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Immigration and Naturalization Law

MARGARET D. STOCK*

I. Introduction

The year 2004 started on a hopeful note for US immigration advocates, with President George W. Bush announcing that his administration supported comprehensive immigration reform, including a guest worker program and a component to address the large numbers of undocumented migrants in the United States. All major presidential candidates agreed that legalizing many of the undocumented workers in the United States was necessary. As the year progressed, however, the national focus on the presidential election and splits within the Republican Party derailed any significant immigration legislation.

A few important business immigration bills were enacted—most prominently, a bill affecting intracompany transferees and temporary professional workers—but the anticipated comprehensive immigration reform did not materialize by the end of 2004. The release of the Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission)¹ caused a flurry of proposals to tighten the United States' borders, which ultimately resulted in the passage of the Intelligence Reform and Terrorism Prevention Act of 2004.²

During 2004, several prominent business groups argued that tighter border controls and visa delays that resulted from security concerns had cost U.S. firms and the U.S. economy tens of billions of dollars.³ Business leaders expressed concern that the security net had

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1. See generally, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9-11 COMMISSION REPORT (2004), available at <http://www.9-11commission.gov/report/index.htm> [hereinafter FINAL REPORT].

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

3. See, e.g., Santangelo Group, *Survey Results & Analysis: Do Visa Delays Hurt U.S. Business?* (Jun. 2, 2004), available at <http://www.santangelogroup.com>. Researchers surveyed 734 members of eight leading international trade associations to compile the report. According to the report, U.S. companies suffered a \$30.7 billion (\$25.35 billion in revenue losses, and \$5.15 billion in indirect costs) financial impact between July 2002 and March 2004 as a result of delays and denials in the processing of business visas. Companies surveyed reported that the most severe processing issues were length and unpredictability of processing times, excessively long waiting times to receive an interview, and apparently arbitrary visa denials.

been cast too wide at the expense of international commerce, resulting in increasing pressure for firms to outsource work or set up offices abroad.⁴ Furthermore, some of the nation's leading scientific and academic organizations warned that the restrictions threatened their ability to attract the brightest foreign students, and would eventually cause the United States to lose its lead in the forefront of science and technology.⁵ In light of these complaints, administration officials claimed to be making efforts to address these concerns.⁶

II. Legislative Developments

The pending presidential election overshadowed most legislative developments during 2004. On January 7, 2004, President Bush announced a major immigration reform proposal that would allow immigrants with job offers to enter the United States temporarily,⁷ as well as legalize many immigrants who are already here. Details of the plan remained unclear, but the President said he was committed to a system that would allow American employers to bring in foreign workers when Americans were unwilling or unable to fill the jobs.⁸ The President's program would also legalize eight to ten million illegal immigrants by granting them temporary three-year visas.⁹ Opponents of Bush's proposal called the plan an amnesty program that would pardon and reward aliens who have broken immigration laws and encourage future illegal immigration. While numerous immigration bills were introduced into Congress during the year, few immigration bills passed, even when there was bipartisan support. Anti-immigration advocates effectively controlled the House Immigration Subcommittee, and the President's failure to exercise any leverage to move immigration legislation left most bills stalled.

A. 9/11 COMMISSION PROCEEDINGS

Throughout 2004, the 9/11 Commission held hearings to investigate the events leading up to the September 11, 2001 (9/11) terrorist attacks on New York and Washington, D.C. Many of the hearings focused on immigration issues. On July 22, 2004, the 9/11 Commission issued a comprehensive report,¹⁰ in which the commissioners concluded that immigration policies touted as being essential for national security had been ineffective, and had produced little information that could lead to the identification or apprehension of terrorists. The commissioners also criticized controversial post 9/11 programs that had mostly targeted individuals from Muslim and Arab countries.¹¹

Prior to the Commission's hearings, U.S. officials contended that immigration personnel had no reason to suspect the 9/11 hijackers, thereby allowing them to enter legally and

4. *Id.*

5. *Id.*

6. *Id.*

7. Press release, The White House, Remarks by the President on Immigration Policy (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

8. *Id.*

9. *Id.*

10. Final Report, *supra* note 1.

11. National Commission on Terrorist Attacks Upon the United States, 9-11 COMMISSION REPORT EXECUTIVE SUMMARY (2004) available at http://www.9-11commission.gov/report/911Report_Exec.pdf [hereinafter Executive Summary].

reside in the United States.¹² In the seventh hearing held by the 9/11 Commission, however, the commissioners found that the government repeatedly missed opportunities to prevent thirteen of the 9/11 hijackers from entering the United States.¹³ The Commission's report found that consular officers and immigration officials missed clues in visa applications, entry documents, and passports that should have caused them to deny entry to the hijackers.¹⁴ In addition, the Commission heard testimony indicating that most immigration officials were focused on identifying individuals who might try to settle in the United States, rather than on identifying terrorists.¹⁵

The Commission's report confirmed that at least five suspected al Qaeda members were prevented from joining the 9/11 plot.¹⁶ Four were denied visas, and a fifth, Mohamed al Qahtani, was sent back to Saudi Arabia.¹⁷ Al Qahtani made his way to Afghanistan, where he was later captured and sent to Guantanamo Bay, Cuba.¹⁸ Officials believe that Al Qahtani was the "twentieth" hijacker—a theory that explains why one of the planes had four hijackers, while the others had five.¹⁹ Officials theorize that because Flight 93 had only four hijackers, the passengers were able to fight their attackers and crash the plane in Pennsylvania.²⁰

B. NATIONAL INTELLIGENCE REFORM

Following the release of the 9/11 Commission Report, Congress commenced efforts to enact the recommendations of the Commission. While there was bipartisan support for most of the recommendations, an impasse over immigration reform almost derailed enactment of a final bill.²¹ Several conservative lawmakers sought to go beyond the recommendations of the Commission and enact harsh anti-immigrant measures, but these efforts mostly failed.²² The final bill, the Intelligence Reform and Terrorism Prevention Act of 2004 (Intelligence Reform Act),²³ signed into law on December 17, 2004, contained numerous immigration-related provisions aimed at improving security.²⁴ For example, the law required (1) testing of advanced technology such as sensors, video, and unmanned aerial vehicles (UAVs) on the northern border; (2) surveillance of the southern border with UAVs and increased Border Patrol and Immigration and Customs Enforcement (ICE) agents; and (3) increased detention beds.²⁵ In addition, the Intelligence Reform Act required the Department of Homeland Security (DHS) to establish minimum identification standards for boarding commercial aircraft, while also establishing a visa and passport security program

12. *Id.*

13. *Id.*

14. Final Report, *supra* note 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. Executive Summary, *supra* note 11.

