

Immigration and Naturalization Law

DAVID W. AUSTIN, QIANG BJORNBAK, AND JOSH D. FRIEDMAN*

I. Local Enforcement of Immigration Law

One of the top ten domestic news stories of 2010¹ was Arizona's attempts to deal with immigration and lawsuits that followed the passage of S.B. 1070. Although S.B. 1070 is a local measure, it epitomized the tension that underlies local attempts to enforce and influence federal immigration policy. The conflict between state and national approaches to immigration law also captured the attention of the U.S. Supreme Court.

A. ARIZONA'S S.B. 1070

Arizona's S.B. 1070, a local immigration provision criticized as a discriminatory and unnecessary infringement on the Federal Government's ability to establish immigration policy, was subjected to widespread international² and domestic³ condemnation in 2010. As predicted, numerous legal challenges followed in the wake of the bill's enactment at the end of April.⁴

* David Austin is a Professor of Legal Writing, California Western School of Law and a former director of the Asylum Program of the National Immigrant Justice Center. He served as the committee editor, contributed throughout the article, and was the primary author of Sections I and VI (B), (C). Qiang Bjornbak is an immigration attorney in Los Angeles, California and vice chair of the Section's Immigration and Naturalization Committee. She was the primary author of Sections II, III, IV (B), V, and VI (A). Josh D. Friedman is a Judicial Law Clerk for the U.S. Department of Justice's Executive Office for Immigration Review in Los Angeles, California. He was the primary author of Section IV(A). The opinions expressed in that section are offered in the author's personal capacity and are not to be attributed to any organization with which he is affiliated. The authors wish to thank Susan Cohen, Christopher Nugent, Maria Constantinescu, Judith Wood, Jesse Moorman, and Mark E. Wojcik.

1. Ishaan Tharoor, *The Top 10 Everything of 2010: 7. Arizona's Strict Immigration Law*, TIME, Dec. 9, 2010, http://www.time.com/time/specials/packages/article/0,28804,2035319_2035315_2035749,00.html.

2. See, e.g., Guy Adams, *The Law that Turned Arizona into a Pariah State*, INDEP., Apr. 29, 2010, at 34, available at 2010 WLNR 8788098.

3. See, e.g., Linda Greenhouse, *Breathing While Undocumented*, N.Y. TIMES, Apr. 27, 2010, at A23 ("Breathing while undocumented, without a civil liberties lawyer at hand, is now a perilous activity anywhere in Arizona.").

4. In 2010, seven lawsuits challenging the constitutionality of S.B. 1070 were filed in Arizona. Ginger Rough, *State's Tab to Fight SB 1070 Suits Grows*, ARIZ. REPUBLIC., Sept. 3, 2010, at B8. Several were dismissed, while others have yet to be heard. *Id.* Hundreds of lawyers have worked on these cases, generating more than 900 filings containing more than 12,000 pages of legal briefings. *Id.* The legal costs sustained by the state of Arizona in defending the legislation is more than a million dollars. *Id.*

In July, Federal Judge Susan Bolton blocked the most controversial provisions of the legislation.⁵ Nevertheless, Judge Bolton rejected the contention that “the overall statutory scheme of S.B. 1070 is preempted because it attempts to set immigration policy at the state level and interferes and conflicts with federal immigration law, foreign relations, and foreign policy.”⁶ Judge Bolton suggests that there is room for state legislators to craft constitutional, albeit limited, local responses to illegal immigration.

The order enjoins enforcement of provisions that would require state officials to determine the immigration status of those detained or arrested under local laws and prohibit their release until such a determination has been made. Judge Bolton reasoned that such provisions would impact large numbers of citizens and legal residents as well as aliens who are unlawfully present and would, therefore, frustrate Congress’s attempt to protect people “from the possibility of inquisitorial practices and police surveillance.”⁷

The decision to enjoin these provisions was not rooted solely in concerns for civil liberties. The order also underscored pragmatic fiscal prerogatives. Judge Bolton concluded that these provisions would impermissibly burden federal resources because the Department of Homeland Security is required, under federal law, to respond to all state or local government inquiries seeking to verify an individual’s immigration status.⁸

Another provision that failed to pass constitutional muster was that portion of S.B. 1070 creating independent state penalties for an immigrant’s failure to carry an alien registration document. Judge Bolton recognized that the Arizona law did not create additional registration requirements or alter those imposed by federal law, but she nonetheless concluded that the state’s attempt to provide additional penalties was “an impermissible attempt by Arizona to regulate alien registration.”⁹

Judge Bolton also enjoined enforcement of Section 5 of the law, which makes it a crime for unauthorized aliens to apply for, solicit, or perform work as an employee anywhere within Arizona. The order acknowledges that a presumption against preemption applies to state regulation of employment, but concludes that the Government would likely prevail because there was sufficient evidence that Congress had “comprehensively regulated in the field of employment of unauthorized aliens” and had rejected the possibility of creating a crime for unauthorized work.¹⁰

Finally, the order also enjoined enforcement of Section 6, which allowed state police officers the discretionary authority to arrest a person without a warrant if there is probable cause to believe that “the person to be arrested has committed any public offense that makes the person removable from the United States.”¹¹ As the Supreme Court acknowledged, “that is not an easy task.”¹² Judge Bolton opined that enforcement of the statute “would impose a ‘distinct, unusual and extraordinary’ burden on legal resident aliens that

5. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

6. *Id.* at 992.

7. *Id.* at 994 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941)).

8. *Id.* at 995-96.

9. *Id.* at 999.

10. *Id.* at 1002.

