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### Immigration and Nationality

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# Immigration and Nationality

ROBERT CHARLES HILL AND E. DANA NEACSU\*

## I. Introduction

During the year 2000, there were significant developments in immigration law and policy with respect to employment-based immigration, family visas, asylum regulations and jurisprudence, refugee admissions, Temporary Protection Status (TPS) designations, and the implementation of the United Nations Torture Convention.

The net effect of changes in employment-based immigration was a gain to both the business community and to immigrants under most categories. There was a virtual unanimous consent among lawmakers to increase the number of temporary H-1B specialty workers in the United States and to ameliorate some of the unintended consequences of previous legislation such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>1</sup> To accomplish these objectives, Congress enacted two significant pieces of immigration legislation late in the year: the American Competitiveness in the Twenty-First Century Act<sup>2</sup> (AC21) and the Legal Immigration and Family Equity Act of 2000 (LIFE Act),<sup>3</sup> as well as subsequent LIFE Act Amendments. Together, the new laws provide for a three-year increase in the H-1B visa cap, new rules allowing for "portability" and extensions of H-1B visa status, temporary restoration of the special adjustment of status provisions of former Immigration and Nationality Act<sup>4</sup> (INA) § 245(i), and temporary nonimmigrant

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1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996).

2. American Competitiveness in the Twenty-First Century (AC21) Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

3. Legal Immigration and Family Equity Act of 2000 (LIFE Act), Pub. L. No. 106-553, 114 Stat. 2762 (2000).

4. Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

status for certain alien spouses and minor children of U.S. citizens and legal permanent residents during the pendency of their green card processing.

In addition to these legislative developments, the executive branch and courts focused on an array of issues including permanent and temporary worker labor certifications, asylum claims, and implementation of the United Nations Torture Convention.<sup>5</sup>

## II. New Legislation

The INS Service Data Management Improvement Act of 2000 was signed into law on June 15, 2000.<sup>6</sup> This law supplants Section 110 of the IIRIRA, which would have required the INS to create and implement new automated entry and exit controls at all ports of entry.<sup>7</sup> The new law instead assigns the INS the task of establishing a database to organize the entry and exit data presently collected at ports of entry. The creation of a new task force is also mandated by this Act; its purpose is to review current border procedures and make periodic recommendations for improvements. There is also a provision recommending a continued feasibility evaluation of a Section 110 system. This law is widely perceived by the business community as a gain, and represents a compromise between advocates of the comprehensive controls envisioned in Section 110 and the Canadian and Mexican governments, as well as members of the international business and travel industries who view such a system as a serious barrier to cross-border trade.<sup>8</sup>

Perhaps the most significant statutory development to take place in employment-related immigration was the signing of the new H-1B legislation, AC21.<sup>9</sup> The bill was cosponsored by Senator Spencer Abraham (R-MI), Chairman of the Senate Immigration Subcommittee. The employers of H-1B workers will derive a remarkable number of benefits under AC21 in the next three years. Most significantly, it increased the number of allowable approvals (the H-1B cap) from 115,000 to 195,000 for fiscal years 2001, 2002 and 2003, in effect putting an end to high-tech (and other) employers' annual mad scramble to file petitions before the cap is reached, at least for these three fiscal years. The H-1B cap reverts to 65,000 in fiscal year 2004.<sup>10</sup>

AC21 also addresses a number of problem areas in H-1B policy that have been the direct result of the INS's chronic inability to process petitions in reasonable time frames, namely, (1) the question of counting approvals against the cap; (2) portability of H-1B status, I-140 and Alien Labor Certification; (3) H-1B petition backlog reduction; and (4) the loss of H-1B status when applications for permanent residency are pending.

Under AC21, the INS may not count an approval against the cap if the applicant has been in H-1B status at any time during the previous six years, unless the applicant is eligible for another six-year period of stay at the time the petition is filed. Others not counted

5. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/708 (1984).

6. See Immigration and Naturalization Service Data Management Improvement Act of 2000, Pub. L. No. 106-215, 114 Stat. 337 (2000).

7. See *President Signs Entry/Exit Control Legislation*, 77 INTERPRETER RELEASES 828 (2000).

8. See *id.*

9. Pub. L. 106-313, 114 Stat. 1251 (2000).

10. See H. Ronald Klasko, *American Competitiveness in the 21st Century: H-1Bs And Much More*, 77 INTERPRETER RELEASES 1689 (2000).

against the cap include employees of higher educational institutions and their related or affiliated non-profit entities, and applicants employed by nonprofit research organizations.

The new law facilitates portability of H-1B visa status. An H-1B worker may change employers once the new employer files a petition on the beneficiary's behalf, as long as the beneficiary maintains lawful status at the time of filing. I-140 Petitions for Alien Workers and Alien Labor Certifications are also now portable for employees wishing to change employers, if the employee has had an adjustment of status application pending for at least 180 days and on the condition that the position with the new employer is in the same or similar occupational classification as the position listed in the original I-140 or Alien Labor Certification.<sup>11</sup>

Implementing AC21, however, may yield some unintended consequences. An increase in H-1B workers in the United States, especially over the course of three years, will probably result in an increase in the filing of all types of applications relating to employment-based immigrant visa petitions, perhaps exceeding annual limitations and again overwhelming governmental capacity to keep up with processing demand. An intolerable backlog at the Department of Labor (DOL) and the INS already exists for Alien Labor Certification applications for permanent workers and adjustment of status petitions.

The content of the Immigration Services and Infrastructure Improvement Act, introduced by Senator Dianne Feinstein (D-CA), was also added to AC21.<sup>12</sup> Senator Feinstein introduced S. 2586 in May 2000.<sup>13</sup> This section specifies that an INS account should be created and dedicated to the goals of reducing the immigration backlogs and improving the overall INS process and systems used to provide various services. Funds in the account are to be available across fiscal years, and they may be used for such purposes as providing additional personnel and equipment. In addition, the new legislation requires an annual report to Congress on the top ten areas that have the worst immigration backlogs. It also requires the INS to explain why backlogs persist in these areas and what the agency is doing to fix them. The INS must also report on what additional resources are needed to meet Congress's mandate that backlogs be eliminated and that processing times are reduced to an acceptable time frame. The bill defined "backlog" as any naturalization, adjustment of status, family and employment-based immigration, asylum and temporary protected status application awaiting adjudication longer than 180 days, and stipulated that nonimmigrant visa petitions should not remain pending for more than thirty days.