19. *Id.*

20. Final Report, *supra* note 1.

21. *Id.*

22. *Id.*

23. Intelligence Reform Act, *supra* note 2.

24. For a comprehensive discussion of all the provisions of the Intelligence Reform Bill, see David Leopold, *Debate Over the 9/11 Intelligence Reform Bills: A Preview of Things To Come?*, in *BUSINESS IMMIGRATION: CHARTING A COURSE THROUGH NEW WATERS* 1-8 (Nancy-Jo Merritt ed., 2005).

25. *Id.*

in the State Department and authorizing funding for an immigration security initiative that allowed immigration screening overseas.²⁶ Furthermore, the bill also required the creation of a Human Smuggling and Trafficking Center.²⁷ Aliens who received military-type training from designated terrorist organizations were deportable, and the law mandated a GAO study of potential weaknesses in the U.S. asylum system.²⁸ Finally, the most notable provision of the law established minimum federal standards for birth certificates and driver's licenses.²⁹

C. H AND L LEGISLATION

While the Terrorist Prevention Act made most of the headlines, another piece of legislation passed later in 2004 had more immediate impact on the business immigration community. The L-1 Visa and H-1B Visa Reform Act ("Visa Reform Act"),³⁰ signed into law on December 8, 2004, changed several key rules for L-1 (intra-company transferee) and H-1B (temporary professional) workers.³¹ For L-1 visas, the Visa Reform Act prohibited the controversial practice of subcontracting employees to third party businesses, and all L-1 blanket applicants are obligated to meet the one year requirement applicable to all other L-1 applicants.³² With regard to H-1B workers, the Visa Reform Act reinstated and made permanent the H-1B non-displacement attestation requirements that were in effect until October 1, 2003.³³ In addition, the law also reinstated the previous worker retraining fee, increasing the amount from \$1000 to \$1500, however, employers with less than twenty-five full-time equivalent employees in the United States need only pay \$750.³⁴ Previously exempt employers continue to be exempt from the fee. The law allowing employers to pay 95 percent of the prevailing wage was changed so that employers must now pay 100 percent of the prevailing wage or higher.³⁵ The new law made permanent provisions that allow the U.S. Department of Labor to investigate any employer that it reasonably believes is engaged in fraud and abuse.³⁶ The most notable change on the H-1B front, however, is an exemption of up to 20,000 graduates of U.S. graduate degree programs each year from the infamous H-1B cap.³⁷

The Visa Reform Act directed DHS to charge a \$500 fraud prevention and detection fee—on top of the normal processing fee, the worker retraining fund fee, and the premium processing fee when faster processing is chosen—in all new H-1B and L-1 cases, as well as applications to change employers.³⁸ The money will go toward the creation of a new H-1B

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. L-1 Visa and H-1B Visa Reform Act., Pub. L. No. 108-447, 118 Stat. 2809 (2004) [hereinafter *Visa Reform Act*].

31. *Id.*

32. *Id.* The new section only applies to new L-1 petitions and not to people already in the United States in L-1 status.

33. *Id.*

34. *Id.*

35. *Visa Reform Act*, *supra* note 30.

36. *Id.*

37. *Id.*

38. *Id.*

and L-1 Fraud Prevention and Detection Account, which will be shared by the State Department, DHS, and the Department of Labor.³⁹

D. IMPORTANT BILLS NOT ENACTED

Throughout 2004, many bills were introduced in an effort to enact comprehensive immigration reform and address other important immigration-related issues. Notable bills that were introduced but failed to pass included the AgJobs bill, the DREAM Act, the CLEAR Act, the Civil Liberties Restoration Act, and the Permanent Partners Act.

The Agricultural Job Opportunity, Benefits and Security Act⁴⁰ (AgJobs) was intended to provide a process for certain illegal agricultural workers to obtain permanent status in the United States. With strong bipartisan support, the bill appeared headed for passage when it was blocked from consideration by Senate Majority Leader Bill Frist (R-TN).⁴¹ *The Wall Street Journal* reported that the White House wanted to prevent the bill from reaching the President's desk because of election year concerns.⁴²

Despite bipartisan support, the DREAM Act⁴³ also failed to pass for the second year in a row. This law promised to legalize many undocumented students who had grown up in the United States.⁴⁴ In addition, lawmakers also resurrected another failed proposal from the prior year, the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act),⁴⁵ which required state and local law enforcement officials to enforce federal immigration laws. Essentially, cities and states would lose federal funding if their police refused to help the Department of Homeland Security track down illegal immigrants for deportation. More than a hundred lawmakers co-sponsored the bill, but many state and local law enforcement officials said that the law would hinder policing efforts.⁴⁶

A group of Democratic Senators and Congressional Representatives introduced the Civil Liberties Restoration Act of 2004 (CLRA)⁴⁷ to rectify the way in which immigrants have been treated in the United States since 9/11. Many immigrants detained in the post-9/11 sweep were denied access to attorneys and family members, held for months without being charged, or subjected to secret hearings.⁴⁸ Some detainees were physically and mentally abused. The CLRA would prohibit blanket closures of immigration hearings, but authorize partial or full closure of individual cases when necessary to protect national security.⁴⁹ Furthermore, the CLRA required that detained individuals be served with notice of the charges

39. *Id.*

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

41. *Id.*

42. David Rogers, *Farm-Worker Bill Becomes a Hot Potato*, WALL ST. J., July 14, 2004, at A4.

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

44. *Id.*

45. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, 108th Cong. (2003).

46. National Lawyers Guild, *National Immigration Project: Legislation to Deputize Local Police as Immigration Agents Gaining Ground in Congress*, available at <http://www.nationalimmigrationproject.org/GetInvolved/CLEAR%20Act%20Oppose.htm> (last visited May 27, 2005).

47. Civil Liberties Restoration Act, S. 2528, H.R. 4591, 108th Cong. (2004) [hereinafter CLRA].

48. The American Immigration Law Foundation, *Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States* (May 2004), available at <http://www.aifl.org/ipc/ipf050104.asp> [hereinafter *Targets of Suspicion*].

49. CLRA, *supra* note 47.

against them and be brought before an immigration judge in a timely fashion.⁵⁰ While proponents of the bill thought it had little chance of passage, they introduced it to draw the public's attention to the harsh treatment of immigrants after 9/11.⁵¹

Next, the Permanent Partners Immigration Act,⁵² which would grant same-sex couples the same immigration benefits as married couples, was also introduced in Congress but failed to pass. Although controversial, the bill had more than a hundred co-sponsors.⁵³ Under the previously-passed Defense of Marriage Act,⁵⁴ marriage is defined under federal law—including immigration law—as the union of a man and a woman. Because of this definition, gay couples who marry are unable to sponsor their partners for permanent residence. Immigration attorneys have thus been forced to devise creative solutions to keep these couples from becoming illegal, and this bill sought to rectify this problem.