11. Section 6 of S.B. 1070 amended Arizona Revised Statutes § 13-8333(A) in a way that clearly targeted only non-citizens because citizens are not removable. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2nd Sess. (Ariz. 2010).

12. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1488 (2010) (Alito, J., concurring).

only the federal government has the authority to impose.”¹³ Judge Bolton noted that, absent an injunction, the United States would likely suffer irreparable harm because it is not in the public interest for a state to enforce preempted laws even if “the state statutes have substantially the same goals as federal law.”¹⁴

Although the injunction is only a temporary measure, lawmakers across the country viewed Judge Bolton’s ruling as a litmus test for constitutional challenges to similar bills under consideration in other states. By the end of 2010, approximately twenty states had passed or were considering similar legislation.¹⁵ The injunction caused some legislators to reconsider plans to introduce laws modeled on S.B. 1070.¹⁶ Others are awaiting the outcome of the appeal filed by Arizona. During oral arguments held in November, the Court seemed less troubled by provisions that allow police to question individuals about their immigration status, than they were by provisions allowing the police to indefinitely detain individuals pending confirmation of their immigration status.¹⁷ Commentators anticipate that the case may reach the Supreme Court.¹⁸

B. SUPREME COURT HEARS ARGUMENTS IN FEDERAL PREEMPTION CASE

While waiting for legal challenges to S.B. 1070 to wind their way to the Supreme Court, the Justices heard oral arguments in *Chamber of Commerce v. Whiting*,¹⁹ a case addressing the constitutionality of Arizona’s efforts to supplement federal legislation regulating the hiring of non-citizens with harsher state penalties. For example, whereas federal law might subject a business that hires undocumented immigrants to a \$250 fine, under the Legal Arizona Workers Act, the same business might lose its license. When it enacted the federal immigration provisions, Congress expressly allowed States to continue regulating business through “licensing and similar laws.”²⁰ The question for the Court is whether this language encompasses revocation of a license or merely the issuance of the same. Although a decision is not expected until later in 2011, commentators suggest that a tied vote is likely and that the Arizona law would therefore be sustained.²¹

13. *Arizona*, 703 F. Supp. at 1006.

14. *Id.* at 1007.

15. *See, e.g.*, Anna Gorman & Nicholas Riccardi, *The Altered State of Arizona*, L.A. TIMES, Aug. 2, 2010, at 12.

16. *See, e.g.*, Alan Gomez, *States Rethink Immigration Bills: Arizona Ruling Gives Lawmakers Pause*, USA TODAY, Aug. 2, 2010, at A1.

17. Michael Kiefer, *Judges Seem Split On SB 1070*, ARIZ. REPUBLIC, Nov. 2, 2010, at A1.

18. *See, e.g.*, Marcia Coyle, *What Makes Arizona a Hot Bed of High Court Action?*, NAT’L L.J., Aug. 18, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202470232253&slreturn=1&hblogin=1>.

19. Transcript of Oral Argument, *Chamber of Commerce v. Whiting*, ___ U.S. ___, (2011) (No. 09-115), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-115.pdf.

20. Immigration Reform and Control Act, 8 U.S.C. § 1324a(h)(2) (2011).

21. Adam Liptak, *Supreme Court Weighs Law on Illegal Workers*, N.Y. TIMES, Dec. 9, 2010, at A38.

II. Immigration and Criminal Law

A. INEFFECTIVE ASSISTANCE OF COUNSEL

In 2010, the Supreme Court also issued a landmark decision that recognized the dramatic repercussions a criminal conviction can have on the lives of noncitizens.²² In *Padilla v. Kentucky*, the Court held that a failure to advise a criminal defendant of the deportation consequences of a guilty plea constitutes ineffective assistance of counsel under the Sixth Amendment.²³ The case involved an honorably discharged Vietnam veteran who had lawfully resided in the United States for over forty years prior to his arrest on drug-related charges.²⁴ On the advice of his criminal attorney, the defendant pled guilty and was subjected to deportation proceedings.²⁵ The defendant sought post-conviction relief, claiming ineffective assistance of counsel.²⁶ The Supreme Court of Kentucky denied the claim, holding that “the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a ‘collateral’ consequence of his conviction.”²⁷ The U.S. Supreme Court granted certiorari and reversed after noting that “[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important.”²⁸

The Court rejected the notion that deportation was merely a collateral consequence of a criminal conviction and concluded “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”²⁹ *Padilla* is an important case because it articulates the standard practicing attorneys must satisfy when the adequacy of counsel’s representation is at issue. The Court recognized that immigration law is complex and that attorneys who practice criminal law may lack the knowledge necessary to identify the deportation consequences of a particular plea.³⁰ Nevertheless, *Padilla* makes it clear that private practitioners have, at a minimum, the duty to “advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”³¹ In cases where the deportation consequence is clear, “the duty to give correct advice is equally clear.”³² The case, therefore, underscores the importance of close cooperation between a criminal defense attorney and an immigration attorney in cases involving noncitizens who reside in the United States.³³ As a result, immigration attorneys should anticipate fielding numerous requests for assistance from their colleagues in the criminal defense bar.

22. *Padilla*, 130 S. Ct. at 1473.

23. *Id.* at 1483.

24. *Id.* at 1477.

25. *Id.*

26. *Id.* at 1478.

27. *Id.* (citing *Kentucky v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008)).

28. *Id.* at 1480.

29. *Id.* at 1481-82.

30. *Id.* at 1483.

31. *Id.*

32. *Id.*

33. Justice Alito recognized that *Padilla* marked a “dramatic expansion of the scope of criminal defense counsel’s duties under the Sixth Amendment[.]” *Id.* at 1492 (Alito, J., concurring).

