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Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990

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PRESUMED INELIGIBLE: THE EFFECT OF CRIMINAL CONVICTIONS ON APPLICATIONS FOR ASYLUM AND WITHHOLDING OF DEPORTATION UNDER SECTION 515 OF THE IMMIGRATION ACT OF 1990

Evangeline G. Abriel*

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I. INTRODUCTION

A person seeking refuge in the United States from persecution in his own country may apply for it at a U.S. Embassy or Consulate abroad, as a refugee, or may apply for it at or within U.S. borders, by applying for asylum and/or withholding of deportation. Regardless of the method chosen to apply for refuge, the applicant must show that he does not fall under certain statutory or regulatory bars to his application. Section 515 of the Immigration Act of 1990 has made a severe change in the statutory bars to obtaining refuge in the United States by significantly limiting the opportunity to apply for asylum and withholding of deportation in the cases of aliens with criminal convictions.

This Article will review the U.S. laws providing for asylum and withholding of deportation (withholding) and the United Nations treaties


from which our legislation is derived. It will then discuss the changes made in the criminal bars to asylum and withholding by the Immigration Act of 1990 and evaluate those changes under the United Nations Convention Relating to the Status of Refugees and the United States Constitution. Finally, this Article will make some recommendations for representation of refugees who have criminal convictions.

The author's conclusion is that Section 515 of the Immigration Act of 1990 is inconsistent with the United States' obligations under the 1951 United Nations Convention Relating to the Status of Refugees (Convention) and the 1967 Protocol Relating to the Status of Refugees (Protocol) in two respects: 1) the unavailability under the Immigration Act of 1990 of any method of balancing the applicant's criminal conviction against other factors in his case, such as the severity of the persecution he faces upon return to his country, and 2) the equating of "particularly serious crime" with "aggravated felony," as defined in the Immigration Act of 1990. Moreover, Section 515 is in violation of the substantive and procedural due process requirements of the Fifth Amendment to the United States Constitution because it effectively precludes refugees with certain criminal backgrounds from applying for asylum and withholding while failing to provide a meaningful opportunity for those refugees to be heard.

The purpose of the Article is not to argue that asylum and withholding of deportation should, in general, be granted to persons who have committed particularly serious crimes. Rather, the author's points are, first, that the adjudication of the asylum claim of such persons should consider all relevant factors, instead of stopping at the determination of conviction for a particularly serious crime, and, second, that the United States' definition of "particularly serious crime" must conform with that of the United Nations.

II. THE FRAMEWORK OF UNITED STATES REFUGEE LAW

The Refugee Act of 1980, which sets out the current United States provisions for asylum and for withholding of exclusion and deportation, was enacted to bring United States refugee laws into accord with the United States' obligations under the 1951 Convention and the 1967 Protocol. The Refugee Act's establishment of a broad class of refugees

who are eligible for a discretionary grant of asylum and a narrower class of aliens who are given a statutory right not to be deported to countries where they are in danger mirrors the provisions of the Convention.6

The Convention and Protocol, interestingly, do not impose upon their contracting parties a duty to provide asylum.7 Instead, the Convention defines the term "refugee"8 and imposes on the contracting states the

8. Other conventions go further towards imposing an obligation to grant asylum. See, e.g., Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45 (concluded on Sept. 10, 1969) ("Member States of the Organization of African Unity (OAU) shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."); art. II(1), 1001 U.N.T.S. at 48 [hereinafter OAU Convention].
9. The U.N. Convention provides for two types of refugees. The first type, the "statutory refugee," is a person who has "been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization." Convention, supra note 4, art. I(A)(1). The second type of refugee is a person who, "as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Id. art. I(A)(2). The Convention allowed contracting states to define "events occurring before 1 January 1951" as either "events occurring in Europe before 1 January 1951" or "events occurring in Europe elsewhere before 1 January 1951." Id. art. I(B)(1)
10. The Protocol amended the Convention, such that the Convention now applies to refugees irrespective of time or geographic considerations. The amendment removed the phrases "as a result of events occurring before 1 January 1951" and "as a result of such events" from the definition of "refugee" in Article I(A)(2) of the Convention. Protocol, supra note 5, at art. I(2). The amendment also removed the geographic limitations under Article I(B)(1) of the Convention, except for contracting states who had elected under the Convention to limit their obligations to refugees from events occurring in Europe. Protocol, art. I(3).
11. See, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFU-
obligation of “non-refoulement,” that is, the obligation to refrain from forcibly returning a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion. The concept of non-refoulement is a crucial one in refugee law, and adherence to it by states is considered essential for the protection of refugees.

