# Immigration and Nationality Law

MARK R. VON STERNBERG* AND ERIC A. JONES**

## I. Introduction

2007 was most strongly characterized by polarization over immigration issues and by Congress's resulting failure to adopt a comprehensive immigration reform statute. The collapse of immigration reform was caused, in part, by acrimonious news coverage including sustained attacks on proposed legalization and guest worker measures as well as by provisions in the final Senate bill that would have virtually displaced significant areas of traditional family-based and employment-based immigration law. Also of moment during the year, the Department of Homeland Security (DHS) adopted a final interim rule that, four years after enactment, would implement the statute's provisions creating the non-

* Mark R. von Sternberg is a Co-Chair of the Immigration and Naturalization Committee of the American Bar Association's International Division and Senior Attorney at Catholic Charities Community Services/Archdiocese of New York, where he concentrates on litigation before the Immigration Courts and the Board of Immigration Appeals. Since January 1999, Mr. von Sternberg has served as an adjunct faculty member at Pace University School of Law where he teaches general immigration and comparative refugee law. Since August 2003, Mr. von Sternberg has also been an adjunct professor at St. John's University Law School where he co-teaches an immigration rights clinic. Mr. von Sternberg received a J.D. degree from Vanderbilt University School of Law in 1973 and an LL.M. degree (in international legal studies) from New York University School of Law in 1984. Mr. von Sternberg has lectured in law schools and at professional associations regarding immigration matters and has written extensively, particularly in the areas of refugee law, international humanitarian law, and human rights. In 2002, he received the American Immigration Lawyers Association Pro Bono Award. The author would like to thank Jennifer Ismat and Nathaniel Eichler, third-year students at St. John's University Law School, for their research and recommendations with respect to this article.

** Eric A. Jones is the founder of the law firm Emmaus Consulting PLLC, where he concentrates on Immigration & Business Development issues for clients from all over the world, including Eastern Europe, the United States, Asia, Africa, and the Middle East. Mr. Jones obtained his Juris Doctorate from Gonzaga School of Law, where he focused on International Human Rights law and obtained his Bachelors in International Studies from the School For International Training where his focus was on Central American and Soviet issues. Mr. Jones is a member of the American Bar Association (ABA). He served from August 2003 to 2006 as a Commissioner on the ABA Commission on Immigration and currently serves as a Vice-Chair of the ABA Section of International Law's Immigration & Naturalization Committee. Mr. Jones is a Fellow to the American Bar Foundation. The Fellows is an honorary organization of attorneys, judges and law professors whose professional, public, and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession and is limited to one third of one percent of lawyers licensed to practice in each jurisdiction.

immigrant "U" classification, and the agency proposed regulations that would substantially change immigrant and non-immigrant processing of religious workers.

The Department of Labor also adopted a final regulation significantly modifying the alien labor certification process, barring substitutions and creating a shelf-life for labor certifications. The year was also one that saw prolific decision-making, both at the federal and administrative levels. The federal courts maintained their recent high level of involvement in immigration cases spawned by the administrative practice of issuing summary opinions in cases before the Board of Immigration Appeals (the "Board"). The Board, in turn, was particularly active in the asylum field, as it sought to address questions relating to victims of coercive family planning and female genital mutilation, as well as issues concerning when serious harm is related to a protected ground and the criteria governing the credibility of asylum applicants. Finally, the Department of Homeland Security attempted to relieve the problems generated by the terrorist bars to asylum, making some headway by year's end through adoption of waivers pertaining to the material support of terrorism provisions.

## II. Legislative Developments

### A. Immigration Reform

2007 was not a year of significant statutory enactments. Nonetheless, it was marked by a flurry of legislative proposals, including House and Senate versions of comprehensive immigration reform. The year also saw a reintroduction of legislative proposals, which had been originally put forward in prior years, including the AgJOBS bill and the DREAM Act. Neither the AgJOBS bill nor the proposed DREAM Act legislation had been adopted by year's end, despite the fact that there was significant public support for them.

#### 1. *Comprehensive Immigration Reform*

The first important step in comprehensive immigration reform during the year was taken on March 22, 2007, when Representatives Luis V. Gutierrez (D. Ill.) and Jeff Flake (R. Ariz.) introduced H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act of 2007).[1] The proposed legislation was a combination of enhanced border security, interior enforcement, visa reform, employment authorization, new foreign worker provisions, employment verification, and a legalization program.

On May 9, 2007, Harry Reid (D. Nev.), Senate Majority Leader, introduced S. 1348—the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007.[2] The bill largely acted as the basis for a proposal around which Senate debate and compromise could take place.[3] On June 7, 2007, three votes for cloture failed, and S. 1348 was withdrawn from consideration. On June 18, 2007, however, Senator Edward Kennedy (D.

1. H.R. 1645, 110th Cong. (2007).

2. S. 1348, 110th Cong. (2007).

3. *Immigration Reform Proposal Reached Behind the Scenes; Senate Expected to Begin Debate*, 84 No. 21 Interpreter Releases (West) 1117 (May 21, 2007).

