷⁵ The Court ruled that it would defer to the legislative presumption that aliens convicted of certain types of crimes constituted flight risks. In making this determination, the Court noted the Vera Institute's findings that about twenty-three percent of aliens actually released from detention fail to appear for their immigration hearings.⁷⁶

The Court distinguished *Zadvydas* on two essential grounds. *Zadvydas*, the Court found, concerned indefinite detention, whereas aliens detained under INA § 236(c) were confined only for comparatively shorter periods of time.⁷⁷ The Court's consideration of the rational relationship between detention and removal in *Demore* illustrated the continuing influence of *Zadvydas*. Alien detentions under INA § 236(c) pending their removal from the U.S. were necessarily incident to that removal. No such rational relationship was made out in *Zadvydas* where the Court concluded INA § 241(a)(6), which provides an unspecified period of detention, would apply irrespective of the likelihood of removal.⁷⁸ Hence, the required showing that there be a rational relationship between removal and detention is one which survives *Demore*.

The Court's decision to deny certiorari in the case of *North Jersey Media Group v. Ashcroft* was also significant.⁷⁹ The Third Circuit had held that closure of "special interest" removal hearings involving respondents having alleged terrorist associations did not offend First Amendment principles.⁸⁰ The case involved a government memorandum issued by Chief

71. *Id.*

72. *Demore*, 538 U.S. 510.

73. *Zadvydas*, 533 U.S. 678.

74. *Id.*

75. *Id.*

76. 538 U.S. at 520.

77. The Court's assessment that individuals must wait a few months at most while their cases are winding towards a conclusion was highly optimistic in light of current litigation realities. Indeed, between trial, administrative appeal and judicial review, the process may well take up to at least a year.

78. *Demore*, 538 U.S. at 526–533. (discussing *Zadvydas*).

79. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert denied*, 538 U.S. 1056 (2003).

80. *Id.* A similar result was reached in *Center for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003). *But see* *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

Immigration Judge Michael Creppy, which essentially closed to the public certain types of removal proceedings—namely those involving respondents that might have knowledge of September 11 attacks.⁸¹ The Third Circuit reconciled its holding with the rationale of *Richmond Newspapers, Inc. v. Virginia*,⁸² by distinguishing criminal trials from administrative removal proceedings. The Third Circuit thus rejected the analogy between common law criminal trials and administrative removal proceedings that had been upheld by the Sixth Circuit.⁸³

After determining that there was no mandatory right of access, the court ruled that such access could exist only through “administrative grace.” In this respect, the Third Circuit concluded that the interests protected by secrecy outweighed the interests advanced by open proceedings.⁸⁴ An interesting dissent discussed the growth of the administrative state and the dire consequences of allowing agencies to affect vital interests in an environment governed by secrecy.⁸⁵ The Supreme Court’s decision to deny certiorari, however, leaves the regime set up by the Creppy memorandum intact.

In *Kenyeres v. Ashcroft*,⁸⁶ the Supreme Court denied a stay of removal to an asylum seeker while his petition for review of his case was pending. In *Kenyeres*, a native and citizen of Hungary had been denied asylum by an immigration judge on the grounds that the application was not within the one-year filing deadline. In addition, the judge withheld removal under § 8 U.S.C. 1231(b)(3) (2003) because there was evidence that prior to coming to the United States, the applicant had committed embezzlement, a serious non-political crime. When the BIA denied his appeal, the asylum seeker sought review and a stay in the Eleventh Circuit. That court denied the application for a stay under 8 U.S.C. § 1252(f)(2), which provides that “no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.”⁸⁷

Petitioner had argued that the standard set forth in § 1252(f)(2) should apply to permanent injunctions against removal, not temporary stays such as the one sought here. The Court’s majority, however, in an opinion written by Justice Kennedy, was of an opposing view. Section 1252(f)(2), the Court held, was part of Congress’ deliberate effort to remove federal courts from the need to consider petitions which were essentially without merit. Despite apparent public policy misgivings,⁸⁸ Kennedy wrote that “a reviewing court must uphold an administrative determination in an immigration case unless the evidence compels a conclusion to the contrary.”⁸⁹ There was evidence that the applicant had committed fi-

81. *Id.*

82. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

83. *North Jersey Media Group*, 308 F.3d at 204–216.