Backlogs continue to be a major problem area. A snapshot of processing timeframes for adjustment of status petitions at three of the nation's four service centers is one indication of the current state of affairs. As of the end of January 2001, Vermont Service Center reports that applications received on October 15, 1999, are still pending initial adjudication; Nebraska Service Center provides a date of October 21, 1999; and the Texas Service Center posts June 1, 1999, as the receipt date of petitions pending initial adjudication.<sup>14</sup> No figures for the California Service Center were available at the time of this writing. The INS has a

11. *See id.*

12. *See* Press Release, Senator Feinstein, Senator Feinstein to Introduce Legislation to Reduce Immigration Backlog (Apr. 13, 2000), at [http://www.senate.gov/feinstein/releases00/immigration\\_backlog.html](http://www.senate.gov/feinstein/releases00/immigration_backlog.html).

13. *See* Press Release, Senator Feinstein, Senator Feinstein Introduces New Measure to Reduce Immigration Backlog (May 18, 2000), at [http://www.senate.gov/feinstein/releases00/immigration\\_backlog2.html](http://www.senate.gov/feinstein/releases00/immigration_backlog2.html).

14. This information was obtained through the American Immigration Lawyers Association (AILA) Infonet, at <http://www.aila.org>.

total caseload of 950,000 adjustment of status applications pending at this time. In addition, according to information obtained from Senator Feinstein's office, the INS has a backlog of approximately 1.3 million naturalization applications with the cities of Los Angeles, New York, San Francisco, Miami, and Chicago, accounting for 65 percent of the country's naturalization caseload.

This year, most Democrats in the House and Senate supported the H-1B bill but pushed for an increase in the education and training of U.S. workers as a condition of their support. Consequently, President Clinton signed a companion act (H.R. 5362)<sup>15</sup> increasing the education and training portion of the H-1B fee paid by petitioners of H-1B applications from \$500.00 to \$1000.00 (per petition) into law the same day as AC21. A segment of AC21 clearly outlines the direction the extra funds will be routed; 55 percent of the fees are earmarked for the Department of Labor, specifically for the creation of technical skills training programs for U.S. workers, rather than directly to private sector initiatives designed to accomplish the same purpose.

The Visa Waiver Permanent Program Act (H.R. 3767)<sup>16</sup> was also signed into law on October 30, 2000.<sup>17</sup> The Visa Waiver Program was originally established as a pilot program in 1986. It provided a means for visitors who are nationals of designated countries with a history of compliance with U.S. immigration laws and, on the basis of reciprocity, to enter the United States for short periods of stay without having to first obtain a visa. The pilot program was extended several times and expanded to include a list of twenty-nine participating countries. Some additional countries, such as Greece, are classified as having been approved to be part of the program, but are not functioning participants since these countries must fulfill certain requirements before they can actually participate. The program has been a boon to international business, international tourists, and the U.S. tourism industry in general, as well as to our overseas consular offices, saving the latter millions of dollars in visa processing resources.

The bill also contained provisions that eliminate the requirement for H-1B employers involved in a corporate restructuring to file new petitions for all of their H-1B employees and extends a pilot program in the immigrant investor (EB-5) visa category for investments in regional enterprise zones.

A section of the Visa Waiver legislation also authorizes the INS to begin fee collection for new students and exchange visitors who are "F", "M", and "J" visa holders. The Co-ordinated Interagency Partnership Regulating International Students (CIPRIS) program, slated to begin as soon as the INS establishes a fee collection system and develops regulations, is the result of a 1995 INS task force created to make recommendations on how to gather information for monitoring "F", "M", and "J" visa holders in the United States. A computerized tracking system for foreign students and exchange visitors was formalized in Section 641 of IIRIRA. The CIPRIS tracking system will give the INS, consular officers, and eventually, schools, immediate access to an "F", "M", or "J" visa holder's visitor data. The State Department anticipates CIPRIS will assist consular officers with eliminating student visa fraud and will substantially reduce the amount of paperwork used to adjudicate a student or exchange visitor visa.<sup>18</sup>

15. See Immigration and Nationality Act, Amendments, Pub. L. No. 106-311, 114 Stat. 1247 (2000).

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

17. See *State Dept. Instructs on Permanent Visa Waiver Program*, 77 INTERPRETER RELEASES 1608 (2000).

18. See *CIPRIS Program Update: INS Will Collect F/M/J Fee Beginning in 2001*(STATE 229049 Cable Text: UTE1395), at <http://www.immigrationlinks.com/news/news649.htm>.

The Religious Workers Act of 2000 (H.R. 4068), originally established as a pilot program in 1990, was enacted on October 31, 2000.<sup>19</sup> This law extends the special religious worker visa program and the special green card program until September 30, 2003,<sup>20</sup> allowing thousands of clergy and other religious workers to obtain permanent residence status to continue their ministry in the United States.

Another significant piece of legislation, which was signed into law on December 21, 2000, is the Legal Immigration and Family Equity Act of 2000 (LIFE Act)<sup>21</sup> and its amendments.<sup>22</sup> The LIFE Act included language extending Section 245(i), a section of immigration law that was active from 1994–1997.<sup>23</sup> This law permitted immigrants who were close to becoming permanent residents but who were not currently in lawful status to apply for permanent residence in the United States upon submitting a \$1000 fee; thus releasing these individuals from the obligation to return to their native countries. The business community strongly supported this measure, since it curtailed the loss of employees falling under this category. Congress allowed Section 245(i) to expire in November 1997, but immigrants already waiting for adjustment of status were “grandfathered” under the law.<sup>24</sup> The LIFE Act extends the grandfather portion of Section 245(i) from January 14, 1998 until April 30, 2001;<sup>25</sup> this means that a beneficiary of a non-frivolous immigrant visa petition or labor certification application filed before April 30, 2001 will be able to apply for adjustment of status and obtain his/her green card under Section 245(i), provided that he/she is otherwise eligible for an immigrant visa. The caveat eligibility requirement for the immigrant is demonstrated physical presence in the United States on the date of the enactment of the LIFE Act.

The LIFE Act also creates a new temporary visa category, the “V” visa, and expands the availability of the already established “K” visa. The “V” visa will now be available for certain spouses and unmarried children (under twenty-one) of legal permanent residents.<sup>26</sup> Due to quota backlogs, this category of beneficiaries typically waited five to six years to obtain permanent residence. Additionally, there was no way for these individuals to legally enter the United States, since they are intending immigrants. The “V” visa grants these individuals legal status and work authorization while their applications are pending, and will have obvious implications for families wishing to stay together in the United States. The law also stipulates that periods of stay in the United States in unauthorized status will not prevent someone from obtaining a “V” visa, and permits individuals already in the United States to adjust to “V” visa status. The applicant must meet a two-part criterion, however: (1) he/she must have been waiting for permanent residence three years or more from the time the INS received a second preference petition filed on his/her behalf, and (2) the INS must have received the petition on or before the date of enactment of the LIFE Act.<sup>27</sup>

19. See Religious Workers Act of 2000, Pub. L. No. 106-409, 114 Stat. 1787 (2000).

20. See State Dept. Releases December Visa Numbers; Religious Worker Visas Available; FY 2001 Employment Visas Up, 77 INTERPRETER RELEASES 1636 (2000).