Mass.) introduced S. 1639—the Unaccompanied Alien Child Protection Act of 2007, a comprehensive bill, which after an early bundling of amendments, encompassed and superseded most of the provisions of the earlier bill.

S. 1639, as amended, was a combination of enhanced law enforcement, visa reform, guest worker provisions, and a long-awaited legalization program.[4] S. 1639, however, was by far the most radical of the measures recently entertained by Congress in its ongoing efforts to reform immigration law and policy. Among other things, the bill created a new "Z visa," for which all non-citizens living in theUnited States since January 1, 2007 would be eligible.[5] The visa would empower the holder to remain in the United States indefinitely and obtain a Social Security Card.[6] After the expiration of eight years, the holder of the Z visa could adjust status to that of a lawful permanent resident, upon the payment of a $2,000 fine and back taxes. Five years after receiving lawful resident status, the citizenship process could begin.[7]

A new "Y visa" was also created by the bill and would have permitted guest workers to remain in the United States for two years, after which they would be constrained to return home.[8] Pursuant to a succession of amendments, the number of entrants permitted under the program was reduced to from 400,000 to 200,000,[9] and the length of the program was limited to a period of five years.[10]

The bill also substantially altered the historical foundations of U.S. immigration law by restricting the bases upon which family members could be admitted permanently to the United States based on the petition of a relative. Seeking to end chain migration, the bill limited potential beneficiaries in family-based immigration to members of the nuclear family—spouses, children and parents.[11] Concerning immediate relative classification, the bill capped the parents of U.S. citizens as persons eligible for an immigrant visa while eliminating siblings and adult children as aliens who could be petitioned.[12]

As an alternative to the historical family and employment-based predicates to U.S. immigration, the bill set up a point system, largely based on the Canadian model. Points would be awarded by a USCIS adjudicating officer based on a totality of the circumstances approach in which the adjudicator would look at the alien's education, job skills, family members living in the United States, English proficiency, and whether the alien had been offered a job.[13] The point system would have eliminated the alien labor certification program, the essential feature of the Immigration and Nationality Act's employment-based visa scheme, and would have clearly dominated family-based immigration in light of the restrictions to be affected by the bill. [14]

4. The proposed legislation drew upon three failed prior bills—the "McCain-Kennedy bill" of May 2005, the Comprehensive Enforcement and Immigration Reform Act of July 2005, and the Comprehensive Immigration Reform Act of 2006.

5. S. 1639, 110th Cong. § 601 (2007).

6. *Id.* § 606.

7. *Id.*

8. *Id.* §§ 401, 403.

9. *Id.* § 409.

10. *Id.* § 401.

11. *Id.* § 503.

12. *Id.* § 503.

13. *Id.* § 502.

14. *Id.* §§ 612 - 620.

With respect to enforcement, the bill would have strengthened control at the U.S.-Mexico border by, among other things, increasing the number of border patrol agents by 14,000[15] and by adding an additional 370 miles of fencing.[16] As was the case with the STRIVE Act, the bill would have created the Employment Eligibility Verification System, a central database designed to maintain immigrant status information on all workers living in the United States.[17] Also as was the case with the STRIVE Act, no further portions of the bill would have gone into effect until enforcement measures had been effected.

As discussed above, on June 7, after S. 1348 was removed from consideration, proposed immigration reform legislation was brought back for discussion upon the urging of the President in the form of Senator Kennedy's S. 1639. Throughout this process, there was unprecedented pressure from talk-radio broadcasters, private bloggers, and other opponents of the bill. This opposition effectively ended the bill's chances.[18] On June 28, the cloture vote again fell short, and the bill's fate was sealed.

2. *Miscellaneous Immigration Reform Bills*

On January 10, 2007, Sen. Diane Feinstein (D. Cal.) introduced S. 237,[19] and Rep. Howard L. Berman (D. Cal.) introduced H.R. 371.[20] Both measures were designated as bills to "improve agricultural job opportunities, benefits and security for aliens in the United States."[21] The bill essentially reintroduced previously sponsored legislation that was first introduced in 2003 and again in 2006 during the 109th Congress. The bill would have provided a path to lawful permanent residence for undocumented agricultural workers who could establish a minimum number of hours in agricultural labor. As of year's end, neither the Senate nor the House had approved a version of the AgJOBS bill.

On September 21, 2007, Senator Richard Durbin (D. Ill.) introduced S.A. 2919—the Development, Relief, and Education for Minors Act of 2007, or DREAM Act[22]—as an amendment to H.R. 1585—the Department of Defense Authorization bill. The amendment was, generally, a modified version of legislation that was proposed as early as 2001. The bill essentially created a mechanism under which undocumented children who arrived in the United States before reaching the age of sixteen could regularize their status in the United States by demonstrating receipt of a high school diploma or a general equivalency diploma. On October 24, 2007, the DREAM Act failed a cloture vote in the Senate. [23]