The Convention’s distinction between asylum and non-refoulement is reflected in U.S. refugee law. The Refugee Act of 1980 provided a definition of “refugee,” which conformed with the general definition of

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9. Convention, supra note 4, art. 33(1). Under the Convention, persecution alone is insufficient to confer refugee status. Rather, the persecution must be on account of one of five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group. Other grounds for eligibility for refugee status, such as famine, war, and other disasters, were not included in the Convention. By contrast OAU Convention, supra note 7, art. I(2) (entered into force on June 20, 1974). The OAU Convention includes the United Nations definition of refugee, but also provides that the term “refugee” “shall apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” Id.

10. Goodwin-Gill points out the importance of non-refoulement:

If each state remains absolutely free to determine the status of asylum-seekers and either to abide by or ignore the principle of “non-refoulement,” then the refugee’s status in international law is denied and the standing, authority, and effectiveness of the principles and institutions of protection are seriously undermined.

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The term “refugee” means

(A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
refugee under the Convention and Protocol and established three principal mechanisms for seeking refuge. First, a refugee located outside the United States may seek refugee status by application at a United States Consulate abroad or through the United Nations High Commissioner for Refugees' office, with possible resettlement in the United States. An alien within the United States, or at its borders, may seek refuge through two additional methods: an application for asylum and an application for withholding of deportation, respec-

(B) in such circumstances as the President after appropriate consultation (as defined in § 297(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. 12. See supra note 8.

13. In addition to those three methods, there are certain other methods for obtaining refugee status in the U.S., but those methods are generally reserved for large influxes of persons seeking refuge from a particular country or region, are limited to a particular period of time, and are not designed to grant refuge on an individual basis. The other measures include the following: (1) INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (Supp. II 1990) (authorizing the Attorney General, under his parole power, to parole aliens into the country on a temporary basis for emergency reasons or for reasons in the public interest; an example of the exercise of the parole power was the parole of Cuban refugees into the U.S. during the 1980 Mariel boatlift). (2) Special overseas refugee programs such as the Orderly Departure Program, established in 1979 in response to the flood of people fleeing Vietnam. U.S. Raises Number of Monthly Interviews under ODP, 68 INTERPRETER RELEASES 470 (1991); see generally, Orderly Departure Program, 2 AM. IMMIGR. LAW ASS'N, IMMIGRATION AND NATIONALITY LAW 37-50 (R. Juceam and E. Rubin, eds., 1987). (3) The Extended Voluntary Departure (EVD) program allows the Attorney General to grant temporary authorized stay to all aliens from a particular country or region, allowing them to remain in the United States for a specified period in order to escape sudden political changes in their countries. EVD programs have existed for nationals of Poland, Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Lebanon, Hungary, Romania, Uganda, Iran, Nicaragua, Afghanistan, and Ethiopia. See IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 123-124 (1989); Grants of Extended Voluntary Departure Since 1960, 64 INTERPRETER RELEASES 1084 (Sept. 21, 1987). (4) Under Temporary Protected Status (TPS), established by § 302(a) of the Immigration Act of 1990, the Attorney General may grant extended stay and work authorization to aliens who are nationals of foreign states designated by the Attorney General because of ongoing armed conflict or environmental disaster. Immigration Act of 1990 §302(a) (adding INA § 244A, 8 U.S.C. § 1254a). To date, TPS has been extended to Salvadorans, for a period of eighteen months beginning January 1, 1991, Immigration Act of 1990 § 303 (INA § 244A(b), 8 U.S.C. § 1253a(b)); to Kuwaitis, Lebanese, and Liberians, for a period of one year commencing March 27, 1991, 56 Fed. Reg. 12,745 (Mar. 27, 1991); and to nationals of Somalia, for 12 months from September 16, 1992, 56 Fed. Reg. 46,804 (Sept. 16, 1991). (5) From time to time, Congress enacts specific legislation such as the Lautenberg Amendment to the Foreign Operations Appropriations Act §§ 599D and 599E, Pub. L. No. 101-167 (Nov. 20, 1989), allowing certain Soviets and Indochinese to more easily obtain refugee status. (6) The President may also act by Executive Order. In 1989, nationals of the People's Republic of China who had been present in the United States since June 6, 1989, were granted deferred departure status by the Attorney General, acting on instructions of President Bush giving temporary authorized stay to mainland Chinese. President Vetoes Chinese Student Bill, Offers Administrative Relief Instead, 66 INTERPRETER RELEASES 1313 (1989); More on Administrative Relief for PRC Nationals, 66 INTERPRETER RELEASES 1361 (1989).