21. The LIFE Act is codified as Title XI of H.R. 5548, enacted by reference in H.R. 4942, P.L. No. 106-553; 114 Stat. 2762, H. Rep. No. 106-1005.

22. The LIFE Act amendments are codified as Title XV, Division B, of H.R. 5666, enacted by reference in H.R. 4577, P.L. No. 106-554; 114 Stat. 2763, H. Rep. No. 106-1033.

23. See Immigration and Nationality Act § 245(i), 8 U.S.C.A. § 1255.

24. See *Congress Breathes 'LIFE' into Immigration Bill*, 5 BENDER'S IMMIGR. BULL. 1021 (2001).

25. See *id.*

26. See *id.*

27. See *id.*

A second temporary visa category, the "K" visa, has been expanded under the LIFE Act to include current spouses of U.S. citizens and accompanying children under the age of twenty-one.<sup>28</sup> Prior to LIFE, the "K" visa was available only to a U.S. citizen's fiancé and the fiancé's children. The new law allows for both the future and current spouses of U.S. citizens and any accompanying children to enter the United States and obtain work authorization while waiting for an immigrant visa petition to be approved. In order to be eligible for a "K" visa, the primary applicant needs to have a U.S. citizen submit a spousal petition on his/her behalf. It is not necessary for the petition to have been filed by December 21, 2000, and the "K" visa applicant does not have a waiting requirement.

Another change under the new law enables the fiancé K-1 visa holder's children, even if they are aged eighteen to under twenty-one, to adjust status on their parent's petition, if the fiancé married the U.S. citizen petitioner within ninety days of entry. Under the previous law, a child eighteen to under twenty-one whose parent had already married a U.S. citizen was required to have an immigrant petition filed for him/her directly and therefore faced a long wait of up to six years or more to get permanent residence.

The "K" visa can only be issued by a consular officer outside the United States; thus, undocumented immigrants will most likely have to apply at a U.S. consul abroad as well. A waiver under Section INA 212(d)(3)(A) and a finding that the applicant would be eligible for a waiver would be necessary for an applicant who was inadmissible on any grounds at the adjustment of status interview.

These "V" visa and "K" visa expansion provisions went into effect the date of enactment: December 21, 2000. As of this writing, however, neither the INS nor the Department of State have issued regulations or otherwise provided guidance regarding implementation of either category and, as such, are not yet accepting applications.

The LIFE Act also addressed individuals who participated in various class action lawsuits against the INS for improper handling of the 1986 amnesty program. An individual may now be eligible for relief if he/she has filed a written claim before October 1, 2000 for class membership<sup>29</sup> in either *Catholic Social Services (CSS) vs. Reno*,<sup>30</sup> *League of United Latin or American Citizens (LULAC) v. INS*<sup>31</sup> or *INS v. Zambrano*<sup>32</sup> and meets a list of other criteria, such as having maintained continuous physical presence in the United States beginning on November 6, 1986 and ending on May 4, 1988. Individuals able to meet these criteria will be eligible to apply directly for permanent residence and bypass temporary resident status. Additionally, the Attorney General must establish a process under which the eligible individual who is currently not physically present in the United States can apply for an adjustment of status to permanent residence from his/her location outside the United States.

The LIFE Act contains provisions that prevent the deportation of the spouse and minor, unmarried children of a person who is eligible for adjustment of status as a result of late legalization rules under the new law. These family members are also eligible for work authorization. The family member must have entered the United States before December 1, 1988, and must have resided in the United States on that date. The individual may not have been convicted of a felony or three or more misdemeanors in the United States, cannot

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28. *See id.*

29. *See id.*

30. *Catholic Social Services (CSS) vs. Reno*, 996 F.2d 221 (9th Cir. 1993).

31. *League of United Latin or American Citizens (LULAC) v. INS*, 1989 WL 252578 (C.D. Cal. 1989).

32. *INS v. Zambrano*, 509 U.S. 918 (1993).

have assisted in the persecution of any person (on the basis of race, religion, nationality, political opinion or membership in a particular social group), or be considered a danger to the community of the United States. Eligible individuals will be protected from deportation for violations of status in the United States but will continue to be deportable on other grounds, including criminal activity. If the applicant applies for benefits under the late legalization provisions of the LIFE Act from outside of the United States, the Attorney General is required to establish a process by which eligible spouses and children may be paroled into the United States in order to obtain the benefits under the new law.

The LIFE Act makes several miscellaneous technical changes to the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>33</sup> and the Haitian Refugee Immigration Fairness Act (HRIFA).<sup>34</sup> Section 1505 of the LIFE Act Amendments amends NACARA § 202(a) and HRIFA § 902(a). According to this section, the Attorney General may waive the grounds of inadmissibility set forth in INA § 212(a)(9)(A) and (C), regarding aliens previously removed and those unlawfully present after previous immigration violations. In addition, the new law provides that INA § 241(a)(5) does not apply to NACARA or HRIFA applicants.<sup>35</sup> The LIFE Act also allows NACARA and HRIFA applicants who become eligible to apply for adjustment of status, suspension of deportation, or cancellation of removal as a result of the changes made in the LIFE Act to file one Motion to Reopen any exclusion, deportation, or removal proceeding in order to apply for adjustment of status within 180 days of the date of enactment of the LIFE Act.

## II. New Regulations

### A. DEPARTMENT OF LABOR

The Department of Labor (DOL) published its interim final regulations on August 22, 2000, implementing the H-1C nonimmigrant program for registered nurses from the Nursing Relief for Disadvantaged Areas Act.<sup>36</sup> The regulations became effective on September 21, 2000.<sup>37</sup> The H-1A program that was created in 1989 and terminated in 1995 served as the model for the H-1C program, and the two programs are similar in that they require sponsors to fulfill certain attestation requirements. Only facilities in Health Professional Shortage Areas, as defined by the Department of Health and Human Services as having shortages of primary care physicians, may employ H-1C workers. Facilities must also meet particular criteria regarding the percentage of patients treated who are covered by Medicare and Medicaid; under these guidelines, the DOL estimates that only fourteen U.S. hospitals will actually be eligible to hire H-1C nurses.