III. Administrative and Regulatory Developments

A. U.S. VISIT

The biggest story of the year in the immigration regulatory arena was the January 5, 2004 debut of U.S. Visitor and Immigrant Status Indicator Technology (U.S. VISIT), an automated entry-exit security system that tracks the arrival and departure of aliens, verifies their identities, and authenticates their travel documents using biometric identifiers such as fingerprints and photographs.⁵⁵ Theoretically, the program is intended to reduce the number of persons who overstay their visa limits by requiring anyone subject to U.S. VISIT to register electronically upon arriving and departing the United States.⁵⁶ During 2004, the full program was not in place. DHS implemented only the entry portion of the program, which was introduced at more than a hundred airports and cruise ship terminals.⁵⁷ Initially, the program only applied to visitors who entered the United States with visas, but DHS officials indicated that the program would be expanded in the future.⁵⁸ The departure component of U.S. VISIT was supposed to go into effect at the end of 2004, but this did not happen as planned.

B. DEPARTMENT OF HOMELAND SECURITY

1. *Backlog Reduction*

A significant problem at DHS has been the perennial issue of backlogs in the processing of applications and petitions. President Bush highlighted this problem in his 2000 election campaign and also stated that "legal immigrants should be greeted with open arms, rather than endless lines."⁵⁹ DHS's predecessor agency devised a Backlog Elimination Plan, the

50. *Id.*

51. Targets of Suspicion, *supra* note 48.

52. Permanent Partners Immigration Act of 2003, S. 1510, H.R. 832, 108th Cong. (2003).

53. *Id.*

54. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

55. Department of Homeland Security, *Travel & Transportation: U.S.-VISIT*, available at <http://www.dhs.gov/dhspublic/display?theme=91&content=4071> (last visited May 27, 2005).

56. *Id.*

57. *Id.*

58. *Id.*

59. Press release, White House, A Blueprint for New Beginnings, available at <http://www.whitehouse.gov/news/usbudget/blueprint/bud14.html> (last visited May 27, 2005).

goal of which was to reach a national average cycle time of six months or less for all applications by the end of 2003.⁶⁰ This goal was not met. According to the agency, the failure to meet its planned goal was a result of new post 9/11 security mandates. On June 16, 2004, the Director of U.S. Citizenship and Immigration Services (USCIS), Eduardo Aguirre, submitted to Congress a revised version of this plan⁶¹ to meet the requirements of section 459(a) of the Homeland Security Act of 2002,⁶² which called for the agency to advise Congress how it planned to reduce the backlog of non-immigrant, immigrant, naturalization, and asylum/refugee applications and petitions. The new plan called for reaching the six-month processing target by the end of 2006.⁶³ In its Third Quarter Update for Fiscal Year 2004, USCIS reported significant progress in meeting this goal by having reduced the backlog by 12 9/10 percent since the beginning of Fiscal Year 2004.⁶⁴

2. Biometric Passport Deadline

At the beginning of 2004, many expressed concern about a Congressionally-mandated⁶⁵ October 26, 2004 deadline for all Visa Waiver Program (VWP) countries to have biometric features such as digital photographs or fingerprints in all new passports. According to the mandate, failure to comply with the deadline would mean loss of VWP privileges.⁶⁶ Great Britain and Japan, among other countries, notified DHS that they would miss the deadline.⁶⁷ Citizens of countries that failed to meet the deadline would be required to apply for visas in their home countries. Moreover, experts predicted that consulates would be unable to accommodate the additional visa applicants, and others would be deterred from visiting altogether, resulting in a loss of billions of dollars to the U.S. economy. Early in 2004, the Bush administration requested that Congress extend the deadline until October 2006, and on August 9, 2004, President Bush signed H.R. 4417, which extended the deadline by one year to October 26, 2005.⁶⁸ DHS also announced that it would soon begin enrolling VWP travelers through the U.S. VISIT program at all airports and seaports.⁶⁹

3. Visa Quota Problems

As a result of legislation, on October 1, 2003, the quota for the popular H-1B temporary professional worker visas had dropped from 195,000 to 65,000.⁷⁰ With this substantial reduction in available visas, the H-1B quota for Fiscal Year 2004 was reached on February 17,

60. *Id.*

61. See U.S. Citizenship and Immigration Services, *Backlog Elimination Plan* (Nov. 5, 2004), available at http://uscis.gov/graphics/aboutus/repstudies/BEPQ3v2_1.pdf.

62. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

63. *Id.*

64. *Id.*

65. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

66. *Id.*

67. Press Release, U.S. State Department, State Dept. Says Visa Waiver Countries Will Miss Passport Deadline (Mar. 5, 2004), available at <http://usinfo.state.gov/gi/Archive/2004/Mar/08-356793.html>.

68. Modification of Certain Deadlines for Machine-Readable Tamper Resistant Entry and Exit Documents, Pub. L. No. 108-299, § 1, 118 Stat. 1100 (2004).

69. *Id.*

70. Cyrus D. Mehtha, *The H-1B Visa Program*, available at http://www.cyrusmetha.com/Gen_Imm_cyrus.asp?news_id=282&intPage=1 (updated Mar. 14, 2005).

2004, less than halfway through the fiscal year.⁷¹ Following an announcement that the cap had been reached, DHS advised that it would reject any new applications for H-1B employment filed after the cap was reached and would not accept future applications until April 1, 2004. Petitions filed on or after April 1, 2004 had to request a start date of October 1, 2004 or later.⁷² Many immigration lawyers immediately scrambled to find alternatives to the H-1B visas, but the end of the saga was not yet in sight. Further complications arose on October 1, 2004, when, for the first time in history, the cap was reached on the first day of the fiscal year (October 1, 2004).⁷³ No additional visas would be available until October 1, 2005. This is the first time that H-1B visas have been unavailable for almost an entire fiscal year.⁷⁴

On March 10, 2004, less than a month after the H-1B quota was reached, DHS announced that it had also reached the congressionally-mandated cap of 66,000 H-2B temporary non-agricultural workers for Fiscal Year 2004.⁷⁵ H-2B workers fill many summer seasonal jobs, and the announcement that the cap had been reached threatened to derail several industries, including the Alaska seafood industry, which employs hundreds of H-2B workers in its summer processing season.⁷⁶ Employers pressed for an immediate increase, claiming their businesses were in jeopardy, but only a few selected employers were able to obtain such relief.⁷⁷ Lawmakers on both sides of the aisle introduced relief legislation, but no such legislation actually passed, other than a bill providing special relief for Alaska.⁷⁸