If he has not been detained by the Immigration and Naturalization Service (INS or the Service), he may make an initial application for asylum, called an "affirmative application," to the INS District Director having jurisdiction over the place of his residence or the port of entry from which he seeks admission. If the application is denied by the District Director, the alien has no right of appeal, but may renew his application in deportation or exclusion proceedings before an Immigration Judge (IJ). An alien in deportation or exclusion proceedings must make his applications for asylum and withholding before the IJ as a form of discretionary relief.

The two principal mechanisms by which aliens physically within the United States or at its borders may seek refuge — asylum and withholding of deportation — appear similar but are in fact two distinct forms of relief, differing as to both the standard of proof and the scope of relief. Asylum may be granted, in the discretion of the INS District Director or the IJ, to an alien who meets the definition of refugee found in Section 101(a)(42) of the INA — that is, an alien who has been persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. The alien bears the burden of proof in asserting his claim of a well-founded fear of persecution. The Board of Immigration Appeals (BIA or the Board) has held that an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution. An application for asylum may be denied in the exercise of the Attorney General's discretion. An alien who is granted asylum may, after one year as an asylee, apply to adjust his status to that of lawful permanent resident. His asylum status grants him certain benefits, including employment authorization and the opportunity to include his spouse and minor children in his grant of asylum.
In contrast, an alien granted withholding of deportation or exclusion is afforded a much narrower remedy than is an asylee. He may not be sent to any country in which his life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group, but he may be sent to any other country which will accept him. His status grants him employment authorization and certain other benefits, but there are no provisions allowing him to adjust his status to permanent resident or to include his family in his grant of withholding. Like the applicant for asylum, the alien seeking withholding of deportation has the burden of proof in establishing his eligibility for relief, but he must do so by clear and convincing evidence. This is a more rigorous standard of proof than the lower preponderance of the evidence standard used to evaluate a claim for asylum. Unlike asylum, withholding must be granted if it is determined that the applicant's life or liberty would be in jeopardy on the basis of race, religion, nationality, political opinion, or membership in a particular social group, unless the alien falls within one of the statutory or regulatory bars to withholding.

III. THE EFFECT OF CRIMINAL CONVICTIONS ON THE STATUS OF REFUGEES

Both the United Nations Convention and United States refugee law provide methods for dealing with the refugee who has committed criminal acts. In addition, both bodies of law distinguish between "serious non-political crimes" committed outside the country of refuge prior to entry and "particularly serious crimes" committed after arrival in the country of refuge. Under the United Nations Convention, the commission of the former before entry may preclude the attainment of refugee status, but it can never justify expulsion by the country of refuge; however, commission of the latter, being more serious, may justify expulsion. Under United States law, however, particularly serious crimes committed within the U.S. may serve as the basis for both denial of asylum and denial of withholding of deportation. In addition, the existence of serious reasons for believing that an applicant has committed a "serious non-political crime" outside the United States requires denial

of withholding.

The question arises as to why asylum and withholding should be made available at all to persons who have committed criminal acts. “To extend the legislative grace of political asylum to an aggravated felon is inconsistent” with national drug control policies.34 The drafters of the United Nations Convention, however, believed that a balance should be struck between the goal of providing safety to refugees and the goal of protecting the community of the country of refuge.35 Thus, only commission of crimes of a particular severity can preclude a person from being granted refugee status.36 Moreover, once a refugee has reached a country of refuge, he should be expelled from that country only for the most serious offenses.37

Congress, in drafting the Refugee Act of 1980, intended its treatment of refugee applications by aliens with criminal convictions to be consistent with that of the United Nations, and clearly stated that “[t]he conference substitute adopted the House provision [mandating withholding except under certain specific conditions] with the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol.”38 This Article will argue that, despite Congress’ intentions, the treatment under Section 515 of refuge seekers with criminal convictions is not consistent with United Nations practice.