On August 25, 2000, DOL announced its plan in the Federal Register to streamline its permanent alien labor certification program. The "PERM" program<sup>38</sup> will be a new system for certifying that no U.S. worker is able, willing and qualified for a position offered per-

33. See Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, 111 Stat. 2160, *amended* Pub. L. 105-139, 111 Stat. 2644 (1997).

34. See Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681 (1998).

35. Section 241(a)(5), 104 Stat. at 4978, bars anyone who has been ordered removed and who subsequently reenters the United States from obtaining relief under the INA.

36. See Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat. 1312 (1999).

37. See 65 Fed. Reg. 51,137-71 (Aug. 22, 2000).

38. See 65 Fed. Reg. 51,777-79 (Aug. 25, 2000).



manently to a foreign national; this certification usually initiates the permanent residence or "green card" application process for a foreign worker. The business community hopes that this system will result in a more efficient labor certification program. Although the original target start-up date for the PERM program was April 2001, the DOL has recently indicated October 2001 as the likely target date for implementing the program.

The DOL anticipates using a system similar to the "Faxback" Labor Condition Application (LCA) system used to certify temporary foreign workers. It is doubtful that it will be possible, initially, to file applications on the Internet, since the technology required for capturing signatures on forms would be an issue for both the DOL and many employers, in terms of expense. In another similarity to the LCA process, it is anticipated that no fee will be charged, despite having been authorized by the President's budget. This is because a fee requirement necessitates a paper filing. There will be no requirement to send in supporting documentation with the initial faxed submission, as the DOL plans to request it only for cases requiring additional review.

The new system will be based on the current procedures for "Reduction in Recruitment" (RIR) filing. In its Notice, the DOL stated that it would still be necessary for employers to obtain a prevailing wage from the appropriate State Employment Security Agency (SESA) before filing. Next, the employer would submit an attestation to the appropriate DOL regional office that no qualified U.S. workers were found, instead of following a heavily DOL-supervised course of recruitment to show a lack of U.S. workers. The attestation submitted must certify that the employer has taken certain "mandatory steps" and other "alternative steps" during recruitment; it would be entered into a computer system that would check it for completeness. The computer system would also review the attestation for information that would "flag" the application for additional examination. These "flags" would be pre-selected by the DOL to indicate "problematic" applications needing an in-depth audit. Certain applications also would be randomly selected for this review procedure. Once the filing is submitted, the DOL anticipates the attestation could be certified in seven to twenty-one working days, provided that no "flags" are caught by the DOL system. If selected for an audit, the employer could be sent a letter requesting supporting documentation. Once the audit is completed, the DOL could request that the employer engage in additional supervised recruitment, or it could certify or deny the attestation.

The DOL's intention to investigate attestations at the post-approval stage as a means of ensuring compliance with its program is one feature of PERM that leaves some members of the business community apprehensive. Although DOL states that review of any post-approved attestations will not result in a revocation of a foreign national's permanent residence, employers are concerned about such audits and their findings leading to the disruption of business. The DOL intends to conduct post-approval review on both a random basis against employers and on a baseline level to ascertain various industries' compliance.

On December 20, 2000, the DOL also issued its Interim Final H-1B Regulation<sup>39</sup> in the Federal Register implementing the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA)<sup>40</sup> with regard to H-1B LCAs. The Regulation addressed issues such as filing procedures, corporate reorganizations, traveling employees and "benching;"

39. See 65 Fed. Reg. 80,109-208 (Dec. 20, 2000).

40. American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

wage issues and documentation; benefits; special requirements for "H-1B dependent employers;" and enforcement issues. Most provisions of this regulation became effective January 19, 2000.

The DOL issued a new form designed specifically for processing by fax at a single site; each regional office will no longer process LCAs. As of this writing, the DOL is now accepting this new form for filings.

An important new provision contained in the DOL regulations concerns existing H-1B workers employed at companies affected by corporate reorganizations. If specific conditions are met, a new LCA will not be required for such workers to continue employment with the new or reorganized entity. However, the new entity will be required to maintain up-to-date lists of the existing H-1B workers affected, as well as the numbers and dates of certification for all relevant LCAs previously filed. In addition, the new employer must execute and maintain a sworn statement expressly assuming the liabilities and obligations of the existing LCAs and containing certain specified language, including assumption of liability for any violations by the previous entity under the LCA. According to the regulation, the new entity "shall not" employ any of the predecessor's H-1B employees unless this statement is executed or new LCAs and visa petitions are filed.<sup>41</sup> Note, however, that the new employer will not be permitted to use the existing LCAs of the predecessor company to file new petitions or extend existing petitions.

Perhaps the most significant provisions in the new DOL rules applicable to all H-1B employers are those governing LCA requirements for "roving" or traveling employees as well as employees who are "benched," a practice described in the regulations as being placed in a nonproductive status due to a decision by the employer.

The regulations establish specific rules for employees assigned to multiple worksites, as well as a specific methodology for determining whether those rules will apply in any given case. A detailed definition of "place of employment" tied to the "nature and duration" of the employee's job functions is set by the DOL. Unless the employee's travel involves going to a new "place of employment" or "worksite," the rules governing travel to multiple worksites will not apply. If a new worksite is involved, the employer will be required either to comply with LCA requirements including notice and filing,<sup>42</sup> or under limited circumstances, may opt instead to comply with new "short-term placement" rules.<sup>43</sup>

The DOL rules cite specific examples of job duties that would be exempt from or subject to the new requirements. Those described as exempt from the new or multiple worksite requirements include computer engineers who troubleshoot at customer sites; physical therapists making home visits "within the area of intended employment;" or sales representatives making customer calls.<sup>44</sup> H-1B employees temporarily visiting a different location for training or other developmental activity are similarly exempt from the rules.<sup>45</sup>

On the other hand, examples cited that would not meet the criteria for exemption and therefore would be subject to the new LCA or short-term placement requirements include

41. See *Employees' Benefits*, 20 C.F.R. § 655.760.

42. Interestingly, the regulation reinstates a requirement struck down by the NAM lawsuit, that notices must be posted at new worksites within an area of intended employment covered by an existing LCA on or before the date that the H-1B employee reports to that site, regardless of whether that worksite is the employer's own facility or a third-party worksite.