C. DEPARTMENT OF STATE

In January 2004, the Government Accountability Office (GAO) released a follow-up report⁷⁹ about the visa revocation process of the Departments of State and Homeland Security. The GAO's original report in 2003⁸⁰ found that the visa revocation process should be strengthened to be effective as an antiterrorism tool. The goal of the follow-up investigation was to determine if the weaknesses reported in the original study had been addressed. The follow-up report, however, found that the visa revocation process still had serious problems, including a lack of procedure and performance standards, outstanding policy and legal issues, and a lack of coordination between DHS and the State Department. GAO recom-

71. Information Regarding the H-1B Numerical Limitation for Fiscal Year 2004, 69 Fed. Reg. 8675-76 (Feb. 25, 2004).

72. *Id.*

73. America Visa Law, *H-1B Cap Has Been Reached for Fiscal Year 2005* (Oct. 1, 2004), available at <http://www.americavisalaw.com/Default.aspx?tabid=31>.

74. *Id.*

75. American Immigration Lawyers Association, *H-2B Emergency Relief: "Save Our Small and Seasonal Businesses Act of 2005"* (2005), available at <http://www.aila.org/fileViewer.aspx?docID=17884>.

76. *Id.*

77. *Id.*

78. See Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004) (containing a limited H-2B exception for certain seafood industry workers).

79. Press Release, U.S. Government Accountability Office, Border Security: Additional Actions Needed to Eliminate Weaknesses in the Visa Revocation Process (July 13, 2004), available at <http://www.gao.gov/new.items/d04795.pdf>.

80. Report to Congressional Requesters, U.S. General Accounting Office, Border Security: New Policies and Procedures Are Needed to Fill Gaps in the Visa Revocation Process (June 2003), available at <http://www.gao.gov/new.items/d03798.pdf>.

mended that the Secretaries of Homeland Security and State jointly develop a government policy and address outstanding legal and policy issues in the visa revocation process area.

On July 16, 2004, the State Department ended its policy of allowing domestic revalidation of certain non-immigrant visas. The domestic revalidation of non-immigrant visas was originally developed to help foreign government officials and international organization employees. Over time, the privilege was extended to some business-related visas. In ending the practice, the State Department cited the increased interview requirements and the need for biometric identifiers in visas imposed by the Enhanced Border Security and Visa Entry Reform Act.⁸¹ To lessen the inconvenience to affected applicants, the State Department directed visa adjudicating posts to give priority to those who would have benefited from the prior visa reissuance policy.⁸² The State Department also renewed the designations of several organizations as Foreign Terrorist Organizations, meaning that under the Immigration and Nationality Act (INA), persons in the United States, or subject to U.S. jurisdiction, are forbidden from providing material support to them.⁸³ Forty organizations had been so designated by the year's end.⁸⁴

D. DEPARTMENT OF LABOR

On July 21, 2004, the Department of Labor (DOL) published an interim rule⁸⁵ to address the backlog of pending applications for permanent labor certification of foreign workers. The rule proposed allowing the National Certifying Officer to transfer applications awaiting processing by State Workforce Agencies (SWAs) or by the Employment and Training Administration ("ETA") Regional Offices to a centralized ETA processing center.⁸⁶ The DOL proposed this rule in conjunction with its plans to establish a new Program Electronic Review Management (PERM) program for filing labor certifications.⁸⁷ PERM is intended to reduce processing times for the vast majority of labor certification cases.⁸⁸ On December 27, 2004, DOL published its long-awaited PERM regulations, making them effective on March 28, 2005.⁸⁹ The regulations set up a new system for processing employers' applications for permanent employment of aliens, requiring employers to conduct recruitment before filing their applications.⁹⁰ The SWAs will provide prevailing wage determinations to employers, but will no longer receive or process applications as they do under the current system.⁹¹ Employers will be required to place a job order with the SWA, which the SWA

81. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

82. *Id.*

83. *Id.*

84. See U.S. Dep't of State, *Foreign Terrorist Organizations* (Mar. 23, 2005), available at <http://www.state.gov/s/ct/rls/fs37191.htm>.

85. Labor Certification for the Permanent Employment of Aliens in the United States; Backlog Reduction, 69 Fed. Reg. 43716 (July 21, 2004) (to be codified at 20 C.F.R. pt. 655).

86. *Id.*

87. *Id.*

88. *Id.*

89. Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326 (Dec. 27, 2004) (to be codified at 20 C.F.R. pt. 655-56).

90. *Id.*

91. *Id.*

will process like any other job order.⁹² Employers will have the option of filing applications either electronically, using web-based forms and instructions, or through the mail.⁹³ The new program is supposed to eliminate the long-standing backlog in labor certification applications, as well as meeting criticisms that the current system is too burdensome and time-consuming.

IV. New Case Law Developments

During 2004, the federal courts continued to see increases in their immigration-related caseloads. One U.S. newspaper ran an investigative article stating that federal circuit courts have seen a 600 percent increase in deportation and asylum appeals.⁹⁴ This increase was blamed on changes in the way the U.S. Department of Justice handles administrative appeals of immigration cases.⁹⁵ Two years ago, the Board of Immigration Appeals (BIA) began "streamlining" most proceedings, and its membership was reduced from twenty-three judges to eleven.⁹⁶ Although this restructuring has nearly eliminated a huge backlog of administrative appeals, it has also had the side-effect of creating overload in the federal appellate courts, which handle most federal court challenges to immigration decisions.⁹⁷

A. UNITED STATES SUPREME COURT DECISIONS

1. *Rumsfeld v. Padilla*

On June 28, 2004, the U.S. Supreme Court announced its long-awaited decision in *Rumsfeld v. Padilla*.⁹⁸ In a decision with implications for immigration attorneys who file *habeas corpus* petitions, the Court addressed the question of the proper respondent in a *habeas corpus* petition filed pursuant to 28 U.S.C. § 2241 by a United States citizen held by the U.S. government as an "enemy combatant."⁹⁹ In a footnote to the decision,¹⁰⁰ the Court stated that it was expressly refraining from deciding whether the Attorney General or any other immigration official is the proper respondent when a non-U.S. citizen files an immigration-related *habeas* petition. Experts predict, however, that the government will try to argue that *Padilla* is controlling in circuits where this particular issue has not yet been decided.¹⁰¹

Authorities suspected Jose Padilla, a U.S. citizen who was arrested at Chicago's O'Hare airport when he arrived on an international flight, of having links to the Al Qaeda terrorist group.¹⁰² Padilla was detained and initially held on a material witness warrant in New York,

92. *Id.*

93. *Id.*

94. Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1, available at http://www.sacbee.com/content/news/courts_legal/story/10637877p-11556573c.html.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

99. *Id.* at 2712.