35. The Handbook states:

The aim of [Article I(F)(b) of the Convention] . . . is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offense.

HANDBOOK, supra note 8, ¶ 151. See also, THE REFUGEE, supra note 7, at 63 (“[T]he objective of [the criminal bar] provisions is to obtain a humanitarian balance between a potential threat to the community of refuge and the interests of the individual who has a well-founded fear of persecution”).
36. Convention, supra note 4, art. 1(F)(b).
37. The necessity of exclusions from the principle of non-refoulement provision has been questioned. Atle Grahl-Madsen has observed that:

With regard to the abolition of exceptions to the rule of non-refoulement, the argument is that such exceptions are not really necessary, in order to safeguard the interests of a modern State. Should an asylee break the law, he should be punished like anybody else, no more, no less. However, there is hardly any chance that a majority of States will be ready to accept a non-refoulement provision not allowing any exceptions, for example along the lines of Article 33(2) of the Refugee Convention, 1951.

GRAHL-MADSEN, TERRITORIAL ASYLUM, supra note 7, at 54.
A. Criminal Bases for Denial of Refugee Status and for Expulsion of Refugees under the United Nations Convention Pertaining to the Status of Refugees

The United Nations Convention distinguishes between the effect of a crime on the granting of refugee status and the effect of a crime on the ability of a state to expel a refugee. Article 1(F) of the Convention states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations. 39

Under Article 33(1), contracting states are prohibited from expelling or returning (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political crime. Article 33(2), however, provides that the benefit of Article 33(1) may not be claimed by a refugee "whom there are reasonable grounds for regarding as a danger to the security of any country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." 40

Thus, a person may be denied refugee status on the basis that there

39. The Handbook explains:

In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

HANDBOOK, supra note 8, ¶ 152. See generally, THE REFUGEE, supra note 7, at 35-38. For dispositions under United States refugee law, see McMullen v. INS, 788 F.2d 591 (9th Cir. 1986) (acts directed at civilians rather than military by member of the PIRA are non-political crimes); Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988) (Participation in a coup d'etat may be a political crime where there is no opportunity for citizens to freely and peacefully change their laws, officials, or form of government).

The State Department regulations on visa issuance provide that the term "purely political offenses", as used in INA § 212(a)(9) [renumbered as § 212(a)(2)(A)(i)(1), (a)(2)(B), following the Immigration Act of 1990] "includes offenses that resulted in convictions obviously based on fabricated charges or predicated upon repressive measures against racial, religious, or political minorities." 22 C.F.R. § 40.7(a)(9)(vii), (a)(10)(v) (1991).

40. Convention, supra note 4, art. 33(2).
were serious reasons for considering that he had committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee, but, once inside that country, he cannot be expelled (refoulé) on that basis if his life or liberty would be in jeopardy in his country because of one of the five listed grounds. He may be expelled on criminal grounds only if, having been convicted by a final judgment of a particularly serious crime, he constitutes a danger to the community of the country of refuge.

B. Criminal Bars to Asylum and Withholding under United States Law Prior to the Immigration Act of 1990

The Immigration Act of 1990 considerably increased the criminal bars to obtaining asylum and withholding under United States law. This Section of the Article will review the criminal bars existing prior to the Immigration Act of 1990, and the following Section will examine the effect of the Immigration Act of 1990 on asylum and withholding.