43. See 20 C.F.R. § 655.735 (2000).

44. *Id.*

45. See *id.*

computer engineers who work on projects at new locations for weeks or months at a time; physical therapists who “fill in” for others for extended periods or who are placed by contractor companies; or sales representatives assigned on a continuing basis to a location away from the home office.<sup>46</sup>

Under the new rules, if an H-1B employee is “benched” or placed in a nonproductive status due to a “decision by the employer,” such as a lack of work assignments, the employee must continue to be paid the full amount due under the LCA wage requirements. If the nonproductive period is due to “conditions unrelated to employment,” and at the employee’s “voluntary request and convenience,” such as a desire on the part of the employee to care for a sick relative or to travel, or due to circumstances that cause the employee to be unable to undertake work, the employer is not obligated to pay the employee, provided compensation is not mandated by the employer’s benefit plan or by other laws.<sup>47</sup> The preamble makes clear that DOL cannot “forgive” employers from compliance with this rule due to holiday plant shutdowns, or other events that affect both U.S. workers and H-1B nonimmigrants, and at the same time, establishes its view that laying off U.S. workers in such situations while retaining H-1B nonimmigrants may violate other laws prohibiting discrimination or the LCA attestation required of H-1B dependent employers under ACWIA.

The Interim Final Rule omits “Appendix A” that was included in its January 1999 “Notice of Proposed Rulemaking” (NPRM).<sup>48</sup> This appendix contained controversial “guidance” regarding computation of the actual wages. The NPRM suggested that employers must have an objective wage system “sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H-1B nonimmigrant.”<sup>49</sup> This has been deleted from the interim final rule, and instead, the preamble states only that the system does not have to be “objective,” but must only use “legitimate business factors.”

ACWIA requires that benefits be offered to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as they are offered to the employer’s U.S. workers. The regulation defines this to mean that H-1B workers must be offered the same benefits package as U.S. workers, cannot be subjected to stricter eligibility criteria, and cannot be treated as “temporary employees” for benefits purposes by virtue of their nonimmigrant status. Multinational companies can keep transferred employees on the foreign payroll and offer “home country” benefits under certain circumstances.

In another controversial provision, the DOL regulation makes it a violation of the required wage provisions if the H-1B employee pays “attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition”<sup>50</sup> such that, when deducted from the employee’s wage, the wage would fall below the higher of the actual or the prevailing wage. If such payments would not reduce the employee’s wage beneath the required wage, such payments are permissible.<sup>51</sup>

Under ACWIA, certain employers defined as “H-1B dependent” or “willful violators” are subject to enhanced scrutiny and additional requirements with respect to the displace-

46. *See id.*

47. 20 C.F.R. § 655.738 (2001).

48. Notice of Proposed Rulemaking, 64 Fed. Reg. 628 (proposed Jan. 5, 1999).

49. *Id.*

50. 20 C.F.R. § 655.731 (2000).

51. *See id.*

ment and recruitment of American workers. To demonstrate compliance with these requirements, these employers must make additional attestations during the LCA process. All employers are compelled to determine and affirmatively declare whether or not they fall into the classification of H-1B dependent or willful violators. The interim final rule sets out detailed provisions implementing these requirements under ACWIA.<sup>52</sup>

Finally, the interim rule establishes a process for receiving information, from persons who would not be considered aggrieved parties, for the purpose of investigations expressly authorized by ACWIA. It also establishes new and separate civil penalties for any violation of other LCA rules that impedes the ability of the DOL to investigate or the ability of members of the public to obtain information needed to file a complaint.<sup>53</sup>

#### B. IMMIGRATION AND NATURALIZATION SERVICE

The INS announced this year that the new Form I-129W must be submitted with all H-1B petitions.<sup>54</sup> All petitions filed after March 30, 2000, must include this form. The rule also applies to change of employer and extension of status petitions. The purpose of this form is to collect information required by the 1998 H-1B law, and to evaluate whether the petitioner is required to pay the \$500 training fee, which was increased to \$1000 in 2000, as discussed above.

The INS announced its plans to delegate the authority to adjudicate H-2A petitions for nonimmigrant agricultural workers to the DOL.<sup>55</sup> The DOL was slated to assume responsibility for making the final determination on H-2A agricultural worker LCAs and petitions starting November 13, 2000. A new Form ETA-9079, Application for Temporary Agricultural Labor Certification and H-2A Petition, containing features of both the ETA-750 and I-129 forms, was created in an effort to streamline the process. A sliding-scale fee for the filing, based on the number of H-2A workers sponsors seek to employ, was also to be put into effect by the DOL, in addition to the \$110 filing fee already charged for the petition. The transfer of adjudication authority to the DOL would not affect the INS's authority to make determinations at the port-of-entry of an alien's admissibility to the United States, to make determinations of an alien's eligibility for change of nonimmigrant status, or to make determinations of an alien's eligibility for extension of stay. As of this writing, however, the INS and the DOL have announced that the effective date of this plan has been postponed from November 13, 2000 to October 1, 2001.<sup>56</sup>

On September 6, 2000, the INS published interim regulations implementing the provisions in the Nursing Relief for Disadvantaged Areas Act, which pertains to immigrant visas for physicians serving in Health Professional Shortage Areas.<sup>57</sup> Under these provisions,

52. See 20 C.F.R. § 655.736 (2000). The H-1B dependent provisions are complex and continue at § 655.736.

53. See 20 C.F.R. § 655.735.

54. See Immigration and Naturalization Service, 8 C.F.R. § 103 (2000).

55. See Delegation of the Adjudication of Certain Temporary Agricultural Worker Petitions, 65 Fed. Reg. 43,528-34 (proposed July 13, 2000) (INS) and Labor Certification and Petition Process for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States, 65 Fed. Reg. 43,538-44 (proposed July 13, 2000) (DOL).

56. See Delegation of the Adjudication of Certain Temporary Agricultural Worker Petitions, 65 Fed. Reg. 67,616-01 (Nov. 13, 2000).

57. See National Interest Waivers for Second-Preference Employment-Based Immigrant Physicians Serving Medically Underserved Areas or at Department of Veterans Affairs Facilities, 65 Fed. Reg. 53,889-96 (proposed Sept. 6, 2000).

doctors who agree to work for three or five years in Health Professional Shortage Areas, or at a VA facility, may obtain permanent residence based on a "national interest waiver." These doctors are not required to obtain certification that there are no U.S. workers able, willing and qualified for their position. The law reintroduces this waiver, which the INS had previously administratively terminated.