B. CATEGORICAL APPROACH FOR CRIMINAL ALIENS

In the immigration context, a “strict” categorical approach limits the immigration judge to comparing the general federal grounds of removal with the bare elements of the criminal statute of conviction.³⁴ If the criminal statute can be offended without engaging in any conduct that will trigger removal, then the alien is not removable regardless of the actual conduct.

Most federal courts use a “modified” categorical approach when the particular elements of the crime of conviction are broader than the generic crime.³⁵ This modified approach “permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.”³⁶

In *Matter of Milian-Dubon*, the Board of Immigration Appeals (“BIA”) took yet another step in eroding the categorical approach by allowing the immigration judge to consider police reports as part of a conviction record if such contents were incorporated into a plea or if admitted to by the alien in criminal proceedings.³⁷

In *Matter of Perez Ramirez*, the BIA also held that “[a]n alien’s misdemeanor conviction for willful infliction of corporal injury on a spouse in violation of [California Penal Code 273.5(a)] qualifies categorically as a conviction for a ‘crime of violence’ [under] 18 U.S.C. § 16(a).”³⁸ This decision differentiated the consequences of simple assault from spousal battery.

C. STOP TIME RULE

In *Matter of Garcia*, the BIA held that “[a] conviction for a single crime involving moral turpitude that qualifies as a petty offense is not . . . an ‘offense referred to in section 212(a)(2)’ of the Immigration and Nationality Act [INA] for purposes of triggering the ‘stop-time’ rule . . . under [INA] 237(a)(2)(A)(i).”³⁹ This decision will help criminal aliens with a single petty offense involving moral turpitude to establish requisite physical presence for the purposes of cancellation of removal. Their physical presence will not be deemed to be interrupted by commission of such crime.

III. Family-Based Adjustment and Immigration

A. QUALIFIED RELATIVES FOR THE CANCELLATION OF REMOVAL

An alien facing deportation from the United States may be eligible for cancellation of removal if he or she: (1) has been continuously present in the United States for at least ten years immediately before the date of the application; (2) has been a person of good

34. *Taylor v. United States*, 495 U.S. 575 (1990).

35. *See, e.g., Johnson v. United States*, 130 S. Ct. 1265, 1273-74 (2010).

36. *Id.* at 1273.

37. *Matter of Milian-Dubon*, 25 I&N Dec. 197 (BIA 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3674.pdf>.

38. 25 I&N Dec. at 203.

39. 25 I&N Dec. at 332.

moral character; (3) has not been convicted of a criminal offense under certain sections of the INA;⁴⁰ and (4) establishes that removal would result in extreme hardship to a qualifying relative who is a U.S. citizen or lawful permanent resident.⁴¹

Two recent cases dealt with qualifying relatives. In one case, the Ninth Circuit determined that an unborn child would not be a qualifying relative for purposes of establishing requisite hardship.⁴² In the second case, the BIA held that a stepfather who qualifies as a "parent" under section 101(b)(2) of the INA at the time of the removal proceedings is a qualifying relative for purposes of establishing extreme hardship for cancellation of removal.⁴³

B. 245(i) WAIVER

INA section 245(i) allows any alien who (1) entered the United States without inspection, (2) was present in the United States before December 21, 2000, and (3) is the beneficiary of an approvable petition filed on or before April 30, 2001, to adjust status by paying a \$1,000 fine.⁴⁴ This provision allows an alien to adjust status either on the original or subsequent valid petitions. The children and spouses of the principal beneficiary are also allowed to adjust. But, such benefits cannot be conferred on "[a]n alien who becomes the child or spouse of a grandfathered alien after the alien adjusts status or immigrates."⁴⁵

In 2010, the BIA further narrowed the list of family members who can be grandfathered. In *Matter of Legaspi*, the Board resolved the question "whether the spouse of an alien who is grandfathered for purposes of section 245(i) . . . can independently adjust his status under section 245(i)."⁴⁶ The case involved a citizen of the Philippines whose wife, a lawful permanent resident, was a derivative beneficiary of a petition filed by her grandfather. The Board rejected the husband's claim that he could qualify for adjustment as a derivative beneficiary of his wife inasmuch as he was not the spouse or child of the principal alien beneficiary and could not, therefore, be grandfathered as a derivative.

40. Immigration & Nationality Act [INA] §§ 212(a)(2), 237(a)(2), and 237(a)(3)(2010).

41. § 240A(b).

42. *Partap v. Holder*, 603 F.3d 1173 (9th Cir. 2010).

43. *Matter of Morales*, 25 I&N Dec. 186 (BIA 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3675.pdf>.

44. INA § 245(i).

45. Memorandum from Robert L. Bach, Exec. Assoc. Comm'r, Office of Pol'y & Programs, Immigration & Naturalization Serv., U.S. Dep't of Justice, to All Regional Directors et al. (June 10, 2009), available at <http://www.uscis.gov/files/pressrelease/245i.pdf>.

46. *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3694.pdf>.

C. THE “WIDOW’S PENALTY” ELIMINATED BY FY 2010 DHS APPROPRIATIONS ACT⁴⁷

For many years, absent “humanitarian reasons to reinstate the approval,”⁴⁸ the government would automatically revoke an I-130 petition to allow an alien spouse to obtain residency if the petitioner died while the petition was pending.⁴⁹ More recent regulations, however, prevented automatic revocation if the deceased petitioner and the alien widow(er) had been married for at least two years when the petitioner died. Widow(er)s of citizens who died before the second anniversary of their marriages brought lawsuits to challenge the law.⁵⁰

In response, Congress enacted the FY 2010 Department of Homeland Security (DHS) Appropriations Act, signed into law by President Obama on October 28, 2009. Section 568(c) of the new law allows a widow(er) of a citizen to remain as an immediate relative even if the U.S. citizen dies within two years of the marriage so long as the petition was filed within two years of the citizen spouse’s death and before the widow(er) remarries. This section applies to aliens in the United States who wish to adjust their status as well as to aliens who apply for an immigrant visa abroad. If the U.S. citizen spouse died before October 28, 2009, and there was no I-130 petition pending, the alien spouse may file a visa petition under section 204(a)(1)(A)(ii) of the INA, as long as the alien spouse has not remarried and files such petition no later than October 28, 2011.