15. *Id.* § 101.
16. *Id.* § 1.
17. *Id.* § 301.
18. Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1.
19. S. 237, 110th Cong. (2007).
20. H.R. 371, 110th Cong. (2007).
21. H.R. 371, 110th Cong. (2007).
22. S.A. 2919, 110th Cong. (2007).
23. Dave Michaels, *DREAM Act Affecting Children Fails Senate Test Vote*, DALLAS MORNING NEWS, Oct. 25, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/102507dnnat dreamact.1a216ca67.html. One important development at the State level aimed in large measure at relieving the plight of the undocumented was New York Governor Eliot Spitzer's plan to issue driver's licenses to undocumented non-citizens. On November 14, 2007, however, Governor Spitzer announced that he would abandon his proposal. The issue had raised disagreements and confusion among Democrat political leaders

### B. Visa Waiver Program and U.S. Passport Requirements

Besides its largely failed immigration reform initiatives, Congress did manage to pass two pieces of legislation relating to travel documents. The first of these tightened the Visa Waiver Pilot Program, and the second addressed the need for additional State Department personnel to meet increased passport applications.

On August 3, 2007, the President signed the Secure Travel and Counterterrorism Partnership Act of 2007. [24] In its opening passages, the Act indicated that it is the sense of Congress that the United States should extend its Visa Waiver Program to nationals of States that can demonstrate alliance in the war on terror by sharing information on terrorism and showing that their nationals are complying with the terms and conditions of their admission.[25] Accordingly, the Act requires the Secretary of Homeland Security to certify to Congress the existence of a new air exit system that would permit DHS to verify the departure of not less than 97 percent of a country's nationals.[26]

On July 30, 2007, the President signed the Passport Backlog Reduction Act of 2007.[27] The Act essentially addresses the need for additional State Department personnel by permitting the hiring of retirees who are now exempted from previously applicable salary caps. Under Congressional Budget Office estimates, about 150 additional such employees will work an additional two months in 2008 for a cost of $2,000 per employee while an additional sixty-five retirees will work for an additional two months in 2009 for a cost of $1,000.[28]

## III. Administrative and Regulatory Developments

### A. Department of Homeland Security

#### 1. *Fee Increases for Filings*

In rule-making that is destined to have a permanent effect on immigration processing, DHS issued a final regulation, effective July 30, 2007, raising significantly the fees applicable to certain petitions and applications that must be filed to secure immigration benefits. [29] Illustrative of the nature of these increases is the increase pertaining to Form I-539, Application to Extend/Change Non-Immigrant Status, which will be raised from $480 to

---

both at the federal and at the State level. *See* Nicholas Confessore, *Spitzer Drops Bid to Offer Licenses More Widely*, N.Y. Times, Nov. 14, 2007, *available at* http://www.nytimes.com/2007/11/14/nyregion/14cndspitzer.html?hp.

24. Secure Travel and Counter-terrorism Partnership Act of 1997, Pub. L. No. 110-53, 121 Stat. 338 -345. Three years ago, Congress significantly expanded the need for passport possession by requiring that U.S. citizens returning from anywhere in the western hemisphere present a passport on retuning to the United States. The new requirements significantly increased passport applications thereby causing delays not foreseen by Congress when it adopted the legislation.

25. *Id.* § 711(b)(1).

26. *Id.* § 711(c).

27. Passport Backlog Reduction Act of 2007, Pub. L. No. 110-50, 121 Stat. 261.

28. Congressional Budget Office Cost Estimate, Public Law 110-50, Passport Backlog Reduction Act of 2007 (Sept. 5, 2007).

29. Removal of Temporary Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 46,142 (Aug. 17, 2007) (to be codified at 8 C.F.R. pt. 103).

$1,435. Such increases of threefold the original filing fee for the petition are expected to be a matter of serious concern for all those seeking immigrant and non-immigrant status in the United States.

2. *New U Visa Regulations*

The U non-immigrant visa category was first added to the Act in 2000. The statutory amendments were designed to improve the capacity of law enforcement agencies to "investigate and prosecute cases of domestic violence, sexual assault . . . and other crimes while offering protection to the victims of such crimes."[30] In 2007, for the first time, interim final regulations were promulgated that would implement the statutory provisions.[31] Criminal activity covered by the statute and regulations includes murder, rape, torture, sexual exploitation, witness tampering, and false imprisonment. [32] Under the regulations, the petition must include on Supplement B a Non-immigrant Status Certification supplied by a federal, state, or local law enforcement official (a "certifying agency"), showing either past, present, or prospective usefulness in investigating or prosecuting the criminal activity involved.[33] The victim-petitioner may petition for certain family members including the principal's spouse, children, and parents.[34]

The U non-immigrant period of stay is four years (with possible extensions if the certifying agency certifies that the petitioner's presence in the United States is still needed).[35] After three years of continuous physical presence in the United States since the date of admission, a U non-immigrant may seek to adjust status in the United States, provided that the agency determines that certain humanitarian, public interest, and family unity criteria are met. [36]

3. *Proposed Religious Worker Regulations*

Perhaps the most dramatic of USCIS policy initiatives was the proposed revision of the religious worker regulations, which would substantively alter the admission of religious workers both in immigrant and in non-immigrant classes.[37] The changes were recommended against a background of actual and perceived fraud in the processing of religious worker cases.[38] The proposed rules include changes in the nature of a "religious vocation," defined as "formal lifetime commitment to a religious way of life"[39] and linking it to

30. U.S. CITIZENSHIP AND IMMIGRATION SERV., FACT SHEET: USCIS PUBLISHES RULE FOR NON-IMMIGRANT VICTIMS OF CRIMINAL ACTIVITY (Sept. 5, 2007).