84. *Id.* at 216–220.

85. *Id.* at 221–229.

86. *Kenyeres v. Ashcroft*, 538 U.S. 1301 (2003).

87. *Id.*

88. According to Court records, Kennedy clearly recognized the significance of the Court’s decision. Henceforth, Kennedy wrote, asylum seekers seeking a stay of removal while their petitions are pending will be required to show a great deal more than likely success on the merits, a standard arguably incompatible with the mores of an asylum state which, unlike the persecuting state the non-citizen was fleeing, champions the rule of law. See David Cleveland, *Immigration Law and the U.S. Supreme Court: 2002 Has Been a Precedential Term*, 22 IMMIGR. LAW TODAY 12 (Sept.–Oct. 2003).

89. *Kenyeres*, 538 U.S. 1301.

nancial crimes in the home state which precluded him from withholding of removal under U.S. law.⁹⁰

Another important development was the Supreme Court's granting of certiorari in *Al Odab v. United States*.⁹¹ The case concerned the Military Order signed by President Bush in 2001 ordering the establishment of military commissions to try certain individuals believed to be involved in terrorist acts against the United States.⁹² The Order relates to non-citizens whom the President has reason to believe: (1) are present or former members of al Qaeda; (2) are involved in activities with adverse effects on the United States, its citizens, its national security, economy, or foreign policy; or (3) persons who may have harbored any of the foregoing individuals.⁹³

Al Odab v. United States,⁹⁴ involved two actions in which the petitioners, non-citizens detained at Guantanamo Bay, Cuba, pursuant to the Military Order, challenged the conditions of their confinement. In one case, the petitioners sought more humanitarian treatment, including access to their families. In the other case, petitioners sought actual release from confinement. The District Court for the District of Columbia,⁹⁵ treating both cases as involving petitions for writ of habeas corpus, ruled that it lacked jurisdiction to hear such petitions, as petitioners were non-citizens seeking relief from outside the jurisdictional confines of the United States. The Court of Appeals for the District of Columbia affirmed this ruling with minor modification. Relying on the authority of *Johnson v. Eisentrager*,⁹⁶ the court found that Fifth Amendment rights do not extend to aliens who are outside the sovereign territory of the United States.

The *Al Odab* case and others like it raise substantial issues with respect to whether: (1) the President has the constitutional authority to establish military tribunals which do not conform with the applicable rules of the Uniform Code of Military Justice and the Third Geneva Convention III Relative to Prisoners of War; and (2) such tribunals are compatible with general international law. Unless the Court upholds habeas jurisdiction to review the situation in Guantanamo, these questions will not receive judicial treatment.

B. LOWER COURT AND ADMINISTRATIVE CASES

1. Lower Court Cases

The year also saw significant developments in the areas of federal and administrative case law. While many of these developments occurred at the Board level, there were also some lower court decisions of note.

In *Padilla v. Rumsfeld*,⁹⁷ the Second Circuit held that the President did not have independent authority, absent a specific grant of power from Congress, to detain a U.S. citizen

90. *Id.*

91. The Supreme Court's grant of certiorari is limited to the following question: "Whether United States courts lack jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Naval Base, Cuba." See *Al Odab v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); see also Linda Greenhouse, *Justices to Hear Case of Detainees at Guantanamo*, N.Y. TIMES, Nov. 11, 2003.

92. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

93. *Id.*

94. *Al Odab*, 321 F.3d 1134.

95. *Rasul v. Bush*, 215 F. Supp. 2d 55, *73 (D.D.C. 2002).

96. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

97. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

as an "unlawful combatant." The Court determined that the *Quirin*⁹⁸ case, a 1942 decision putatively authorizing the possible detention of U.S. citizens as enemy combatants pursuant to the war power, was not controlling in light of subsequent legislation specifically prohibiting the detention of U.S. citizens absent congressional authorization.⁹⁹ In *Gherebi v. Rumsfeld*,¹⁰⁰ the Ninth Circuit held that detainees at the Guantanamo Naval Base could have access to the U.S. justice system to challenge the conditions of their confinement there. Gherebi had challenged the President's asserted exclusive competence to hold foreign nationals indefinitely without trial as a violation of the U.S. Constitution and of the Third Geneva Convention Relative to Prisoners of War. In upholding habeas jurisdiction in this instance, the Ninth Circuit effectively ruled that those on Guantanamo must have access to counsel and recourse of judicial review.