On December 6, 2000, the INS and the Executive Office for Immigration Review (EOIR) published a joint final rule that implements the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) governing asylum claims and amends regulations about establishing past persecution.<sup>58</sup> The following are some of the areas affected by that rule:

- 8 C.F.R. § 208.2-Jurisdiction. Section 208.2 was amended to establish that the Office of International Affairs has initial jurisdiction over credible fear determinations under § 208.30 and reasonable fear determinations under § 208.31. Additionally, section 208.2(c)(1)(v) (formerly § 208.2(b)(1)(v)), was modified to clarify the existing rules relating to cases falling under INA § 235(c)—providing an expedited removal process for certain aliens who are suspected of being inadmissible on national security grounds.
- 8 C.F.R. § 208.5-Special Duties Towards Aliens in Custody of the Service. New language was added to paragraph (a) of this section, which relates to aliens in the custody of the INS who request asylum or withholding of removal, or who express a fear of persecution or harm.
- 8 C.F.R. § 208.14-Approval, Denial, Referral, or Dismissal of Application. This section was revised to clarify the circumstances under which an asylum officer may grant, deny, or refer an asylum application. For example, section 208.14(c)(2) clarifies that the classes of aliens to whom an asylum officer may grant or deny asylum status include aliens in valid TPS and immigrant status.
- 8 C.F.R. § 208.30-Credible Fear Determinations. Section 208.30(g)(2)(iv)(A) was revised to include language that would permit the INS to reconsider a negative credible fear determination, even after such determination has been affirmed by an IJ, as long as the Service provides the IJ with notice of its reconsideration.

On June 11, 1999, the Board of Immigration Appeals (BIA), in *Matter of R-A*<sup>59</sup> denied the asylum claim filed by Rodi Alvarado Pena, which she based on grounds of years of domestic abuse at the hands of her husband.<sup>60</sup> On appeal, the BIA reversed the IJ's decision in an en banc decision split ten to five. The BIA held that the abuse that she suffered at the hands of her husband rose to the level of persecution, but that she failed to establish that the harm was committed "on account of" any of the five grounds enumerated in the statute; none of them including gender as a protected social group.<sup>61</sup>

58. See Asylum Procedures, 65 Fed. Reg. 76,121-38 (proposed Dec. 6, 2000).

59. See *Matter of R-A*, Int., Dec. No. 3403, 1999 WL 424364, (B.I.A. June 11, 1999).

60. The INS appealed the Immigration Judge's decision granting the applicant's request on grounds that although the applicant sought protection from the police and through the courts in Guatemala, she was unable to obtain any state protection. *Matter of R A* (San Francisco, CA, Immigration Court, Sept. 20, 1996) (Judge Yam), available at <http://www.uchastings.edu/cgrs/law/ijdec.html>.

61. See *Matter of R-A*, Int. Dec. No. 3403, 1999 WL 424364, (B.I.A. June 11, 1999).

In direct response to an unpopular BIA decision (see discussion below), on December 7, 2000, the INS published the proposed rule regarding gender-related and other emerging types of asylum claims.<sup>62</sup> Its main purpose was to provide guidance on the definitions of “persecution” and “membership in a particular social group.” In addition, the new rule explains the requirement that persecution must be “on account of” a protected characteristic. “It also restates that gender can form the basis of a particular social group, and establishes principles for interpretation and application of the various components of the statutory definition of ‘refugee’ for asylum and withholding cases generally, and, in particular, with an emphasis on the assessment of claims made by applicants who have suffered or fear domestic violence.”<sup>63</sup>

In addition, the Acting Commissioner of the INS referred the BIA’s decision to the Attorney General for review. On January 8, 2001, the Acting Commissioner asked the Attorney General to vacate the decision “immediately,” and remand it to the Board for reconsideration.<sup>64</sup>

On January 20, 2001, the Attorney General vacated the June 11, 1999 decision by the Board of Immigration Appeals.<sup>65</sup> The Attorney General’s order also remanded the matter to the BIA and directed the Board to “stay reconsideration of the decision until after the proposed rule published at 65 Fed. Reg. 76588 (Dec. 7, 2000) is published in final form.”<sup>66</sup> According to the order, “[t]he Board should then reconsider the decision in light of the final rule.”<sup>67</sup> At the end of January 2001, the BIA reissued its decision to include Attorney General Reno’s decision in the case.<sup>68</sup>

#### IV. New Case Law

##### A. ASYLUM CLAIMS BY MINOR CHILDREN

Both the INS and the federal courts found that a six-year-old child does not have the capacity to apply for asylum against the express wishes of the child’s sole surviving parent, even if the application was submitted by a third party on behalf of (or bearing the name of) the child.

On November 25, 1999, a five-year-old Cuban boy—Elian Gonzalez (Elian)—was found off the Florida coast. The INS temporarily paroled him to the custody of his paternal great-uncle, Lazaro Gonzalez.<sup>69</sup> While his father, Juan Miguel Gonzalez (Juan Miguel), requested that his son be returned to him in Cuba, Lazaro applied for asylum on behalf of Elian, on grounds of a well-founded fear of persecution on account of political opinion or membership in a particular social group.<sup>70</sup> Later, an identical application was submitted with Elian’s own signature. Contrary to that application, Juan Miguel requested the INS to have Elian

62. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588–98 (proposed Dec. 7, 2000).

63. *INS Issues Proposed Rule on Gender- and Domestic Violence-Based Asylum Claims*, 77 No. 48 INTERPRETER RELEASES 1737 (Dec. 18, 2000).

64. See *INS Seeks Review of Matter of R-A-*, 78 No. 3 INTERPRETER RELEASES 233 (Jan. 15, 2001).

65. See Susan Sachs, *Reno Voids Denial of Asylum For Guatemalan Battered Wife*, N.Y. TIMES, Jan. 20, 2001, at B4.

66. *Board Reissues Matter of R-A-*, 78 No. 6 INTERPRETER RELEASES 335 (Feb. 5, 2001).

67. *Id.*

68. See *Matter of R-A-*, Int., Dec. 3403, 1999 WL 424364 (B.I.A. June 11, 1999, A.G. 2001).

69. See *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000).

70. See *id.*

returned to his custody, and that any application for asylum filed on behalf of Elian be withdrawn.<sup>71</sup>

On January 3, 2000, the INS General Counsel issued a memorandum on Elian's ability to apply for asylum in direct opposition to his father's wishes. The memorandum argued that the father was the sole guardian and that according to his wishes Elian's asylum application should be withdrawn.<sup>72</sup> The INS adopted that memorandum and its findings.<sup>73</sup> Accordingly, the INS informed Lazaro, who had physical custody of Elian, that he lacked the authority to request asylum for Elian under those circumstances. U.S. Attorney General Janet Reno supported the decision of the INS.<sup>74</sup>

Lazaro challenged the INS decision in both state and federal courts.<sup>75</sup> He filed a case in Florida state court<sup>76</sup> asserting that the matter was an issue of family law. The Florida court dismissed the case on grounds of lack of subject matter jurisdiction, and lack of standing of Lazaro under the relevant Florida statute on temporary custody of minor children by extended family.<sup>77</sup>