According to U.S. Citizenship and Immigration Services (USCIS), “the K-1 nonimmigrant will also be deemed the beneficiary of a[n] . . . I-360 petition if the K-1 nonimmigrant now qualifies as a widow(er).”⁵¹ For the purposes of INA section 212(a)(9)(B)(i), if the alien remained in the United States while the petition was pending, no unlawful presence will be deemed to have accrued to the alien.⁵²

Section 568(d) of the new law covers benefits to: (1) the beneficiary of a pending or approved immediate relative visa petition;⁵³ (2) the principal or derivative beneficiary of a pending or approved family-based visa petition;⁵⁴ (3) any derivative beneficiary of a pending or approved employment-based visa petition;⁵⁵ (4) refugee/asylee relative petition beneficiaries;⁵⁶ (5) non-immigrants in “T” or “U” status;⁵⁷ and (6) a derivative asylee under section 208(b)(3) of the INA.⁵⁸

47. Department of Homeland Security [DHS] Appropriates Act, 2010, Pub. L. 111-83, 123 Stat. 2142 (2009).

48. Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship and Immigration Servs., U.S. Dep’t of Homeland Sec., to Exec. Leadership (Dec. 2, 2009), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/Widower120209.pdf> [hereinafter USCIS Memo].

49. 8 C.F.R. § 205.1 (a)(3)(iii)(B), (i)(C)(2) (2011).

50. See, e.g., *Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009); *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

51. USCIS Memo, *supra* note 48.

52. Under section 568(c) of the FY 2010 DHS Appropriations Act, the I-130 petition can now be converted to an I-360 petition. Pub. L. 111-83, 123 Stat. 2142 § 568(c).

53. INA § 204(l)(2)(A).

54. INA § 204(l)(2)(B).

55. INA § 204(l)(2)(C).

56. INA § 204(l)(2)(D).

57. INA § 204(l)(2)(E).

58. INA § 204(l)(2)(F).

In May 2010, USCIS issued a draft memorandum providing guidance on the way in which the agency will implement surviving relative benefits pursuant to the new law.⁵⁹ Comments submitted by various stakeholders highlighted the need for additional revisions, and the agency is still in the process of finalizing guidance on the manner in which the new provisions will be implemented.⁶⁰

IV. Human Rights and Immigration Law

A. THE U.N. HUMAN RIGHTS COUNCIL'S REVIEW OF U.S. IMMIGRATION POLICY AND PRACTICE

On November 5, 2010, a senior U.S. delegation appeared for the first time ever before the U.N. Human Rights Council ("Council") during the ninth session of that body's Universal Periodic Review ("UPR")⁶¹ to make a formal presentation and respond to questions regarding U.S. efforts to comply with its international human-rights obligations.⁶² Throughout the UPR proceedings, U.S. practices relating to immigration figured as a central theme.

The United States was elected to the Council on May 12, 2009.⁶³ To prepare for the UPR process, the U.S. Department of State hosted a series of on-site consultations with local and national stakeholder organizations.⁶⁴ Then, on August 23, 2010, the U.S. Government submitted its national report reflecting the input collected during the civil-society consultations.⁶⁵ Numerous member states, U.N. treaty bodies, and civil-society stakeholder organizations submitted comments on the U.S. report.⁶⁶ Following an inter-

59. Draft Policy Memorandum for Comment Only from Office of the Dir., U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Security (May 17, 2010), available at <http://www.ssad.org/images/Widow-Policy-204I-PM-Comment-5-11-2010.pdf>.

60. For an example of the process, see *Questions and Answers USCIS American Immigration Lawyers Association (AILA) Meeting*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, Oct. 12, 2010, http://www.uscis.gov/USCIS/Outreach/Public%20Engagement/National%20Engagement%20Pages/2010%20Events/October%202010/AILA_QandA_Summary.pdf.

61. The Council is tasked with "undertak[ing] a universal periodic review" of the human rights record of each of the 192 U.N. member states every four years. G.A. Res. 60/251, ¶ 5(e), U.N. Doc., 60th Sess., Supp. 251, A/RES/60/251 (Mar. 15, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement>.

62. U.N. Human Rights Council, Comments and Answers by the United States of America, U.N. (Nov. 5, 2010), <http://www.un.org/webcast/unhrc/archive.asp?go=101105>; Colleen Barry, *US Submits to UN Human Rights Review*, WASH. POST, Nov. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110304471.html>.

63. Press Release, Dep't of Pub. Info., U.N. Gen. Assembly, United States Elected to Human Rights Council for First Time, with Belgium, Hungary, Kyrgyzstan, Norway, as 18 Seats Filled in Single Round of Voting, U.N. Press Release GA/0826 (May 19, 2009), available at <http://www.un.org/News/Press/docs/2009/ga10826.doc.htm>.

64. See Summaries of UPR Civil Society Consultations, <http://www.state.gov/g/drl/upr/summaries/index.htm> (last visited Jan. 23, 2011).