Several decisions of note came down during the year regarding the Convention Against Torture. In *Wang v. Ashcroft*,¹⁰¹ the Second Circuit held that federal courts retain jurisdiction under the general habeas corpus statute and that petitioner's claim under the Convention Against Torture, which challenged the application by the Board of particular facts to his case, fell within the permissible scope of review.¹⁰² However, the appeals court also ruled that petitioner had failed to show that it was more likely than not that his desertion from the Chinese military would lead to his being tortured upon return to the People's Republic of China.¹⁰³ In *Ogbudimkpa v. INS*,¹⁰⁴ the Third Circuit held that habeas jurisdiction would lie where petitioner sought review of the Board's denial of his motion to reopen his case alleging that his removal to Nigeria would violate the Convention Against Torture.¹⁰⁵ The appeals court held that habeas jurisdiction was not precluded by the Foreign Affairs Reform and Restructuring Act of 1998.¹⁰⁶

Several other significant decisions also were made involving immigration consequences of a criminal conviction. In *Cedano-Viera v. Ashcroft*,¹⁰⁷ the Ninth Circuit ruled that a state offense of lewdness with a child under fourteen years of age constitutes "sexual abuse of a minor" and is therefore an "aggravated felony" within the meaning of INA § 101(a)(43).¹⁰⁸ The appeals court determined that: (1) it had jurisdiction only to review whether petitioner was removable under INA § 101(a)(43); and (2) it was thus precluded from reviewing the removal order per se.¹⁰⁹ The court found that the term "sexual abuse of a minor" was not ambiguous in light of the "ordinary, contemporary and common meaning" of the term.¹¹⁰ The Ninth Circuit followed a similar approach in *Nevarez-Martinez v. INS*,¹¹¹ where the court limited its review to determining whether a "theft offense" under state law fell within

98. *Ex parte Quirin*, 317 U.S. 1 (1942).

99. 353 F.3d at 715.

100. *Gherebi v. Rumsfeld*, 352 F.3d 1278 (9th Cir. 2003).

101. *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

102. *Id.* at 141-142.

103. *Id.* at 144.

104. *Ogbudimkpa v. INS*, 342 F.3d 207 (3d Cir. 2003).

105. *Id.* at 222.

106. *Id.*

107. *Cedano-Viera v. Ashcroft*, 324 F.3d 1062 (9th Cir. 2003).

108. *Id.* at 1067.

109. *Id.* at 1070.

110. *Id.* at 1066.

111. 326 F.3d 1053 (9th Cir. 2003).

INA § 101(a)(43), but achieved a different result. Here, the court found that the state statute was divisible, and that, since some sections of the law did not require the elements of an "aggravated felony," the non-citizen had not been convicted of one.¹¹²

A similar result was reached in the Second Circuit in *Jobson v. Ashcroft*.¹¹³ There, the court determined that a New York State conviction for "second degree manslaughter" did not satisfy the criteria of a "crime of violence" so as to be an "aggravated felony," because the statute did not require, under a minimum reading, a "substantial risk of the use of physical force against the person or property of another."¹¹⁴ Instead, a conviction under the statute could rest on reckless conduct standing alone. In a companion case, *Chrzanoski v. Ashcroft*,¹¹⁵ the Second Circuit ruled that third degree assault under Connecticut law did not amount to a crime of violence so as to render the respondent deportable under INA § 237(a)(2)(A)(iii).¹¹⁶ In *Chrzanoski*, the Second Circuit found that the state statute did not require the "use of force" for a conviction to be sustained.¹¹⁷

These cases illustrate the very limited review which federal courts will give to cases where lawful permanent residents are ordered removed based on an aggravated felony conviction, despite the dramatic consequences such removal normally entails. The decisions also illustrate, however, that the categorical analysis will be applied with great vigor by reviewing courts, forcing the government to meet its burden of showing deportability by clear and convincing evidence.