31. *Id.*

32. 8 U.S.C. § 1101(a)(15)(U)(i) (2006); 8 C.F.R. § 214.14(b)(1) (2007).

33. 8 C.F.R. § 214.14(a)(2)-(3).

34. 8 U.S.C. 1101 § (a)(15)(U)(ii)(II); 8 C.F.R. § 214.14(f).

35. 8 C.F.R. § 214.14(g)(2)(ii).

36. 8 U.S.C. § 1255(m)(1)(B) (2006).

37. 8 C.F.R. §§ 214.2(r) (2007); Special Immigrant and Nonimmigrant Religious Workers, 72 Fed. Reg. 20, 442 (proposed Apr. 25, 2007).

38. U.S. CITIZENSHIP AND IMMIGRATION SERV., FACT SHEET: USCIS PUBLISHES RULE FOR RELIGIOUS WORKER CLASSIFICATION (Apr. 19, 2007), *available at* http://www.uscis.gov/files/pressrelease/RvisaFactSheet19Apr07.pdf.

39. 8 C.F.R. §§ 214.2(r)(2); Special Immigrant and Nonimmigrant Religious Workers, 72 Fed. Reg. at 20, 453.

the taking of permanent vows, as well as a narrowing of the religious occupation category, conditioning it on two years of paid employment.[40] The new rules would also establish significant new requirements (including the submission of an attestation regarding the number of immigrant and non-immigrant petitions filed during the last five years by the employer's organization), which would tighten considerably the procedures under which religious petitions are adjudicated.

4. *Enforcement Issues*

Effective September 14, 2007, USICE issued a final rule providing a safe-harbor for employers who receive "no-match" letters (i.e., a letter from the Social Security Administrator to the effect that the Social Security Number provided by any given employee is not a validly assigned number under the Social Security Act).[41] The new regulations provide that an employer who receives either a no-match letter from SSA or a notice of suspect documents from DHS after submission of Form I-9 will have "constructive knowledge that the employee under consideration is not authorized to work in the United States.[42]

The new rule provides the employer with protection against criminal and civil liability by taking a number of steps, which must be concluded within ninety days. These include review of the employer's own files relating to the employee to assure that the employer's information is correct. If this review does not resolve the dilemma, then the employer must verify through either a special I-9 verification procedure (in which the employer can rely on other documents that do not contain a SSN but do demonstrate identity and employment authorization), or by a telephone call to the Social Security Administrator. A conflict will be considered resolved only if the DHS or SSA acknowledges that the employee's name conforms to SSA records or that an immigration status document was assigned to the employee. [43]

A fact sheet released in August revealed that USICE has considerably heightened its efforts to reduce unlawful employment through a series of work site raids.[44] The agency is stressing criminal, as opposed to civil, sanctions because they are more likely to produce results. To some degree, these efforts are being made in lieu of the enhanced enforcement tools that the agency expected to receive as the result of immigration reform legislation. According to the Fact Sheet, USICE has centered its enforcement actions on sensitive facilities (e.g., nuclear power plants, chemical plants, military bases, airports, and seaports), with a principal view to weed out terrorists and other dangerous criminals. Lesser

40. Special Immigrant and Nonimmigrant Religious Workers, 72 Fed. Reg. at 20, 446.

41. *See, e.g., ICE Final Rule Provides Safe Harbor for Employers Who Receive No-Match Letters from SSA*, 84 No. 32 Interpreter Releases (West) 1893 (Aug. 20, 2007). The final rule amends 8 C.F.R. § 274a.1(l).

42. 8 C.F.R. § 274a.1(l)(1) (West).

43. 8 C.F.R. § 274a.1(l)(2). On November 23, 2007, DHS requested the U. S. District Court for the Northern District of California to suspend legal proceedings while it re-writes the regulation in order to respond to judicial concerns regarding the rule's validity. The legal challenge was brought by the A.F.L.-C.I.O., the San Francisco Labor Council and the U. S. Chamber of Commerce. *See* Julia Preston, *Revised Rule for Employer that Hire Immigrants*, N.Y. TIMES, Nov. 25, 2007, at 134. On the same day, the court granted DHS's motion to stay proceedings for this purpose until March 1, 2008. *Court Stays Proceedings in No-Match litigation: DHS to Conduct New Rulemaking*, AILA InfoNet, http://www.aila.org/content/default.aspx?docid=23918 (last visited Nov. 27, 2007).