65. See U.S. National Report, Human Rights Council Working Group on the Universal Periodic Review, 9th Sess., U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010), available at <http://www.state.gov/documents/organization/146379.pdf>.

66. See generally Contributions for the Compilation of UN Information, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSUNContributionsS9.aspx>; U.N. HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSUNContributionsS9.aspx> (last visited Jan. 23, 2011); Contri-

active dialogue with the U.S. delegation on November 5, 2010, the Council produced a draft outcome report summarizing the proceedings and setting forth recommendations for the United States.⁶⁷

Throughout all of these proceedings, the U.S. Government and UPR participants addressed, among other topics, various issues relating to U.S. immigration policy and practices, including (1) ratification and interpretation of international human-rights instruments, (2) law-enforcement practices, (3) immigrant-detention practices, (4) discriminatory state laws, and (5) access to basic social services by immigrants.

1. *Implementation of International Human-Rights Instruments*

The U.S. Government did not respond to criticisms regarding its implementation of international human-rights instruments relating to immigrants and asylees. In particular, the U.N. Special Rapporteur on the Human Rights of Migrants and the governments of several migrant-sending states (including Egypt, Guatemala, Haiti, and Turkey) encouraged the United States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“ICRMW”).⁶⁸ Given that state participation in this convention is one of the lowest among multilateral human-rights treaties, the U.S. Government’s ratification of the ICRMW would set an important precedent for other democracies.⁶⁹ Nevertheless, the U.S. delegation declined to address this issue.

Several participants also disapproved of the U.S. Government’s interpretation of international standards governing asylum eligibility. For instance, the Office of the United Nations High Commissioner for Refugees (“UNHCR”) criticized the U.S. Government’s “overly restrictive” requirements in U.S. immigration law “for meeting the refugee definition” in “ways that are inconsistent with international standards,”⁷⁰ disapproving in particular of recent jurisprudence requiring a showing of “social visibility” and “particularity” for establishing a particular social group for the purpose of qualifying for asylum, as well as “automatic overly broad criminal and ‘terrorism’-related bars to refugee protection.”⁷¹ Likewise, the U.S. Human Rights Network (“USHRN”) called on the U.S. Government to eliminate the one-year filing deadline for asylum claims.⁷² But during the UPR pro-

butions for the Summary of Stakeholders’ Information, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx>; U.N. HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> (last visited Jan. 23, 2011).

67. See U.S. Draft Report, Human Rights Council Working Group on the Universal Periodic Review, GAOR 9th Sess., U.N. Doc. A/HRC/WG.6/9/L.9 (Nov. 10, 2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf [hereinafter HRC Draft Report].

68. Compilation Report, Human Rights Council Working Group on the Universal Periodic Review, ¶ 2, GAOR 9th Sess., U.N. Doc. A/HRC/WG.6/9/USA/2 (2010), available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_USA_2_United%20States%20of%20America_eng.pdf [hereinafter Compilation Report]; HRC Draft Report, *supra* note 67, ¶¶ 92.15, 92.29-92.31.

69. See SRINI SITARAMAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 129-30 (2009).

70. Compilation Report, *supra* note 68, ¶ 65.

71. U.N. High Comm’r Refugees, Submission to the United Nations Universal Periodic Review, 5 (2010), http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/UNHCR_UnitedNationsHighCommissionerforRefugees.pdf.

72. Advocates for Human Rights, Submission to the United Nations Universal Periodic Review: Migrants, Refugees and Asylum Seekers, at ¶¶ 4, 9 (2010), available at <http://www.ushrnetwork.org/sites/default/files/>

ceedings, the United States did not take up either the UNHCR's or the USHRN's recommendations to reform these interpretations.

2. *Law-Enforcement Practices*

The U.S. delegation was relatively more solicitous of recommendations to reform law-enforcement practices relating to immigrants. The U.N. Committee on the Elimination of Racial Discrimination ("CERD"), accompanied by a handful of member states consisting of Cyprus, Japan, Mexico, Sudan, Uruguay, and Vietnam, expressed concern over allegations of brutality and use of excessive force by law-enforcement officials against immigrants and called for prohibiting the use of lethal force in immigration-enforcement operations.⁷³ Several states, including Bolivia, Egypt, Guatemala, the Holy See, Mexico, Uruguay, and Vietnam, also pressed the United States to avoid the over-criminalization of immigrants⁷⁴ and to prohibit racial profiling by immigration law-enforcement officials.⁷⁵

The U.S. delegation failed to address the allegations of brutality and use of excessive force in law-enforcement operations. But the delegation condemned "racial and ethnic profiling in all of its forms."⁷⁶ It also assured participants of its commitment to review "policies and procedures to ensure that none of its law enforcement practices improperly target individuals based on race or ethnicity,"⁷⁷ "to combat profiling through significantly strengthened protections and training against such discrimination,"⁷⁸ and to take "concrete measures to make border and aviation security measures more effective and targeted to eliminate profiling. . . ." ⁷⁹

3. *Detention Practices*

The UPR participants were the most vocal, and the U.S. delegation the most responsive, in addressing immigrant-detention practices. The attention dedicated to this issue is perhaps unsurprising, given the press coverage that U.S. detention practices have garnered globally. Interestingly, nearly all of the member-state participants (with the exception of Brazil, Guatemala, and Switzerland) steered clear of passing judgment on U.S. immigrant-detention practices. By contrast, the UNHCR and civil-society organizations criticized the U.S. Government's excessive reliance on detention,⁸⁰ poor conditions in detention

declaration-treaty/
Migrants,%20Refugees%20and%20Asylum%20Seekers%20Joint%20Report%20USA.pdf.