Two important pronouncements came down during the year as to what evidence could be examined to determine whether a respondent is deportable under the categorical analysis. The established doctrine is that an immigration judge may look to the "record of conviction," including the judgment of conviction, the accusatory instrument, the plea, and the sentencing minutes, to determine whether the alien stands convicted, for instance, of a crime involving moral turpitude (CIMT). In *Hernandez-Martinez v. Ashcroft*,¹¹⁸ the Ninth Circuit held that the pre-sentence report was not sufficient evidence to establish that the petitioner's conviction for aggravated driving under the influence was a CIMT so as to render petitioner deportable.¹¹⁹ In *Dickson v. Ashcroft*,¹²⁰ the Second Circuit reached a similar result, holding that a narrative contained in the pre-sentence was unreliable and therefore could not be consulted in determining whether conviction under a divisible statute relating to first degree unlawful imprisonment was for a "crime of violence" so as to constitute an aggravated felony.¹²¹

In *United States v. Fry*¹²² the Ninth Circuit Court of Appeals upheld a denial of habeas relief based on a claim of ineffective assistance of counsel at the time of petitioner's criminal trial. Petitioner argued that his counsel had been ineffective by failing to advise him that he would render himself deportable by pleading guilty to participating in a fraudulent

112. *Id.* at 1055.

113. *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003).

114. *Id.* at 371-376.

115. *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003).

116. *Id.* at 196.

117. *Id.*

118. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003).

119. *Id.* at 1119.

120. *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003).

121. *Id.*

122. *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003).

telemarketing scheme. The Ninth Circuit, adopting an "objective standard of reasonableness," as the appropriate test held that deportation is a collateral rather than direct consequence of a criminal conviction. Accordingly, failure to advise a defendant of the immigration consequences of a plea does not violate the Sixth Amendment guarantee of effective assistance of counsel. The case is noteworthy only in that it conforms to jurisprudence in other circuits and represents the emergence of a harsh rule that criminal counsel is not under an absolute duty to advise a client that pleading guilty to a criminal charge may well render him or her deportable and without a remedy.

Concerning applications for lasting immigration relief filed by non-permanent residents, the Eleventh and Ninth Circuits issued decisions in *Gonzalez-Oropeza v. Attorney-General*¹²³ and *Romero-Torres v. Ashcroft*,¹²⁴ respectively, which cast doubt on non-citizens' ability to achieve effective review of denial of their Cancellation of Removal, Part B, claims. Both courts ruled that a determination at the administrative level regarding whether the applicant had met the statutory standard by showing extremely unusual and exceptional hardship to a lawful permanent resident or U.S. citizen spouse, parent or child was a "subjective, discretionary judgment" which is not subject to federal review.¹²⁵ Although the discretionary elements of INA § 240A(b) are clearly exempt from federal review, the hardship standard appears to entail a legal determination that is not exempt. On the other hand, in *Ali v. Ashcroft*,¹²⁶ the Ninth Circuit affirmed a district court decision barring petitioners' removal to Somalia in light of the fact that Somalia did not have a functioning government that could accept them. The court held that exhaustion of administrative remedies did not apply for habeas jurisdiction in this case, and that review was unaffected by INA § 242(g), which precludes jurisdiction over the government's discretionary determination to enforce removal orders.¹²⁷ Resolution of the underlying legal issue of Somalia's ability to accept the petitioners preempted both recourse to further proceedings and the government's exercise of discretion.

2. Administrative Cases

The Board also made some significant pronouncements during the year in the areas of asylum, detention, and the immigration consequences of a criminal conviction.

In *Matter of Y-T-L*,¹²⁸ the claimant showed that his spouse had been sterilized in the People's Republic of China (PRC) and thus was a victim of the PRC's coercive planning family program. The Board ruled that the fact that the claimant and his spouse faced no further threat of sterilization or abortion did not constitute a "fundamental change" in circumstances which could be used to overcome the presumption of future persecution flowing from such past serious harm under 8 CFR § 1208.13(b)(1)(i)(A).¹²⁹ The case thus puts to rest arguments heretofore advanced by the government that acts of serious bodily mutilation, which cannot be repeated, do not give rise to the presumption of future persecution. The Board in a sweeping decision determined: (1) that depriving the asylum seeker

123. *Gonzalez-Oropeza v. Att'y Gen.*, 321 F.3d 1331 (11th Cir. 2003).