Lazaro then filed another case in federal court.<sup>78</sup> The district court dismissed the case finding that the granting of asylum is a matter within the discretion of the attorney general, and that there appeared to have been no abuse of that discretion.<sup>79</sup> The federal district court found that the INS thoroughly considered the asylum application submitted by a third party on behalf of (or bearing the name of) a six-year-old child, against the express wishes of the child's sole surviving parent, within a permissible interpretation and application of the asylum statute 8 U.S.C. § 1158 (a)(1).<sup>80</sup> The court also held that the INS Commissioner's approach to the unusual circumstances of the case—Elian's lack of capacity coupled with his father's stated desire that Elian not apply for asylum—was consistent with asylum-related and family unification guidelines and international conventions.<sup>81</sup>

Lazaro appealed the decision to the Eleventh Circuit Court of Appeals.<sup>82</sup> The Court of Appeals affirmed the district court's decision that, in filling in the gaps of U.S. law, the INS had made a reasonable policy choice for how to handle Elian's asylum applications and had applied that policy in a manner that was neither capricious nor arbitrary.<sup>83</sup> After the Eleventh Circuit and the Supreme Court<sup>84</sup> denied further review, Elian and his father returned to Cuba.<sup>85</sup>

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See Gonzalez ex rel. Gonzalez v. Gonzalez-Quintana*, No. 00-00479-FC-28, 2000 WL 419688 (Fla. Cir. Ct. Jan. 10, 2000).

77. *See id.*

78. *See Gonzalez ex rel. Gonzalez*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000).

79. *See id.*

80. Under 8 U.S.C. § 1158(b)(1), the Attorney General "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section" if the Attorney General finds that the alien is a "refugee." 8 U.S.C. § 1158(b)(1).

81. The UNHCR Guidelines emphasize the need to reunite unaccompanied minors with their immediate families.

82. *See Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

83. *See id.*

84. *See id.*

85. *See* Sean D. Murphy, *Return of Elian Gonzalez to Cuba*, 94 AM. J. INT'L L. 516, 526 (2000). *See also* David Gonzalez & Lizette Alvarez, *Justices Allow Cuban Boy to Fly Home*, N.Y. TIMES June 29, 2000, at A1.

In direct response to this case, Congressional advocates of immigration law reform introduced a bill in the Senate on September 27, 2000, to establish new procedures for dealing with unaccompanied alien children (S. 3117).<sup>86</sup> The stated purpose of the bill is to ensure that children in Elian's position do not become political pawns, and that their interests are adequately represented by appointed guardians. The Unaccompanied Alien Child Protection Act of 2000<sup>87</sup> is sponsored by Senator Dianne Feinstein (D-Cal.) and would establish an Office of Children's Services within the Department of Justice to coordinate and implement government actions involving unaccompanied alien children.

## V. Other Developments

### A. GAO'S REPORT ON EXPEDITED REMOVAL

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 contains new provisions establishing an expedited removal process for aliens attempting to enter the United States on fraudulent grounds, such as falsely claiming to be a U.S. citizen, or using fraudulent documents. INS inspectors at ports of entry can issue expedited removal orders to those aliens while they are "to provide the aliens with certain information about the expedited removal process and to ask them specific questions, such as whether they fear being returned to their home country or country of last residence. With few exceptions, aliens cannot request an immigration judge's review of INS inspectors' removal decisions."<sup>88</sup>

Mandated by Congress, the U.S. General Accounting Office (GAO) has issued two reports on expedited removal.<sup>89</sup> However, neither report—the first one released in March 1998 nor the second one released in September 2000—has yet addressed the issue of accuracy of INS inspectors' decision-making.<sup>90</sup> "Instead they focused on management and internal controls implemented by the INS to assure compliance with controlling law."<sup>91</sup>

### B. INS DETENTION RULES

The INS released thirty-six standards for facilities housing INS detainees, which took effect in January 2001, at INS-owned detention facilities. The standards are to be gradually applied over a two-year period at the INS's contract facilities, as well as at state and local facilities that have entered into Intergovernmental Service Agreements with the INS.<sup>92</sup>

86. See *Immigration Reform, Unaccompanied Alien Child Protection Measures Introduced in Senate*, 77 No. 39 INTERPRETER RELEASES 1442 (Oct. 9, 2000).

87. See S. 3117, 106th Congress (2000).

88. RICHARD M. STANA, U.S. GENERAL ACCT. OFF., *ILLEGAL ALIENS-OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS* 6 (2000).

89. For example, the International Religious Freedom Act of 1998, 22 U.S.C. 6401 (2000), requires GAO to study issues relating to aliens who are subject to expedited removal and those who have claimed a fear of persecution or torture in their home country.

90. See CENTER FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, *EVALUATION OF THE GENERAL ACCOUNTING OFFICE'S SECOND REPORT ON EXPEDITED REMOVAL*, available at <http://www.uchastings.edu/ers/reports/reports.htm>.

91. Karen Musalo, *The Expedited Removal Study Releases Its Third Report*, 77 No. 32 INTERPRETER RELEASES 1189, 1190 (Aug. 21, 2000).

92. See *INS Hopes to Bring Uniformity to Detention Facilities' Processes with Release of Comprehensive Standards*, 77 No. 45 INTERPRETER RELEASES 1637 (Nov. 20, 2000).



The new standards take into consideration the growth in the INS detention population, to an average of 20,000 from 8,200 in 1997.<sup>93</sup> They are based on existing INS detention policies and four additional specific access standards, which were developed in cooperation with the American Bar Association (ABA). The new access standards address visitation, access to legal materials, telephone access, and group presentations on legal matters.<sup>94</sup> For example, detainees are to be allowed to meet privately with current or prospective legal representatives and legal assistants, with their consular officials, and in addition, representatives of news media and nongovernmental organizations may interview the detainees on the premises.<sup>95</sup> In addition, the standards contain numerous details on all facets of detainee life: recreation, medical care, food service, hunger strikes, emergency procedures, disciplinary policy, and other issues fully explained in the new INS "Detention Operations Manual."<sup>96</sup>

#### C. "TEMPORARY PROTECTION STATUS" APPLIES TO FEWER COUNTRIES

Nationals from Honduras and Nicaragua remained the majority of the Temporary Protection Status (TPS) beneficiaries.<sup>97</sup> By 2000, there were over 100,000 applicants from these two countries,<sup>98</sup> and only a few thousands applicants from other TPS designated countries such as Sierra Leone, Sudan, and Burundi.<sup>99</sup> The INS extended and terminated in 2000 the TPS designation for Guinea-Bissau nationals.<sup>100</sup> The INS extended the TPS designation until 2001 for Burundi, Sierra Leone, Sudan, Bosnia, and Somalia nationals.<sup>101</sup> The INS also designated Angola as a beneficiary of the TPS designation for a period of twelve months, until March 2001.<sup>102</sup> The only additional country currently under serious and active consideration for TPS designation is Colombia. The reason for this favorable treatment rests with the country's internal armed conflict.<sup>103</sup>

#### D. TORTURE CONVENTION DEVELOPMENTS

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention) was adopted and opened for signature on December 10, 1984.<sup>104</sup> In 1988, the U.S. Congress passed legislation that implemented

93. See *id.*

94. See *id.*

95. See *id.*

96. The full text of the new INS "Detention Operations Manual" is available on the INS's website at <http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm>.