100. *Id.* at 2718.

101. See Trina Realmuto & Nancy Morawetz, *The Impact of the Supreme Court's Decision in Rumsfeld v. Padilla on Immigration Habeas Petitions* (June 30, 2004), available at http://www.aifl.org/lac/lac_pa_063004.asp.

102. *Id.*

and counsel was appointed to represent him.¹⁰³ While material witness proceedings were pending before the Southern District of New York, and without notice to counsel, the President designated Padilla an enemy combatant and transferred him to the custody of the Department of Defense, which moved Padilla to a naval brig in South Carolina.¹⁰⁴ Two days after the transfer to South Carolina, Padilla's attorney filed a *habeas corpus* petition in the Southern District of New York challenging Padilla's detention and naming the President, the Secretary of Defense, and the officer in charge of the naval brig as respondents.¹⁰⁵

The government argued that the officer in charge of the naval brig was the only proper respondent and that the Southern District of New York was an improper venue because it could not issue a *habeas corpus* writ to a respondent located outside its territorial jurisdiction.¹⁰⁶ Padilla's attorney countered that the case should remain in New York because the Secretary of Defense had purposefully reached into New York to seize Padilla and move him to another state.¹⁰⁷ In a 2003 decision, the Court of Appeals for the Second Circuit held that Padilla could name the Secretary of Defense as a respondent in his petition, and the case could remain in New York.¹⁰⁸ In a 5-4 decision, however, the Supreme Court held that the only proper respondent in a traditional *habeas corpus* petition involving a "core challenge" to physical confinement is the actual or immediate custodian of the facility where the person is detained.¹⁰⁹ Thus, in Padilla's case, the commander of the naval brig was the proper respondent, and the Southern District of New York did not have jurisdiction to issue a *habeas* writ when the detention facility was in South Carolina.¹¹⁰ The concurring opinion stated that the decision was based on venue or personal jurisdiction rules.¹¹¹ Because Padilla filed his *habeas* petition in the wrong court, the Supreme Court ordered that the case be remanded so that the petition could be dismissed without prejudice.¹¹²

The case was watched by immigration attorneys because it is common for U.S. immigration authorities to transfer aliens out of jurisdictions in which they have counsel and *habeas* petitions pending. Similarly, immigration attorneys often name the Attorney General or the Secretary of Homeland Security as the respondent.¹¹³ The Supreme Court left open the question whether the Attorney General is the proper respondent in a *habeas corpus* petition filed by a noncitizen pending deportation.¹¹⁴ Prior to *Padilla*, the Circuit Courts were split on the issue.¹¹⁵ For immigration lawyers, the final *Padilla* decision left more questions unanswered than resolved. The opinion emphasized that the court's ruling applied to core challenges where physical custody is at issue, but not to other types of *habeas* cases, such as those where physical custody is not at issue, those in which the petition has been transferred after the filing of the *habeas*, and those in which the detainee's custodian

103. *Id.*

104. *Id.*

105. *Id.*

106. Realmuto, *supra* note 101.

107. *Id.*

108. *Padilla v. Rumsfeld*, 352 F.3d 695, 704-10 (2d. Cir. 2003).

109. *Rumsfeld*, 124 S. Ct. at 2718.

110. *Id.*

111. *Id.* at 2727 (Kennedy, J., concurring).

112. *Id.*

113. Realmuto, *supra* note 101.

114. *Id.*

115. *Id.*

is "present" in the district through his agents' conduct.¹¹⁶ Arguably, most immigration *habeas* cases are not core challenges because they primarily challenge a final agency decision, rather than the physical custody itself.¹¹⁷ Although the Supreme Court also stated in a footnote that the ruling did not apply to immigration cases,¹¹⁸ practitioners expect that government lawyers will argue that *Padilla's* holding should apply in the lower courts where the immigration issue has not yet been resolved.

2. *Leocal v. Ashcroft*

On November 9, 2004, the Supreme Court decided *Leocal v. Ashcroft*,¹¹⁹ a case in which the court was called upon to decide whether certain drunk driving convictions are "aggravated felonies" under U.S. immigration law. If a particular criminal offense is an aggravated felony, an alien is subject to very harsh sanctions, including mandatory detention and almost certain deportation.

Josue Leocal, a lawful permanent resident from Haiti, was charged under a Florida statute with driving under the influence of alcohol and causing serious bodily injury.¹²⁰ He pled guilty and was sentenced to two and a half years in prison.¹²¹ "In November 2000, while he was serving his sentence, the Immigration and Naturalization Service (INS) initiated removal proceedings against him pursuant to INA § 237(a)."¹²² Because the INS claimed that Leocal's DUI conviction was a "crime of violence" and, therefore, an aggravated felony under the INA, Leocal was ordered deported to Haiti.¹²³ "The Court of Appeals for the Eleventh Circuit agreed."¹²⁴ In a unanimous decision, the Supreme Court reversed, ruling that the negligent conduct involved in a DUI offense was not grounds for categorizing an offense as an aggravated felony.¹²⁵ The Court said that the statute suggests a crime of violence must require intent greater than negligence.¹²⁶ "Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact does not warrant our shoehorning it into statutory sections where it does not fit."¹²⁷ The *Leocal* decision effectively granted relief to hundreds of aliens who had been labeled aggravated felons and subjected to mandatory detention and deportation for certain drunk driving offenses.

3. *Rasul v. Bush*

By a 6-3 margin, the U.S. Supreme Court, in the case of *Rasul v. Bush*,¹²⁸ ruled against the Bush Administration's policy of detaining foreign nationals as "enemy combatants" at Guantanamo Bay Naval Base, Cuba. Fourteen detainees had filed petitions declaring that

116. *Id.*

117. *Id.*

118. Rumsfeld, 124 S. Ct. at 2718 n.8 ("Because the issue is not before us today, we again decline to resolve it.").

119. *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004).

120. *Id.* at 379.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Leocal*, 125 S. Ct. at 379.

125. *Id.*

126. *Id.* at 382-83.

127. *Id.* at 384.