124. *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003).

125. INA § 240A(b).

126. *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003).

127. *Id.*

128. *In re Y-T-L*, 23 I. & N. Dec. 601 (B.I.A. 2003).

129. *Id.*

or the asylum seeker's spouse, of the ability to procreate is a human rights violation which is permanent and does not come to an end when the act of sterilization is completed; and (2) that an alternative reading of the refugee definition in INA §101(a)(42) would tend to make the act of persecution itself a change in circumstances, an anomalous result which is unacceptable from a public policy perspective.¹³⁰

In *Matter of R-S-H*,¹³¹ the Board affirmed an immigration judge's conclusion that a native and citizen of Lebanon, who had been a co-founder, treasurer, and board member of the Global Relief Fund (GRF), was ineligible for asylum since he constituted a national security threat. GRF, the Board found, was an organization classified as a Specially Designated Terrorist Organization by the Department of State. The Board upheld the immigration judge's findings that a plethora of public information linked the GFR to terrorism through its funding projects.¹³² The Board further agreed that the asylum seeker's denial of such links was not credible in light of the scope of such funding efforts, and the public record linking GFR's financial activities to known terrorist organizations. The significant evidence shifted the burden of proof to the respondent who was unable to meet it. Respondent claimed on appeal that he had been prejudiced by the fact that federal employees were allowed to attend the hearing, in arguable contravention of a protective order which the immigration judge had issued with regard to a central document in the case, the Declaration of an FBI agent setting forth the investigation of GRF. The Board dismissed this argument, holding that the protective order was based on national security concerns and was not for the benefit of the asylum seeker. In fact, the Board ruled that the asylum seeker, through his attorney, had violated the protective order through communication of the government Declaration to a third party, and hence was ineligible for any relief except bond.¹³³ The case remains noteworthy because it: (1) demonstrates application of the national security grounds of ineligibility for asylum; (2) illustrates how the burden shifting rules will be applied where grounds of ineligibility are at issue; and (3) demonstrates the collateral consequences of violating an immigration judge's protective order.

A recent decision by the Attorney General reveals that the DHS's detention policy relative to asylum seekers is expanding. In *Matter of D-Jn*,¹³⁴ the Attorney General overturned, as unwarranted, the bonded release of a Haitian asylum seeker who had attempted to reach U.S. shores by boat and who had been apprehended onshore. The opinion noted that there is no constitutional right to an individualized bond hearing for inadmissible non-citizens.¹³⁵

The Attorney General went on to rule that the public policy considerations raised by the INS on appeal merited overturning the asylum seeker's release on bond. Primarily, the Attorney General argued that attempted entry without admission would encourage other non-citizens to attempt the same type of unlawful landing thereby promoting a mass influx.¹³⁶ He also found that granting release on bond would promote evasion of an orderly inspection and admissions process. The opinion noted that third country nationals used Haiti as a point of transit to the United States.¹³⁷ The national security implications of these

130. *Id.*

131. *In re R-S-H*, 23 I. & N. Dec. 629 (B.I.A. 2003).

132. *Id.*

133. *Id.*

134. *In re D-Jn*, 23 I. & N. Dec. 572 (B.I.A. 2003).

135. *Id.*

136. *Id.*

137. *Id.*

findings were deemed persuasive, despite the fact that they had no relevance to the individual merits of the case at hand. In another aspect of its ruling, the Board found that the 1967 Protocol whereby the United States became bound by the 1951 Convention on the Status of Refugees was not self-executing, and therefore did not give rise to any independent rights in U.S. courts or administrative tribunals.