44. *ICE Outlines Enforced Worksite Enforcement Efforts*, 84 No. 34 Interpreter Releases (West) 2051 (Aug. 31, 2007).

violators, however, are also subject to the new policy, including those who engage in money laundering, alien smuggling, document fraud, and other forms of worker exploitation. [45]

### B. Department of Labor

On May 17, 2007, the Department of Labor (DOL) issued a final rule, effective on July 16, 2007, which provides for substantial modifications to the alien labor certification process as in effect and under historical usage.[46] The final regulation's prefatory statement indicates that the DOL is taking action in this area because of practices that have become the object of fraud or abuse, including the sale of approved permanent labor certifications related to employment where the underlying job offer had become purely fictitious. [47]

Principally, the new rule effects the following changes: (1) it eliminates the practice of substitution (under which an employer may substitute a new employee for the alien originally subject to the alien employment certification application) both with respect to pending applications and for those which had been approved;[48] (2) it prohibits any modification to alien employment certification applications once they have been filed with DOL;[49] (3) it establishes, for the first time, a shelf-life for approved labor certification applications under which they remain valid only for a 180-day period following the date of approval within which time an employment-based visa petition must be filed (thus ending the previous regime under which labor certifications were of indefinite validity and would support a petition as long as the job offer remained in effect);[50] (4) it prohibits certain practices including the "sale, barter and purchase" of applications and approved certifications as well as other payments to the employer connected with filing the application (thus establishing a bar on the employee's assuming, directly or indirectly, any of the costs associated with the filing);[51] (5) it provides for debarment of both employers and attorneys who are found to have engaged in stipulated acts of fraud, false statements, or in a pattern or practice of willful non-compliance.[52]

## IV. New Case Law Developments

### A. Supreme Court Decisions

On June 29, 2007, the Supreme Court granted certiorari in *Boumediene v. Bush*[53] and *Al Odah v. United States*,[54] vacating two prior decisions related to detainees at the Guantanamo Naval Base in Cuba. At issue is the jurisdiction of federal courts to hear petitions

45. *Id.*
46. Labor Certification for the Permanent Employment of Aliens in the United States, 72 Fed. Reg. 27,904 (May 17,2007) (to be codified at 20 C.F.R. pt. 656).
47. *Id.*
48. 20 C.F.R. § 656.11(a) (2007).
49. 20 C.F.R. § 656.11(b).
50. 20 C.F.R. § 656.30(b) (2007).
51. 20 C.F.R. § 656.12(b) (2007).
52. 20 C.F.R. § 656.31(f) (2007).
53. Boumediene v. Bush, 127 S. Ct. 3078 (2007).
54. Al Odah v. United States, 127 S. Ct. 1725 (2007).

for writs of habeas corpus filed by non-citizens detained indefinitely at the Naval Base. The cases are expected to raise long-standing questions concerning whether the Military Commissions Act (MCA) in fact eliminated federal district court jurisdiction over habeas petitions and whether such court-stripping measures constitute a lawful exercise under the Suspension Clause. Petitioners' success on the merits would open the door to a substantial docket of gathering cases and to the development of an essentially new area of substantive and procedural due process.

The Court also made significant decisions in the area of the criminal grounds of removability. In *United States v. Resendiz-Ponce*,[55] the Court ruled that an indictment for attempted illegal reentry was not required to list a specific overt act or otherwise describe a component part of the offense for the underlying crime to be classified as a Crime Involving Moral Turpitude (CIMT). In a similar vein, the Court also held in *Gonzales v. Duenas-Alvarez*[56] that, for purposes of the aggravated felony definition in INA section 101(a)(43), a theft offense includes the crime of aiding and abetting.

### B. Lower Court Decisions

During the year, several lower courts made pronouncements on the rights of the detainees at the Guantanamo Naval Base. For example, in *Boumediene v. Bush*,[57] the U.S. Court of Appeals for the District of Columbia held that federal courts do not have jurisdiction over petitions for writs of certiorari sought by non-citizens detained as enemy combatants at the U.S. Naval Base at Guantanamo. The consolidated appeals involved alleged violations of the U.S. Constitution, treaties, statutes, common law, and customary international law.

In *Al-Marri v. Wright*,[58] however, the U.S. Court of Appeals for the Fourth Circuit reversed a district court decision dismissing Al-Marri's petition for a writ of habeas corpus and issued instructions for issuance of the writ directing the Secretary of Defense to release Al-Marri within a reasonable time. Al-Marri was admitted to the United States several years ago as a student, but in 2003 he was detained in a U.S. Navy Brig in South Carolina because the Administration accused him of being a sleeper agent of al-Qaeda and an enemy combatant. The Fourth Circuit ruled that Al-Marri was not subject to the MCA because he was not captured outside the United States, nor held in Guantanamo Bay, nor determined to be an enemy combatant, nor awaiting such determination.[59]

The Ninth Circuit issued several decisions of interest with respect to removal procedures. Among these is *Lin v. Gonzales*,[60] where the court ruled that 8 CFR § 1003.23(b)(1), prohibiting motions to reopen for aliens who depart the United States, applies only to those aliens who leave while the proceedings are actually pending and does not apply where the underlying proceedings have been brought to an end through execution of an order of removal. A Chinese national who was removed after his asylum and withholding claims failed sought reopening based on changed circumstances.