128. *Rasul v. Bush*, 124 S. Ct. 2686, 2687-88 (2004).

they were not involved in terrorist acts, had not been charged with any crimes, and had been denied access to counsel and the courts.¹²⁹ The Bush administration asserted that the plaintiffs were not entitled to the usual rights of prisoners of war set out in the Geneva Conventions.¹³⁰ Government officials also claimed that enemy combatants are not allowed the constitutional protections given to ordinary criminal suspects.¹³¹ The Administration stated that only the President has the authority to order detention of enemy combatants, and, therefore, the courts have no business reviewing President Bush's decision in this matter.

The main question before the Supreme Court was whether the habeas corpus right to judicial review of detention applies in an area over which the United States has complete and "exclusive jurisdiction, but not 'ultimate sovereignty.'" ¹³² Guantanamo Bay is leased from Cuba, and, thus, is outside the territory of the United States. The Supreme Court held that the base is not beyond the reach of American courts although it is outside the country.¹³³ The court also stated that there is no distinction between U.S. citizens and non-U.S. citizens in the right to § 2241 *habeas corpus* review.¹³⁴

B. U.S. CIRCUIT AND DISTRICT COURT DECISIONS

1. *Singh-Kaur v. Ashcroft*

In a case with broad implications for immigrants who admit any sort of connection to terrorist or insurgent groups in their home countries, the Third Circuit Court of Appeals ruled in *Singh-Kaur v. Ashcroft*¹³⁵ that an alien was ineligible for relief under U.S. immigration laws when he had provided food and shelter to freedom fighters in his village who were engaged in military activity against the Indian government. Singh-Kaur entered the United States without inspection, and applied for asylum after deportation proceedings were initiated against him.¹³⁶ He claimed that he was subjected to religious persecution in India due to his involvement in two groups that promoted the Sikh faith, and, in his supporting affidavit, Singh-Kaur admitted that he provided food and shelter to the freedom fighters. The BIA held that his conduct in providing food and shelter to the fighters constituted affording material support to terrorists within the meaning of INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).¹³⁷

The Third Circuit found that substantial evidence supported the BIA's interpretation of the INA, making Singh-Kaur ineligible for admission because he provided material support to individuals who he knew or should of known were engaged in terrorist activities.¹³⁸ A vigorous dissenting opinion argued the majority had read the word "material" out of the statutory language, and that providing food and tents for religious meetings, without more

129. *Id.* at 2687.

130. *Id.* at 2691.

131. *Id.*

132. *Id.* at 2693.

133. *Rasul*, 124 S. Ct. at 2690-91.

134. *Id.* at 2688-89.

135. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301 (3d Cir. 2004).

136. *Id.* at 294.

137. *Id.* at 296.

138. *Id.*

involvement or support, was not an act "of the degree and kind contemplated by the 'material support' provision—*material* acts in support of terrorism."¹³⁹

2. *Resendiz-Alcaraz v. Ashcroft*

In *Resendiz-Alcaraz v. Ashcroft*,¹⁴⁰ the Eleventh Circuit decided that state expungements are insufficient to remove the immigration penalties of a conviction. Fidencio Resendiz-Alcaraz, a Mexican citizen, sought review of a final removal order.¹⁴¹ Resendiz-Alcaraz pled guilty to a Missouri charge of possession of less than thirty-five grams of marijuana, a class A misdemeanor, and after a year of probation, the state court expunged his conviction.¹⁴² In 2001, the INS initiated removal proceedings.¹⁴³ Resendiz-Alcaraz sought cancellation of removal, arguing that the state court expungement rendered him free of a conviction for immigration purposes and, therefore, eligible for cancellation.¹⁴⁴ The Immigration Judge denied relief on the grounds that a state court expungement does not absolve an alien of his drug conviction for immigration purposes.¹⁴⁵ The BIA affirmed.¹⁴⁶

The Eleventh Circuit rejected Resendiz-Alcaraz's argument that, because the Missouri state court expungement resulted from a rehabilitative initiative like that of the Federal First Offender Act ("FFOA"), he should receive the same treatment as if FFOA applied.¹⁴⁷ Under FFOA, expunged simple possession convictions are not treated as convictions under federal law.¹⁴⁸ The Court explained that the BIA had treated state court expungements for first-time drug offenders just like federal ones until Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996.¹⁴⁹ Under the IIRAIRA, an alien has a conviction for immigration purposes if a judge or jury finds him guilty, he pleads guilty, or he pleads no contest to the offense, and a judge imposes punishment.¹⁵⁰ Resendiz-Alcaraz satisfied these conditions because he pled guilty and served a one-year probation.¹⁵¹ Thus, the IIRAIRA effectively nullifies a state court expungement for immigration purposes. The Court rejected Resendiz-Alcaraz's argument that the IIRAIRA violates equal protection because an alien prosecuted under federal law may avoid removal through the FFOA's recognition of expungements, whereas an alien prosecuted under state law has no such opportunity.¹⁵² The Court reasoned that Congress could rationally distinguish between the FFOA and state expungements.

3. *Class Action Lawsuit Settled*

A class action amnesty case, *Catholic Social Services, Inc. v. Ridge*, the longest pending class action suit in immigration history, was approved by a federal district court judge on Janu-

139. *Id.* at 301 (Fisher, J., dissenting).

140. *Resendiz-Alcaraz v. Ashcroft*, 83 F.3d 1262, 1265 (11th Cir. 2004).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 1266.

145. *Resendiz-Alcaraz*, 83 F.3d at 1262.

146. *Id.*

147. *Id.* at 1267.

148. *Id.*

149. *Id.* at 1268; *see also* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 11 Stat. 3009 (1996).

150. *Resendiz-Alcaraz*, 83 F.3d at 1268.

151. *Id.*

152. *Id.* at 1269.

ary 23, 2004.¹⁵³ In September 2003, the Center for Human Rights and Constitutional Law and DHS reached a settlement¹⁵⁴ under a one-time 1986 amnesty program that had allowed 150,000 undocumented immigrants to apply for legal resident status in the United States.¹⁵⁵ Undocumented immigrants who had resided in the U.S. since 1982 were able to obtain legal status under the 1986 law.¹⁵⁶ "The class action suit challenged an INS rule that disqualified those who had briefly traveled abroad during the period of required residence for the amnesty."¹⁵⁷ In April 1988, a federal judge extended the application period by four months for those who had been turned away because the travel rule was illegal.¹⁵⁸ INS agreed to change the rule, but repeatedly appealed federal court orders upholding the extension for the next fifteen years.¹⁵⁹

"Under the approved settlement, immigrants who believe they qualified for the 1986 amnesty but were turned away have a one-year period beginning in May 2004 to apply to adjust their status."¹⁶⁰ The Center for Human Rights and Constitutional Law also reached a settlement in a separate class action case, *Newman v. Citizenship & Immigration Services*,¹⁶¹ which involved another 100,000 immigrants who were turned away by INS during the amnesty program because they, too, had briefly traveled abroad. The *Newman* plaintiffs returned by improperly using non-immigrant visas.¹⁶² This case awaits approval of a federal district court judge.¹⁶³

C. ADMINISTRATIVE COURT DECISIONS

The BIA decided six precedential cases in 2004. In the first case, *In re Vargas*,¹⁶⁴ the Board determined that first degree manslaughter (in violation of section 125.20 of New York Penal Law) is a crime of violence under 18 U.S.C. § 18(b), and is therefore an aggravated felony under INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). In its next precedential case, *In re Malta*,¹⁶⁵ the Board held that a stalking offense for harassing conduct in violation of section 646.9(b) of the California Penal Code, which proscribes stalking when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the stalking behavior, is a crime of violence under 18 U.S.C. § 16(b), and is therefore an aggravated felony under section 101(a)(43)(F) of the INA, 8 U.S.C. § 101(a)(43)(F).