In *Matter of Garcia-Hernandez*,¹³⁸ the Board ruled that a non-citizen seeking Cancellation of Removal, Part B, was not eligible for that relief where he had been convicted of two crimes: (1) causing corporal injury to a spouse, which was a CIMT but was subject to the "petty offense" exception; and (2) battery, which was not a CIMT.¹³⁹ Under the "petty offense" exception contained in INA § 212(a)(2), a non-citizen shall not be deemed to have been convicted of a CIMT if: (1) the maximum penalty for the offense does not exceed one year's imprisonment; and (2) the sentence actually imposed is less than six months, provided that the alien has been convicted of "only one crime."¹⁴⁰ The Board, looking to the legislative history of the "petty offense" provision, held that the "only one crime" proviso means essentially one crime involving moral turpitude.¹⁴¹ The Board's ruling puts to rest a highly unsettled question in the law which had been plaguing practitioners, and adopts a construction of the INA that most scholarly authority had recommended as appropriate.

In *Matter of Koloamatangi*,¹⁴² the Board ruled that an alien who had obtained his permanent residence by fraud was not eligible to apply for Cancellation of Removal, Part A, a form of relief available only to lawful permanent residents who have maintained seven years domicile in the United States, at least five of which as a permanent resident. Looking at the statutory language in INA § 240A(a), the Board determined that the applicant had never in fact been a lawful permanent resident of the United States because he had never been lawfully admitted.¹⁴³

Finally, in *Matter of Assaad*,¹⁴⁴ the Board re-affirmed its earlier ruling in *Matter of Lazada*¹⁴⁵ that a motion to reopen could be predicated on ineffective assistance of counsel in the expulsion proceedings. In the *Assaad* case, ineffective assistance resulted in a failure to file a timely appeal, which had not been discovered by the respondent until three years after the proceedings culminated in a final administrative order. The Board, over the objection of DHS, held that *Lazada* applied in this set of circumstances, noting that "a respondent has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents respondent from meaningfully presenting his or her case."¹⁴⁶

V. Asylee and Refugee Admissions; Temporary Protected Status

At the time of this writing, refugee resettlement for fiscal year 2003 was still subject to extraordinary delays caused by background and security checks. After the September 11,

138. *In re Fidel Garcia-Hernandez*, 23 I. & N. Dec. 590 (B.I.A. 2003).

139. *Id.*

140. INA § 212(a)(2).

141. 23 I. & N. Dec. 590.

142. *In re Siasoi Fisiimaile Koloamatangi*, 23 I. & N. Dec. 548 (B.I.A. 2003).

143. *Id.*

144. *In re Assaad*, 23 I. & N. Dec. 553 (B.I.A. 2003).

145. *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.1988).

146. 23 I. & N. Dec. 553.

2001 terrorist attacks, the admission of overseas refugees was sharply reduced. Only 27,000 of the 70,000 authorized for fiscal year 2002 were actually admitted.¹⁴⁷ The President rejected the pleas of refugee advocates to compensate for this shortfall by increasing the authorized number of admissions in 2003. Instead, the President lowered the number of authorized refugee admissions to 50,000—not including an unallocated reserve of 20,000 for which there is no funding). At the close of fiscal year 2003, the Department of State's Bureau for Population, Refugees, and Migration (PRM) had admitted only 28,455 refugees, about 21,545 short of the already reduced number of authorized admissions.¹⁴⁸

At the same time, extraordinary delays continued with respect to asylees seeking to adjust status to that of lawful permanent residence under INA § 209(a). Unlike refugees, asylees seeking adjustment of status under INA § 209(b) are subject, to a 10,000 annual cap. Backlogs spurred a class action lawsuit in 2003 alleging that, since 1994, the AG had failed to distribute about 18,417 asylum visa numbers that should have been made available.¹⁴⁹ The lawsuit remained pending at year's end.

On a positive note, the United Nations High Commissioner for Refugees issued an opinion letter in the early part of the year stating that becoming a lawful permanent resident does not terminate refugee status.¹⁵⁰ The opinion letter may be very important for refugees placed in removal proceedings, implying that many who have been admitted as refugees are not "properly subject to deportation."¹⁵¹ Similarly, on March 10, 2003, William Yates, Acting Associate Director of Operations for CIS, issued a memorandum of law to the effect that those non-citizens who have been granted asylum are authorized to work incident to status and are not required to apply independently for employment authorization.¹⁵² The policy brings asylees into line with the regime governing refugees who also may work incident to status without being granted employment authorization by DHS.