55. United States v. Resendiz-Ponce, 127 S. Ct. 782 (2007).
56. Gonzalez v. Duenas-Alvarez, 127 S. Ct. 815 (2007).
57. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).
58. al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).
59. *Id.* at 183-84.
60. Lin v. Gonzalez, 473 F.3d 979 (9th Cir. 2007).

In *Matoviski v. Gonzales*, a decision that will undoubtedly affect employment-based immigrant visas, the Sixth Circuit Court of Appeals held that an immigration judge has jurisdiction to determine the portability of an immigrant visa petition based on an offer of employment under INA section 204(j).[61] To the government's argument that no implementing regulations were delegated to immigration judges to make such determinations, the court ruled that six years after adoption by Congress of the portability provisions of 8 USC § 1154(j), there were no regulations of any kind implementing the statute.[62] In the wake of a failure to act by the DHS, which effectively frustrated legislative intent, immigration judges could make portability determinations and thereby carry out the will of Congress in adopting the American Competitiveness in the Twenty-First Century Act of 2000.[63]

The circuit courts of appeals were also active in the asylum area. In *Liu v. Gonzales*,[64] for instance, the U.S. Court of Appeals for the Second Circuit ruled that it had jurisdiction to review whether the one-year filing deadline had been complied with by an asylum seeker. Characterizing the issue as an issue of law, the court found that it retained competence to determine whether the immigration judge had properly applied the correct legal standard (the clear and convincing evidence rule) to the facts of the case. The court reversed and remanded for a determination on the one-year filing deadline and fresh determinations of the petitioner's withholding of removal and Convention Against Torture claims.[65] In *Lin v. U.S. Department of Justice*,[66] however, the Second Circuit virtually overturned the Board of Immigration Appeals' (BIA) holding in *In re C-Y-Z*,[67] ruling, in effect, that where the asylum seeker's spouse has experienced past persecution in the form of a late-term abortion or forced sterilization, such persecution does not necessarily extend to the asylum seeker so as to confer on the latter automatic eligibility for refugee status.[68]

There were also important decisions from the circuit courts interpreting U.S. obligations under Article 3 of the Convention Against Torture. Among other things, the Second Circuit in *Pierre v. Gonzales*[69] generally upheld the broad ruling of the BIA in *In re J-E*[70] that returning Haitian nationals convicted of crimes in the United States to Haiti, where they would be certain to undergo the harsh and substandard conditions of Haitian prisons, does not constitute torture within the meaning of the Convention. Two courts arrived at opposite results, however, and in *Lavira v. U.S. Attorney General*, [71] the Third Circuit

61. Matovski v. Gonzalez, 492 F.3d 722 (6th Cir. 2007).

62. *Id.* at 734-36.

63. *Id.*

64. Liu v. INS, 475 F.3d 135 (2d. Cir. 2007).

65. *Id.* at 137. Some ten months after its initial decision, the Second Circuit revised its opinion to rule that, under the facts of the present case, it lacked jurisdiction to review compliance with the one-year filing deadline. Liu v. INS, 508 F.3d 716 (2d Cir. 2007). The court reaffirmed its earlier ruling that federal appellate courts generally retain jurisdiction over the one-year filing issue in instances where the immigration judge "articulate[s] the correct standard [but]erroneously applie[s] a heightened standard" as presenting a "question of law". Nonetheless, the court found that, in this instance, the immigration judge had not impermissibly applied a heightened legal standard to the facts of this case.

66. Lin v. U.S. Dep't of Justice, 494 F.3d 296 (2d Cir. 2007).

67. In re C-Y-Z-, 21 I. & N. Dec. 915 (B.I.A. 1997).

68. *Lin*, 494 F.3d at 312.

69. Pierre v. Gonzalez, 502 F.3d 109 (2d Cir, 2007).

70. In re J-E-, 23 I. & N. Dec. 291 (B.I.A. 2002).

71. Lavira v. Atty. Gen. of U.S., 478 F.3d 158 (3d Cir. 2007).

ruled that "specific intent" could be shown through evidence of "willful blindness," thus tending to equate the specific intent and the acquiescence criteria.[72] Moreover, the Third Circuit adopted a foreseeability test in determining specific intent in individual cases.[73] The reasoning of *Lavira* was closely followed by the Eleventh Circuit in *Jean Pierre v. U.S. Attorney General*[74] in remanding a case to the BIA for consideration of whether his return to Haiti would entail a violation of Article 3 of the Convention Against Torture by exposing the claimant to "crawl-space confinement, kalot marassa, and beatings with metal rods as the result of AIDS-related mental illness".[75]

### C. Administrative Decisions

By far the greater part of the Board's pronouncements dealt with the area of political asylum in four major areas: (1) eligibility criteria in relation to the well-founded fear standard as generated by the practice of female genital mutilation; (2) continuing questions arising out of the family-planning cases as this class of claimants was envisioned in section 601 of IIRIRA; (3) special problems engendered by passage of the REAL ID Act; and (4) continuing efforts to "refine" the conception of particular social group in the wake of *In re C-A*.[76]