73. Compilation Report, *supra* note 68, ¶ 30; HRC Draft Report, *supra* note 67, ¶¶ 50, 80, 92.105, 92.144, 92.208-92.209.

74. HRC Draft Report, *supra* note 67, ¶¶ 68, 92.79, 92.105.

75. *Id.* ¶¶ 92.64, 92.79, 92.101, 92.108.

76. *Id.* ¶ 72.

77. *Id.*

78. *Id.* ¶ 74.

79. *Id.* ¶ 85.

80. Compilation Report, *supra* note 68, ¶ 67; U.S. Summary, Human Rights Council Working Group on the Universal Periodic Review, ¶¶ 36, 61, 76-81, U.N. Doc. A/HRC/WG.6/9/USA/3/Rev.1 (Oct. 14, 2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/169/65/PDF/G1016965.pdf> [hereinafter Stakeholders Summary Report]; HRC Draft Report, *supra* note 67, ¶¶ 92.182-92.183, 92.212.

facilities,⁸¹ prolonged periods of detention,⁸² lack of access to legal assistance by detained immigrants,⁸³ and lack of access to consular assistance.⁸⁴

The U.S. delegation assured participants that the U.S. Department of Homeland Security (“DHS”) has implemented reforms to utilize detention “only when appropriate” for those immigrants who “pose a flight risk or a danger to the community.”⁸⁵ The U.S. delegation also indicated that DHS “has undertaken major reforms to improve detention center management, health, safety, and uniformity among facilities,” such as “revising standards governing immigration detention conditions” and “assign[ing] new oversight personnel nationwide.”⁸⁶ On the issue of provision of legal representation, the U.S. delegation remained silent, likely considering this issue as firmly settled under U.S. law.⁸⁷

4. *Discriminatory State Laws*

Perhaps the only issue on which the U.S. delegation fully agreed with participants was that Arizona’s controversial law SB 1070⁸⁸ must be repealed. Responding to criticisms of the law,⁸⁹ the U.S. delegation explained that the U.S. Department of Justice has “challenged this law” and expressed “its commitment to advancing comprehensive immigration reform.”⁹⁰ But the delegation sidestepped calls to prohibit the Arizona law and others like it as “discriminatory,” instead resolving to oppose the law “on grounds that it unconstitutionally interferes with the federal Government’s authority to set and enforce immigration policy.”⁹¹

5. *Access to Basic Social Services*

Finally, several member states and NGOs called on the U.S. Government to end restrictions on access by immigrants to publicly funded healthcare and other basic social services.⁹² In view of the fact that U.S. administrations have historically considered such rights as merely aspired-to social goals rather than the proper object of binding treaties,⁹³

81. Compilation Report, *supra* note 68, ¶ 30; Stakeholders Summary Report, *supra* note 80, ¶¶ 76, 80; HRC Draft Report, *supra* note 67, ¶¶ 26, 92.164, 92.184.

82. Compilation Report, *supra* note 68, ¶ 73.

83. *Id.* ¶¶ 66-67; Stakeholders Summary Report, *supra* note 80, ¶ 77; HRC Draft Report, *supra* note 67, ¶¶ 26, 92.185.

84. HRC Draft Report, *supra* note 67, ¶ 92.213.

85. *Id.* ¶¶ 73-74.

86. *Id.*

87. See 8 U.S.C. § 1362 (2011) (granting immigrant respondents the “privilege” of obtaining legal representation without expense to the government). See also *Perez-Perez v. Hanberry*, 781 F.2d 1477, 1480 (11th Cir. 1986) (observing that “the appointment of counsel at government expense for . . . excludable aliens would conflict with this country’s immigration policy”).

88. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2nd Sess. (Ariz. 2010).

89. HRC Draft Report, *supra* note 67, ¶¶ 23, 92.79, 92.110.

90. *Id.* ¶ 37.

91. *Id.*

92. *Id.* ¶¶ 92.99, 92.211, 92.214.

93. PHILIP ALSTON, PUTTING ECONOMIC, SOCIAL, AND CULTURAL RIGHTS BACK ON THE AGENDA OF THE UNITED STATES 1-5, (NYU Law Sch. Ctr. Human Rights & Global Justice, Working Paper No. 22, 2009), available at <http://www.chrgj.org/publications/docs/wp/Alston%20Spring%2009.pdf>.

the U.S. delegation's omission of any discussion of immigrant access to social services was perhaps inevitable.

Overall, the U.S. Government's decision to submit to a transparent and public review of its human-rights performance is a significant milestone in terms of high-level U.S. engagement with U.N. human-rights bodies as well as legitimization of the UPR process in general.⁹⁴ Nevertheless, the "primary responsibility to implement the recommendations contained in the final outcome" lies with the U.S. Government, a system that ensures that the United States alone is "accountable for progress or failure in implementing these recommendations."⁹⁵ Thus, given the non-binding nature of the final recommendations, the ultimate test of U.S. commitment to the UPR process will be its actions on the other wide-ranging recommendations left unaddressed by the U.S. delegation.

B. FRIVOLOUS ASYLUM DETERMINATION

Two cases decided in 2010 address how and when immigration judges may determine whether a claim is frivolous. Those who knowingly file a frivolous asylum application may be subject to a permanent immigration bar under INA Section 208(d)(6).