The year also saw a great deal of activity in the area of Temporary Protected Status (TPS). On January 27, 2003, the Department of Justice determined that TPS status for Angola, originally designated in March 2000, would not be renewed and would be terminated on March 29, 2003.¹⁵³ The AG granted a final extension of TPS for Sierra Leone in light of substantially changed country conditions. TPS will terminate six months after expiration of the current extension on March 4, 2003.¹⁵⁴ Extensions of TPS were granted for the following countries: (1) Montserrat, until August 27, 2004;¹⁵⁵ (2) Honduras and

147. STEVEN LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 144 (3d ed. Supp., Foundation Press 2003).

148. Bureau of Population, Refugees, and Migration, U.S. Dept. of State, *U.S. Refugee Admissions Program News*, Vol. 1, Issue 2, available at <http://www.state.gov/documents/organization/26158.pdf>.

149. *Ngwanya v. Ashcroft*, 302 F. Supp. 2d 1076 (D. Minn. 2004).

150. Letter from Attorney Robert Pauw to Interpreter Releases, quoted in 80 Interpreter Releases 413 (Mar. 17, 2003).

151. See *id.*

152. See generally William Yates, *Asylees, Refugees Authorized to Work in the U.S. Regardless of EAD, BCIS Says*, 80 Interpreter Releases 511 (Apr. 7, 2003).

153. Termination of Designation of Angola Under the Temporary Protected Status Program, 68 Fed. Reg. 3896 (Jan. 27, 2003).

154. Termination of Designation of Sierra Leone Under the Temporary Protected Status Program, 68 Fed. Reg. 52407 (Sept. 3, 2003).

155. Extension of the Designation of Montserrat Under the Temporary Protected Status Program, 68 Fed. Reg. 39106 (July 1, 2003).

Nicaragua, jointly until January 5, 2005;¹⁵⁶ (3) Liberia, until October 1, 2004;¹⁵⁷ (4) Somalia, until September 17, 2004;¹⁵⁸ and (5) El Salvador, until March 9, 2004.¹⁵⁹

VI. Conclusion

The year, at best, could be characterized as ambiguous with respect to the future of immigration law and policy. While the social advances contemplated by DREAM seemed within grasp, the field was filled with restrictive proposals reminiscent of the USA PATRIOT Act. The legislative atmosphere continued to be redolent with secret proceedings, mass detentions, and the discriminatory social policies spawned by the September 11 attacks. Resistance to these policies, however, continued at the federal and local levels. At the same time, the Supreme Court's decision in *Demore v. Kim*, which although clearly limited to its facts, challenges *Zadvydas v. Davis* and seems to spell a period of equipoise with regard to judicial control of the plenary power.

Meanwhile, the Board and the courts continued to wrestle with the kinds of cases that have always played such an important role in immigration jurisprudence. There were some important developments, including the Board decision holding that past forced sterilization does not preclude the asylum seeker from the presumption of future persecution.¹⁶⁰ The large picture, however, remains very much in doubt, at least in the near term. Greater insistence on human rights in the field of immigration is most definitely making itself felt, as witnessed by local opposition to erratic administration of the USA PATRIOT Act. The Second and Ninth Circuits' exercise of judicial control over the government's policy of subjecting "enemy combatants," to detention without trial provided much needed legal clarity to an otherwise highly pejorative situation. The Supreme Court's grant of certiorari to hear whether habeas corpus could be successfully invoked by those detained at Guantanamo was also a significant legal development. The degree to which human and civil rights concerns will affect immigration law and policy unquestionably rests largely in the Court's hands.

156. Extension of the Designation of Honduras Under the Temporary Protected Status Program, 68 Fed. Reg. 23744 (May 5, 2003) (Honduras), and Extension of the Designation of Nicaragua Under the Temporary Protected Status Program, 68 Fed. Reg. 23748 (May 5, 2003).

157. Extension of the Designation of Liberia Under the Temporary Protected Status Program, 68 Fed. Reg. 46648 (Aug. 6, 2003).

158. Extension of the Designation of Somalia Under the Temporary Protected Status Program, 68 Fed. Reg. 43147 (July 21, 2003).

159. Extension of the Designation of El Salvador Under the Temporary Protected Status Program, 68 Fed. Reg. 42071 (July 16, 2003).

160. *In re Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003).