As concerns the family-planning cases, the Board set the general tone for the manner in which it would treat such cases in the future in two important pronouncements—both issued the same day. In *In re J-H-S*,[77] the Board determined that the act of fathering two children in China would not give rise to persecution without more since application of the one-family/one-child policy was (according to the U.S. State Department) "lax" and "uneven."[78] In *In re J-W-S*,[79] on the other hand, the Board was largely concerned with the predicament of claimants who have had more than one child while living in the United States and, therefore, would be in a position of targeted risk if returned. The Board held that China does not have a settled policy requiring sterilization of Chinese nationals who have foreign-born children; accordingly, Chinese citizens who give birth to children abroad in violation of China's coercive family-planning program can expect, at worst, fines and denial of social benefits, sanctions that do not rise to the level of persecution.[80]

Finally, in *In re T-Z*,[81] the Board addressed the central issue of when an abortion is forced for purpose of meeting the refugee definition under INA section 101(a)(42). The Board concluded that the required element of coercion can be met by showing: (1) threats of harm which a reasonable person would view as related to the refusal to have an abortion, provided that the serious harm threatened amounts to persecution; and (2) non-

72. *Id.* at 171.
73. *Id.* at 167-68.
74. Pierre v. U.S. Atty. Gen., 500 F.3d 1315 (11th Cir. 2007).
75. *Id.* at 1333.
76. In re C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).
77. In re J-H-S-, 24 I. & N. Dec. 196 (B.I.A. 2007).
78. *Id.* at 198-99.
79. In re J-W-S-, 24 I. & N. Dec. 185 (B.I.A. 2007).
80. *Id.* at 191.
81. In re T-Z-, 24 I. & N. Dec. 163 (B.I.A. 2007).

physical forms of harm such as economic sanctions provided that these amount to the imposition of severe economic disadvantage.[82]

With respect to the REAL ID Act,[83] the Board issued two decisions of import, one on the nexus issue and the other on the standard of credibility fixed by the statute. In *In re J-B-N- & S-M*, [84] the Board addressed the questions arising from mixed motive cases. At the outset of its decision, the Board acknowledged that the REAL ID Act does not substantially modify existing case law and recognized the principle that even though the persecutor may be driven to act by multiple motives, so long as one of these motives is to overcome a protected ground, the claim remains viable.[85] The Act does require, however, that one central reason for the persecutor's actions must be to impose serious harm on the asylum seeker on account of one of the enumerated grounds.

In *In re J-Y-C*, [86] the Board upheld the decision of an immigration judge to the effect that the asylum seeker had not been credible concerning his fear of persecution in China motivated by his religious activity. Under the REAL ID Act, the adjudicator must weigh the totality of the circumstances in making credibility determinations, including the asylum seeker's demeanor, the plausibility of his or her account, and inconsistencies in statements irrespective of whether they go to the heart of the claim. The Board found that even though not all of the discrepancies relied on by the immigration judge went to the heart of the claim, the REAL ID Act eliminated this requirement so that the contradictions had validly been considered by the immigration judge in making his credibility ruling. [87]

The Board again issued two extraordinary decisions dealing with the subject matter area of female genital mutilation (FGM). In *In re A-K*, [88] the Board concluded, under the facts of the case, that a father, a native and citizen of Senegal, had failed to meet the well-founded fear test by showing that his daughter, a U.S. citizen, would be exposed to female cutting through her having to accompany the asylum seeker upon his forced return. The Board found that the child would not necessarily be constrained to accompany her father since she had another parent in the United States who was not in removal proceedings.[89] In addition, the Board opined, even if the child were forced to proceed to Senegal, it would deny the claim since there was no evidence of such widespread or systemic imposition of FGM in that country as to justify a fear of serious harm there.[90]

82. *Id.* at 169.

83. In a decision of some importance under the REAL ID Act, the Attorney General, in *In re S-K*, 24 I. & N. Dec. 289 (B.I.A. 2007) remanded to the Board for further proceedings a case (*In re S-K-*, 23 I & N Dec. 936 (B.I.A. 2006)) in which the Board had earlier denied asylum relief to members of the Chin National Front in Burma on the ground that they were ineligible for asylum as "terrorists" under the definition as expanded by REAL ID. The Attorney General based his determination on a decision by the Secretary of Homeland Security that the "terrorist bar" as set out in INA section 212(a)(3)(B)(iv)(VI) shall not apply to "material support" provided to the Chin National Front/Chin National Army by asylum seekers who are able to meet certain conditions.

84. In re J-B-N- & S-M-, 24 I. & N. Dec. 208 (B,I.A. 2007).

85. *Id.* at 214.

86. In re J-Y-C-, 24 I. & N. Dec. 260 (B.I.A. 2007).

87. *Id.* at 265.

88. In re A-K-, 24 I. & N. Dec. 275 (B.I.A. 2007).

89. *Id.* at 277.

90. *Id.* at 277-78.