In *Matter of X-M-C*, the BIA held that "the only action required to trigger a frivolousness inquiry is the filing of an asylum application."⁹⁶ The ruling is important because it clarifies that an Immigration Judge does not need to reach the merits of the claim "in order for the frivolousness finding to be effective."⁹⁷ Moreover, the case makes clear that once an application is filed and appropriate warnings regarding the consequences of filing a frivolous claim have been given, the applicant cannot preemptively withdraw the application to prevent a finding of frivolousness, even if withdrawal occurs prior to a ruling on the merits of the claim.⁹⁸

In *Matter of B-Y*, the BIA held that an immigration judge can incorporate by reference any adverse credibility findings into the frivolousness determination, so long as the immigration judge makes explicit findings as to "materiality" and "deliberate fabrication."⁹⁹ The BIA further held that, if an applicant has been warned about the consequences of filing a frivolous claim (either at the time the asylum application has been filed or prior to the commencement of the merits hearing), then immigration judges are under no obligation to provide additional warnings that a frivolousness determination is being considered.¹⁰⁰

94. See Christina M. Cerna & David P. Stewart, *The United States Before the UN Human Rights Council*, ASIL INSIGHT, Nov. 1, 2010, at 3, available at http://asil.org/files/2010/insights/insights_101029.pdf; Barry, *supra* note 62.

95. Basic Facts About the UPR, U.N. HUMAN RIGHTS, Nov. 2008, <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx>.

96. *Matter of X-M-C*, 25 I&N Dec. 322, 324 (BIA 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3693.pdf>.

97. *Id.* at 325, n.2.

98. *Id.* at 325-26.

99. *Matter of B-Y*, 25 I&N Dec. 236, 238-40 (BIA 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3680.pdf>.

100. *Id.* at 242.

V. Business and Immigration Law

A. UPDATES ON H VISA AND L VISA

1. USCIS *January 8, 2010 Memo*

The economic downturn that marked much of the year has had one positive consequence: as of the end of 2010 there were approximately 13,000 H-1B visas still available.¹⁰¹ Although this was good news for those hoping to take advantage of the program, the shortfall is creating a fiscal challenge for USCIS because fees fund the agency: the reduction in applications could lead to a \$148 million loss in revenue for the agency.¹⁰²

USCIS has also increased its scrutiny of H-1B petitions and has indicated that it will strictly interpret the criteria for approval of H-1B visa petitions. In January, the agency issued a formal memorandum offering guidance “on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.”¹⁰³ The memorandum emphasizes that “[t]he petitioner must be able to establish that it has the right to control when, where, and how the beneficiary performs the job.”¹⁰⁴ In addition, the memorandum provides a number of illustrative scenarios that would qualify as valid employer-employee relationships, as well as some that would not.

2. *Increased Fees for Certain H-1B and L-1 Petitions*

Public Law 111-230, which came into effect on August 13, 2010, almost doubled the fee for H-1B, L-1A, and L-1B visa applications submitted by petitioners that “employ 50 or more employees in the United States with more than 50 percent of their employees in the United States in H-1B, L-1A or L-1B nonimmigrant status.”¹⁰⁵ USCIS has clarified that “all employees, whether full-time or part-time, will count towards the calculation of whether an employer is subject to the new fee.”¹⁰⁶ The new fee structure, which requires a petitioner to pay \$2,000 for a covered H-1B petition and \$2,500 for covered L-1 visas, has caused a stir among some communities.¹⁰⁷

101. *H-1B Fiscal Year (FY) 2011 Cap Season*, U.S. CITIZENSHIP & IMMIGRATION SERVS., Jan. 18, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=4b7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD> (reporting that, as of December 7, 2010, 52,400 petitions for H-1B visas had been received out of a capped total of 65,000).

102. David North, *USCIS Interpreter Releases Rally Around Sbrunken H-1B Program*, CTR. IMMIGRATION STUDIES, Apr. 2010, <http://www.cis.org/print/north/rallying-around-h1b>.

103. Memorandum from Donald Neufeld, Assoc. Dir., Serv. Ctr. Operations, U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., to Serv. Ctr. Dirs. (Jan. 8, 2010), *available at* <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

104. *Id.*

105. See Policy Memorandum, U.S. Citizenship & Immigration Services (Jan. 18, 2011), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2011/Public_Law_111-230_Memo.pdf.

106. *Id.*

107. Steve Semerdjian, *New H-1B and L Visa Fee Increases Cause Stir Within Indian Outsourcing Community*, Sept. 10, 2010, *available at* http://www.martindale.com/immigration-law/article_Loeb-Loeb-LLP_1146918.htm.

B. PORTABILITY

On October 20, 2010, *Matter of Al Wazzan* was designated as precedent under 8 C.F.R. § 1003.1(i) (2010).¹⁰⁸ The case addressed INA Section 204(j) portability issues where the beneficiary's application for adjustment of status has been filed and remained pending for 180 days. The USCIS Administrative Appeals Office held that an employment-based petition must have been "valid" to begin with in order to provide portability benefits to a beneficiary who has moved to a new position/employer.

C. OVERVIEW OF REGIONAL CENTER PILOT PROGRAMS

Congress created the regional center pilot program in 1993.¹⁰⁹ The regional center is defined as "any economic unit, public, or private, which is involved in the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment."¹¹⁰ Congress extended the program multiple times, most recently to September 30, 2012.¹¹¹ Compared with regular EB-5 programs, the benefits of investing in an approved regional center pilot program are that the investors do not need to be actively involved in day-to-day management of the commercial enterprise¹¹² and that the ten jobs that must be created because of the investment can be direct or indirect as determined by reasonable methodology.¹¹³

More than ninety percent of investors apply for the EB-5 visa through regional center pilot programs.¹¹⁴ The number of regional center pilot programs has increased from more than twenty in 1996 to more than one hundred this year.¹¹⁵

VI. Miscellaneous Immigration Provisions

A. FRAUD WAIVER (INA § 237 (A)(1)(H) WAIVER)

The Fraud Waiver allows the Attorney General to waive removal for an alien who sought admission by fraud, was in possession of an immigration visa or equivalent documents at the time of the admission, was otherwise admissible, and is currently the spouse, parent, son or daughter of a U.S. citizen or lawful permanent resident.¹¹⁶ "Congress has made clear through a series of amendments that the fraud waiver applies to removal based

108. *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf> (the case was originally decided in 2005).

109. Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations Act, 1992, Pub. L. 102-395, § 610, 106 Stat. 1828 (1992).

110. 8 C.F.R. § 204.6(e) (2011).

111. Continuing Appropriations Resolution, H.R. Res. 2918, 111th Cong., Division B, § 130 (2010).

112. 8 C.F.R. 204.6(j)(5).

113. 8 C.F.R. 204.7.

114. EB-5 Immigrant Investor Program Stakeholder Meeting Agenda, U.S. CITIZENSHIP & IMMIGRATION SERVS., (Oct. 14, 2010), <http://www.aila.org/content/default.aspx?docid=33385>.

115. See *Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., Jan. 21, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d765ee0f4c014210VgnVCM100000082ca60aRCRD&vgnnextchannel=fac83453d4a3210VgnVCM100000b92ca60aRCRD>.

116. INA § 237(a)(1)(H)(i).

on grounds of inadmissibility directly resulting from the fraud or misrepresentation.¹¹⁷ In 2010, the Ninth Circuit held that an alien whose legal status as the spouse of a citizen is later terminated because the marriage was fraudulent is eligible for discretionary relief from removal. The court opined, “Congress assumed the existing fraud waiver would continue to apply to marriage fraud, as it applies to all other species of fraud by which admission is gained to the United States.”¹¹⁸

B. DREAM ACT BLOCKED

The year ended in disappointment for supporters of the DREAM Act,¹¹⁹ a bill that would have provided a path to citizenship for undocumented migrants who entered the country prior to turning sixteen and had been residing here for at least five years, and had attended college or served in the military.¹²⁰ The proposed legislation could have benefited approximately 1.2 million immigrants and was viewed as the key to more sweeping immigration reform.¹²¹ Widely considered the most likely to succeed of a variety of immigration measures promoted by the Obama Administration, the bill failed to muster the required sixty votes in the Senate.¹²² With a Republican majority set to take control of the House, there is little hope that the measure will be revived in the near future.¹²³ An estimated 65,000 undocumented immigrants graduate from U.S. high schools each year.¹²⁴ The arrest of a Harvard student on a full scholarship, who had immigrated to this country when he was a toddler, became emblematic of the difficulties this population faces.¹²⁵ During the period leading up to the Senate vote, many undocumented students disclosed their illegal status, as well as their academic accomplishments, in an effort to gain support for the bill; now that the measure has been defeated, there is uncertainty for their future.¹²⁶

C. COURT ALLOWS CIVIL RIGHTS CLAIMS AGAINST TOP IMMIGRATION OFFICIALS AND AGENTS TO PROCEED

In a case that is likely to have national implications, a federal judge allowed a lawsuit against the former chief of the Immigration and Enforcement agency and other senior officials to move forward.¹²⁷ *Diaz-Bernal v. Myers* stems from federal raids of private homes in New Haven that resulted in the arrest and jailing of thirty-two undocumented

117. *Vasquez v. Holder*, 602 F.3d 1003, 1016 (9th Cir. 2010).

118. *Id.* at 1017.

119. “DREAM” is an acronym for “Development, Relief, and Education for Alien Minors.”

120. DREAM Act of 2009, S. 729, 111th Cong. (2009), <http://thomas.loc.gov/cgi-bin/query/z?c111:S.729>.

121. Lisa Mascaro & James Oliphant, *Dream Act's Failure in Senate Derails Immigration Agenda*, L.A. TIMES, Dec. 19, 2010, at 27.

122. Julia Preston, *Immigration Vote Leaves Obama's Policy in Disarray*, N.Y. TIMES, Dec. 19, 2010, at A35, available at <http://www.nytimes.com/2010/12/19/us/politics/19dream.html>.

123. *Id.*

124. *Id.*

125. Maria Sacchetti, *Case Deepens Immigration Debate: Backers Say Harvard Student Is Poster Child For Dream Act*, BOSTON GLOBE, June 20, 2010, at 1.

126. See Preston, *supra* note 122.

127. Sam Dolnick, *Judge Says Case Against Immigration Officials in New Haven Raids Can Proceed*, N.Y. TIMES, Dec. 18, 2010, at A17.

immigrants. The mayor of the town and others viewed the pre-dawn raids, which took place two days after the city approved a plan to offer undocumented immigrants identification cards, as retaliatory.¹²⁸ Several of those impacted filed claims alleging that the agents violated their civil rights by arresting them “without inquiring into their immigration status, informing them of their rights or explaining why they were being seized.”¹²⁹ The government argued for dismissal on the theory that “senior officials were too far removed from the raids to be held responsible and that immigration agents could not be sued.”¹³⁰ The court rejected the qualified immunity argument and allowed the suit to proceed, noting that the plaintiffs had presented sufficient “evidence that senior federal officials created an environment ‘under which constitutional violations occurred.’”¹³¹ This is a case to watch as the year progresses: for immigration advocates it represents “the beginning of a process of accountability to bring ICE as a law enforcement agency within the fold of every other federal agency.”¹³²

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* Ruling on Motions to Dismiss, Dec. 16, 2010, *available at* http://www.newhavenindependent.org/archives/upload/2010/12/Decision_on_Motions_to_Dismiss.pdf.

132. *Id.* (quoting Muneer Ahmad, the supervising lawyer representing the plaintiffs).