In *In re K—A—*,¹⁶⁶ the Board held that once an asylee has been placed in removal proceedings, the Immigration Judge and the BIA have exclusive jurisdiction to adjudicate

153. Siskind's Immigration Bulletin, *CSS Settlement Approved* (Feb. 3, 2004), available at <http://www.visa.law.com/04feb1/14feb104.html>.

154. The terms of the settlement are available at www.centerforhumanrights.org (last visited May 27, 2005).

155. Siskind's, *supra* note 153.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Press Release, National Immigration Law Center, Judge Approves Catholic Social Services Settlement (Feb. 17, 2004), available at <http://www.nilc.org/immilawpolicy/obtainlpr/oblpr097.htm>.

162. *Id.*

163. *Id.*

164. *In re Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004).

165. *In re Malta-Espinoza*, 23 I&N Dec. 656 (BIA 2004).

166. *In re K—A—*, 23 I&N Dec. 661 (BIA 2004).

the asylee's applications for adjustment of status and a waiver of inadmissibility. In *In re Cisneros-Gonzalez*,¹⁶⁷ the BIA held that an alien's period of continuous physical presence in the United States is deemed to end when the alien is served with the charging document that is the basis for the current proceeding. Thus, service of a charging document in a prior proceeding does not serve to end the alien's period of continuous physical presence with respect to an application for cancellation of removal filed in a later proceeding.

In *In re L—K—*,¹⁶⁸ an important case for asylum applicants, the Board decided that where an alien filed an asylum application while in lawful nonimmigrant status, the nonimmigrant status subsequently expired, and the asylum application was referred to the Immigration Court. Thus, the alien is not eligible to adjust status under INA § 245(a) because the alien has failed to continuously maintain a lawful status since entry into the United States. This decision makes many asylum applicants ineligible to adjust status in removal proceedings.

On October 19, 2004, the BIA decided *In re Eslamizar*,¹⁶⁹ holding that an alien found guilty of a "violation" under Oregon law does not have a "conviction" for immigration purposes under § 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A). Finally, on December 1, 2004, Attorney General John Ashcroft issued a one-sentence decision¹⁷⁰ denying certification of the BIA's decision in *In re C—Y—Z—*,¹⁷¹ a case involving a Chinese asylum applicant who claimed persecution on account of his opposition to Chinese birth control policies. The BIA granted the case, but INS opposed the grant because the applicant's wife was sterilized, and the INS reasoned that Chinese authorities were unlikely to sterilize the applicant as well.¹⁷² When the BIA rejected the INS's argument, INS had asked the Attorney General for review of the Board's decision.¹⁷³

V. Asylum and Refugee Law; Temporary Protected Status

Refugee resettlement for Fiscal Year 2004 began to rebound from the serious delays caused by post 9/11 background and security checks.¹⁷⁴ Security concerns had contributed to a sharp decline in the number in Fiscal Years 2002 and 2003, but the final number for the 2004 Fiscal Year was 52,868, an 85 percent increase over the prior fiscal year's total of 28,422 refugee admissions.¹⁷⁵ In contrast to refugees, who have been able to adjust their status and obtain permanent residence after one year, asylees continued to experience unconscionable delays in adjusting their status to permanent residence. Asylees, unlike refugees, have been subject to a 10,000 annual cap that has resulted in predictions that it will take more than a decade for most current asylees to adjust their status.¹⁷⁶

In *Ngwanya v. Ashcroft*, a class action lawsuit filed by the American Immigration Law Foundation, a federal judge condemned the government for its treatment of adjusting asy-

167. *In re Gonzalez*, 23 I&N Dec. 668, 688 (BIA 2004).

168. *In re L—K—*, 23 I&N Dec. 677, 677 (BIA 2004).

169. *In re Eslamizar*, 23 I&N Dec. 684, 684 (BIA 2004).

170. See *In re C—Y—Z—*, 23 I&N Dec. 693 (BIA 2004).

171. See *In re C—Y—Z—*, 21 I&N Dec. 915 (BIA 1997).

172. *Id.* at 915.

173. *In re C—Y—Z—*, 23 I&N Dec. 693 (1999).

174. U.S. Dep't of State, Bureau of Population, Refugees, & Migration, 52,868 Refugee Admissions in Fiscal Year 2004, U.S. REFUGEE ADMISSIONS PROGRAM NEWS, Vol. 2, Issue 5, Oct. 1, 2004, available at <http://www.state.gov/documents/organization/36825.pdf>.

175. *Id.*

176. See Immigration and Nationality Act, 8 U.S.C. § 1159(b) (2005).

lees, calling the government's behavior a "national embarrassment."¹⁷⁷ The plaintiffs in the case had been granted asylum in the U.S., but were waiting to obtain their permanent resident status.¹⁷⁸ They successfully argued that over the past ten years, the INS and then the USCIS had unlawfully failed to adjust the status of 22,000 asylees due to mismanagement.¹⁷⁹ The agency's ineptitude increased the waiting time for these asylees to become U.S. citizens and extended the waiting list for all asylees by more than two years.¹⁸⁰ The judge ordered the federal government to adjust the status of the 22,000 waiting asylees.¹⁸¹

On November 29, 2004, the USCIS published a final rule to implement a bilateral Safe Third Country Agreement between the United States and Canada that affected asylum seekers at U.S.-Canada land border ports-of-entry and persons transiting through the United States or Canada during removal by the other country.¹⁸² The regulation took effect December 24, 2004.¹⁸³ Under the agreement, the United States will return to Canada certain asylum seekers who attempt to enter the United States from Canada at a U.S.-Canada land border port-of-entry or who removed from Canada in transit through the United States.¹⁸⁴ Similarly, it permits Canada to return to the United States certain asylum seekers attempting to enter Canada from the United States at a U.S.-Canada land border port-of-entry and certain aliens being removed from the United States through Canada.¹⁸⁵ The agreement makes exceptions for unaccompanied minors and some asylum seekers with family members in the United States.¹⁸⁶

During 2004, the citizens of several countries continued to benefit from Temporary Protected Status ("TPS") in the United States. TPS extensions were granted to the following countries: Burundi,¹⁸⁷ El Salvador,¹⁸⁸ Honduras,¹⁸⁹ Liberia,¹⁹⁰ Nicaragua,¹⁹¹ Somalia,¹⁹² and

177. *Ngwanya v. Ashcroft*, 302 F. Supp. 2d 1076, 1087 (D. Minn. 2004).