97. See *State Department, INS Host Informational Meeting on TPS Program*, 77 No. 17 INTERPRETER RELEASES 572 (May 1, 2000).

98. See *id.*

99. See *INS Issues EADS for Hondurans and Nicaraguans Who Have Re-Registered for TPS*, 77 No. 48 INTERPRETER RELEASES 1758 (Dec. 18, 2000).

100. See *INS Extends and Terminates TPS Designation for Guinea-Bissau*, 77 No. 12 INTERPRETER RELEASES 381 (Mar. 24, 2000).

101. See *INS Extends TPS Designation for Somalia*, 77 No. 46 INTERPRETER RELEASES 1664 (Dec. 4, 2000).

102. See *INS Designates Angola for TPS*, 77 No. 13 INTERPRETER RELEASES 431, 432 (Apr. 3, 2000).

103. See *State Department, INS Host Informational Meeting on TPS Program*, 77 No. 17 INTERPRETER RELEASES 572 (May 1, 2000).

104. See G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/708 (1984).

Article 3 of the Convention, the “Foreign Affairs Reform and Restructuring Act” (FARR Act). The new legislation required “the appropriate agencies [to] prescribe regulations to implement the obligations of the United States under Article 3 of . . . the Convention.”<sup>105</sup> An alien may be entitled to such protection, upon determination by Immigration Court. During the year 2000, the BIA issued only two decisions related to this U.N. Convention, and the federal courts reviewed only a few dozens administrative decisions denying relief under Article 3.

In *In Re S-V*,<sup>106</sup> the BIA denied the applicant’s motion to reopen to apply for deferral of removal under Article 3 of the Convention. It held that because (1) an applicant had to demonstrate eligibility for withholding of removal under Article 3, by showing likelihood of torture upon return<sup>107</sup> at “the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity,”<sup>108</sup> and (2) the applicant had “neither alleged nor demonstrated that the Colombian Government’s failure to protect its citizens is the result of deliberate acceptance of the guerrillas’ activities,” he failed to demonstrate prima facie eligibility for relief under Article 3.<sup>109</sup>

In an unpublished decision, *In Re: Anwar Haddam*,<sup>110</sup> the BIA upheld the IJ’s decision that the applicant was eligible for deferral of removal under the Convention, pursuant to 8 C.F.R. § 208.17(a). The BIA stated that the relief under Article 3 applied because the applicant “faced the possibility of torture if returned to Algeria,”<sup>111</sup> because of his political activities and “the Government of Algeria’s belief that he [was] engaged in terrorist activities.”<sup>112</sup>

In *Mansour v. INS*,<sup>113</sup> the Seventh Circuit Court of Appeals vacated the BIA’s decision, denying petitioner’s motion to reopen to apply for deferral of removal under Article 3 of the Convention on grounds of abuse of discretion. The court held that the BIA did not seem to have “thoroughly explored”<sup>114</sup> the petitioner’s torture claim on grounds of his ethnic/religious affiliation as an Assyrian Christian in Iraq. The court vacated the BIA’s decision and remanded it for further proceedings, because “[t]he BIA’s mislabeling of Mansour’s ethnic/religious affiliation [as Syrian Christian instead of Assyrian Christian] and its limited discussion of his torture claim”<sup>115</sup> indicated that the it did not adequately consider his religious affiliation as grounds for torture.<sup>116</sup>

## VI. Conclusion

A combination of factors undoubtedly played a role in shaping the developments impacting immigration and nationality law during 2000. The key developments, of course,

105. Pub. L. 105-277 § 2242(b), 112 Stat. 2681.

106. *In Re S-V*, Int. Dec. No. 3430, 2000 WL 562836 (BIA).

107. 8 C.F.R. § 208.16(c)(2).

108. 8 C.F.R. § 208.18(a)(1).

109. *In Re: S-V*, 2000 WL 562836.

110. *In Re: Anwar Haddam*, File: A22 751 813, 2000 WL 1901995 (BIA 2000).

111. *Id.*

112. *Id.*

113. *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000).

114. *Id.* at 909.

115. *Id.*

116. *See id.*

were the statutory and regulatory changes to the law. These were driven in large part by sustained growth in the U.S. economy and continued shortages in high-skilled workers through much of the year, as well as an increasing incapacity of the INS to keep up with this expanding workload, resulting in severe processing backlogs almost across the board.

Ironically, the consequences of these changes themselves may precipitate even more dramatic developments during 2001. As we begin the year, several key factors are already signaling changes in immigration law and policy. The economic growth that prevailed throughout the 1990s and into early 2000 has changed. According to most news reports, a serious economic downturn has begun and, according to many economists, the specter of full-blown recession looms. If unemployment rates rise again to the levels of 1991–1992, political pressures to address public perceptions of “uncontrolled” migration—even increased levels of high-skilled migration—may be resurrected just as advocates of immigration in both parties had begun to believe that battle was won.

Politically, for the first time in more than half a century, with the inauguration of President George W. Bush, Republicans will control the White House and both houses of Congress, albeit by slim margins. Congressional Republicans and Democrats alike will be exploring ways to find common ground for bipartisan action and immigration reform may take on a new life in this developing political environment. Combined with longstanding congressional frustration over perceived mismanagement in the INS as well as processing backlogs that are likely to grow even larger as a result of legislation passed late last year, a new impetus to reform and restructure the INS may result in the effective separation of the agency’s enforcement and service functions within—or outside of—the Justice Department.

And as changes in international politics and new or continuing conflicts threaten vulnerable populations around the world, migration pressures may once again build necessitating a review of U.S. refugee and asylum policy and increasing resources allocated to diplomatic and humanitarian efforts to predict, prevent, and respond to mass migration emergencies in troubled areas around the world. It will certainly be interesting to see how economic and political developments impact immigration and nationality law during 2001.