Furthermore, in *In re A-T*,[91] the Board rejected a claim of past FGM by a native and citizen of Mali. The Board relied critically on new regulations promulgated in December 2000, 8 CFR §. 1208.13(b)(1)(i)(A), which permit rebuttal of the presumption of a well-founded fear of future persecution flowing from past persecution whenever the government can show a change in personal circumstances of the applicant. The Board ruled that the imposition of FGM itself was such a change in personal circumstances since this constituted the type of physical harm which was non-repeatable.[92]

Finally, in the area of the protected grounds, the Board concluded in *In re A-M-E & J-G-U*[93] that wealthy Guatemalans did not satisfy the criteria for membership in a particular social group. As a class, affluent Guatemalans lacked the visibility characteristic mandated by *In re C-A*.[94] Moreover, the class as a whole was not sufficiently discrete, and it could be shown under modern country conditions that individuals were being harmed who were not wealthy but who declined to support extortion demands.[95]

## V. Asylee and Refugee Admissions; Temporary Protected Status

The issue of principal importance during the year related to the bars now existing for membership in terrorist organizations and for terrorist activity. Covered under the preclusion are Tier I organizations (terrorist groups designated as such by statute), [96] Tier II organizations (groups designated by regulation),[97] and Tier III (groups that have engaged in specified acts of violence that are unlawful under the law where they occur).[98] These bars now extend to those who provide material support for terrorism, a preclusion which would cover asylum seekers and refugees who, out of innocence or as the result of coercion, provided financial or other aid to a terrorist organization as defined. For the last fiscal year, the United States admitted 12,000 fewer refugees than expected and approximately 500 asylum cases were on indefinite hold, mainly because of complications arising out of the application of these preclusions.[99]

Some progress was made during the year towards alleviating the harsh impact of these bars on those seeking international human rights protection in the United States. On February 20, 2007, Secretary of Homeland Security Chertoff announced that the material support inadmissibility provisions would not be applied to aliens who had provided material support to eight undesignated terrorist organizations for whom Secretary of State Rice had executed waivers in January, irrespective of whether the support had been provided

91. *In re* A-T-, 24 I. & N. Dec. 296 (B.I.A. 2007).

92. *Id.* at 298-300. With respect to its earlier holding in *In re Y-T-L-*, 23 I & N Dec. 601 (B.I.A. 2003) to the effect that a victim of sterilization could benefit from the presumption because she suffered from an ongoing form of harm, the Board determined that its earlier holding was limited to a discrete class of claimants (victims of coercive family planning programs) that had been added to the refugee definition by Congress and that the holding in *Y-T-L* should not be extended to conventional refugee cases. *Id.* at 299.

93. *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007).

94. *Id.* at 75 (citing *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006)).

95. *Id.* at 76.

96. 8 U.S.C. § 1102 (a)(3)(B)(vi)(I) (2000).

97. *Id.*

98. *Id.*

99. *See generally* Jennifer Doskal, *The Material Support Bar: Denying Refuge to the Persecuted*, Human Rights Watch, Sept. 19, 2007, *available at* http://hrw.org/english/docs/2007/09/19/usint16941.htm.

under duress. [100] On February 26, 2007, Secretary Chertoff exercised his authority under section 212(d)(3)(B)(i) of the Immigration and Nationality Act not to apply the terrorist-related grounds of inadmissibility to aliens seeking immigration benefits who had provided material support to undesignated Tier III terrorist organizations and who could show that they merited a favorable exercise of discretion.[101] In addition, on April 27, 2007, Secretary Chertoff, announced that the material support provisions shall not apply with respect to Tier I and Tier II organizations for individual aliens who could show that a favorable exercise of discretion was warranted by a "totality of the circumstances."[102]

Implementation of the exemption in practice is entrusted to USCIS and USICE, which are to follow a totality of the circumstances approach. Factors to consider include: whether the applicant could have avoided providing material support; the severity of the harm inflicted or threatened; the object of the harm; and, where threats alone are at issue, the perceived imminence and likelihood of the harm.[103] Against these considerations must be weighed such factors as: the amount and type of material support provided; the frequency of such support; the nature of terrorist activities committed by the organization; the applicant's awareness of these activities; and the length of time passed and the applicant's conduct since material support was provided.[104]

The year also saw some activity in the area of Temporary Protected Status. On May 2, 2007, Secretary Chertoff announced an extension of the Temporary Protected Status designation to eligible nationals of Honduras, Nicaragua, and El Salvador for another eighteen months, which had been set to expire on July 5 (for Nicaraguans and Hondurans) and on September 9 (for Salvadorans).[105]

100. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9954 (Mar. 6, 2007) (The organizations were: Chin National Front/Chin National Army, Chin National League for Democracy, Kayan New Land Party, Tibetan Mustangs, Cuban Alzados, and Karenni National Progressive Party).

101. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958 (Mar. 6, 2007).

102. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26138 (May 8, 2007).

103. *See, e.g., Memorandum for Jonathan Scharfen Deputy Director*, Office of the Director, U.S. Citizenship and Immigration Serv., Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), *available at* http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf.

104. *Id.*

105. Press Release, U.S. Dept. of Homeland Security, Secretary Chertoff Extends Temporary Protected Status for Eligible Hondurans, Nicaraguans and Salvadorans (May 2, 2007), *available at* http://www.uscis.gov/files/pressrelease/TPS_2May07.pdf