178. *Id.* at 1077.

179. *Id.* at 1083.

180. *Id.* at 1087.

181. *Id.* at 1088.

182. See Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480 (Nov. 29, 2004) (to be codified at 8 C.F.R. pts. 208, 212, 235).

183. *Id.*

184. *Id.* at 69,485.

185. *Id.* at 69,487.

186. *Id.* at 69,482.

187. See Extension of the Designation of Temporary Protected Status for Burundi, 69 Fed. Reg. 60165 (Oct. 7, 2004).

188. See Extension of the Designation of Temporary Protected Status for El Salvador; Automatic Extension of Employment Authorization Documentation for El Salvador TPS Beneficiaries, 70 Fed. Reg. 1,451 (Jan. 7, 2005).

189. See Extension of the Designation of Temporary Protected Status for Honduras; Automatic Extension of Employment Authorization Documentation for Honduras TPS Beneficiaries, 69 Fed. Reg. 64,084 (Nov. 3, 2004).

190. See Termination and Re-Designation of Liberia for Temporary Protected Status, 69 Fed. Reg. 52,297 (Aug. 25, 2004).

191. See Extension of the Designation of Temporary Protected Status for Nicaragua; Automatic Extension of Employment Authorization Documentation for Nicaragua TPS Beneficiaries, 69 Fed. Reg. 64,088 (Nov. 3, 2004).

192. See Extension of the Designation of Temporary Protected Status for Somalia, 69 Fed. Reg. 47,937 (Aug. 6, 2004).

Sudan.¹⁹³ DHS terminated TPS for the following countries: Montserrat, as of February 27, 2005;¹⁹⁴ and Sierra Leone, whose citizens were required to leave the United States by May 3, 2004, unless they had obtained another lawful status. The decision to terminate TPS for citizens of Sierra Leone was controversial.¹⁹⁵ Citizens of the West African nation, which was plagued by a ten-year civil war that ended in 2002, had first been granted TPS in 1997, and the designation was subsequently extended five times during the Clinton and Bush administrations until the civil war ended.¹⁹⁶ Critics of the May 3 return date claim that Sierra Leone is still an unsafe country.¹⁹⁷

In asylum case developments, the never-ending saga of Rodi Alvarado-Peña continued to vex advocates who have championed for more generous treatment of gender-based asylum claims. Rodi Alvarado-Peña, a Guatemalan woman who claimed extreme physical abuse by her husband and fled to the United States, was initially granted asylum by an immigration judge in 1996.¹⁹⁸ To qualify for political asylum, the potential asylee must demonstrate that she has been persecuted in the past or has a well-founded fear of future persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion.¹⁹⁹ Alvarado was granted asylum on account of her gender, which falls under the category of a social group. That decision was overturned by the BIA in 1999 in the enormously controversial case of *In re R—A—*.²⁰⁰ Subsequently, Attorney General Janet Reno intervened to overturn the BIA's decision and ordered it to issue a new decision after proposed regulations governing gender-based asylum claims were issued.²⁰¹ After Ms. Reno left office, her successor, Attorney General John Ashcroft, certified the BIA's decision in February 2003, promising to make a speedy decision himself.²⁰² In February 2004, when it appeared that Mr. Ashcroft might be ready to make a decision, DHS filed a lengthy brief supporting Ms. Alvarado's claim.²⁰³ DHS requested that Attorney General Ashcroft remand the case to the BIA with instructions to summarily grant asylum without opinion.²⁰⁴ Alternatively, DHS asked that the AG wait to render a decision until the final DHS regulations were published because they would make Alvarado eligible for asylum.²⁰⁵ Following the filing of the brief, no decision was forthcoming. In an order dated January 19, 2005, Mr.

193. See Extension and Re-Designation of Temporary Protected Status for Sudan, 69 Fed. Reg. 60,168 (Oct. 7, 2004).

194. See Termination of the Designation of Montserrat Under the Temporary Protected Status Program; Extension of Employment Authorization Documentation, 69 Fed. Reg. 40,642 (July 6, 2004).

195. See Termination of the Designation of Sierra Leone Under the Temporary Protected Status Program; Extension of the Designation of Employment Authorization Documentation, 68 Fed. Reg. 52,407 (Sept. 3, 2003).

196. *Id.* at 52,408.

197. *Id.* at 52,409.

198. Center for Gender & Refugee Studies, *Rodi Alvarado's Story*, at <http://sierra.uchastings.edu/cgrs/campaigns/update.htm> (last visited May 27, 2005) [hereinafter *Rodi Alvarado's Story*].

199. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b) (2005).

200. *In re R—A—*, 22 I&N. Dec. 3403 (BIA 1999).

201. Rodi Alvarado's Story, *supra* note 197.

202. *Id.*

203. See Brief for the Dep't of Homeland Security, *In re Alvarado-Peña*, available at http://www.uchastings.edu/cgrs/documents/legal/dhs_brief_ra.pdf.

204. *Id.* at 2-3.

205. *Id.* at 3-4.

Ashcroft sent the case back to the BIA for a new decision.²⁰⁶ Ms. Alvarado's case has now been pending for ten years.²⁰⁷

VI. Conclusion

The year 2004 ended on a low note without the anticipated comprehensive immigration reform that advocates expected at the start. At the same time, the end of the year came without enactment of the harsh legislation that some had been predicting. The U.S. Supreme Court's decisions marked a hopeful trend, as the Court seemed to be monitoring the actions of the Executive Branch more closely than in previous years.

206. Press Release, Center for Gender & Refugee Studies, Landmark Decision Delayed Once Again (Jan. 21, 2005), *available at* http://w3.uchastings.edu/cgrs/documents/legal/dhs_brief_ra.pdf.

207. Updates on the case, including a timeline, are *available at* <http://sierra.uchastings.edu/cgrs/campaigns/alvarado.htm>.