The bars to granting asylum and withholding under U.S. law are found in both statutes and regulations. Prior to the Immigration Act of 1990, there were no statutory provisions barring a grant of asylum on criminal grounds. There were, however, statutory bars to the granting of withholding under Section 243(h) of the INA. Under that section, an alien who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the U.S., may not be granted withholding. Neither may withholding be granted if there are serious grounds for considering that the alien has commit-

41. "It is on the whole agreed that Article 33, as it stands, should be read in such a way that, the moment a refugee sets foot on foreign soil, he is entitled to the benefit of the provisions of that Article. No formal act of admission is required." GRAHL-MADSEN, TERRITORIAL ASYLUM, supra note 7, at 74. See also GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 140 (1978) ("[T]he court also held that the right inherent in Article 33 was not similarly tied to lawful presence, and it had to be interpreted to mean that no refugee, whether lawfully or unlawfully within the territory, may be expelled to a place of persecution.") (Discussing the Refugee (Germany) Case, 28 I.L.R. 297 (July 14, 1959)).

42. There were also regulatory bars to both asylum and withholding. The District Director was required to deny an application for asylum if it was determined that the alien, having been convicted by a final judgment of a particularly serious crime, constituted a danger to the community of the United States or if there were serious reasons for considering that the alien had committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States. 8 C.F.R. § 208.8(f)(1)(iv), (v) (1990). In addition, the District Director was required to deny an asylum application if it was determined that the alien was not a refugee within the meaning of INA § 101(a)(42), had been firmly resettled in a foreign country, or had ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, or if there were reasonable grounds for regarding the alien as a danger to the security of the United States. 8 C.F.R. § 208.8(f)(1)(i), (ii), (iii), (vi) (1990). The mandatory denials did not apply to the I.J. Castro-O’Ryan v. INS, 847 F.2d 1307, 1313 (9th Cir. 1988); Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). These regulations were superseded by new regulations issued at 55 Fed. Reg. 30,674 (July 27, 1990), which became effective on October 1, 1990. They are codified at 8 C.F.R. Pt. 208 (1991), and are described in more detail infra in the text accompanying notes 48-53.

ted a serious nonpolitical crime outside the U.S. prior to arrival in the U.S.44

While the wording of Section 243(h)(1) of INA is almost identical to the non-refoulement provision in Article 33 of the Convention, the exceptions to withholding for criminal reasons in Section 243(h)(2) do not correspond precisely to the criminal bases for which a refugee may be expelled under Article 33(2).46 Under INA Section 243(h)(2)(C), a refugee may be expelled from the United States if there are "serious reasons" for considering that he has committed a "serious non-political crime" outside the U.S. prior to arrival.46 In contrast, Article 33(2) of the United Nations Convention would allow expulsion only for crimes determined to be "particularly serious."47

In July 1990, final asylum regulations were published.48 Under these regulations, both the INS Asylum Officer49 and the IJ are required to deny requests for asylum and requests for withholding in certain instances.50 The regulations distinguish between the bases on which asy-

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45. It was noted at the time of enactment that the criminal bars under INA § 243(h)(2) did not exactly match the provisions of Article 33(2) of the Convention. Anker & Posner, supra note 38, at 9, 56, 63; Refugee Bill Becomes Law, 57 Interpreter Releases 133, 135 (1980). Yet the legislative history indicates that Congress believed § 243(h)(2) to be based directly on the language of the Protocol and intended it to be construed consistent with the Protocol. See supra text accompanying note 38.
46. Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified on other grounds, Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). For example, in Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980), the alien's conviction of robbery was considered to be a serious nonpolitical crime, prohibiting the granting of withholding under INA § 243(h) to him.
47. Convention, supra note 4, art. 33(2).
49. Prior to issuance of the final asylum regulations on July 27, 1990, affirmative applications for asylum were decided by the INS District Director. 8 C.F.R. § 208.3(a) (1990). The final asylum regulations created the position of Asylum Officer, specially trained officers who serve under the general supervision and direction of the Assistant Commissioner for Refugees, Asylum and Parole and who have authority to hear and adjudicate applications for asylum and withholding of deportation, 8 C.F.R. § 208.2(a) (1991), except where the alien has been served with notice of exclusion or deportation proceedings, in which case the application for asylum and withholding is heard by the Immigration Judge. 8 C.F.R. § 208.2(b) (1991).
50. The final asylum regulations also cover the issue of revocation of asylum and withholding. Asylum status may be revoked by the Assistant Commissioner of the Office of Refugees, Asylum, and Parole, in the case of a grant of asylum made by the Asylum Officer, or by the INS, in the case of a grant of asylum made by the IJ or BIA, upon a showing of one of three grounds:

(1) The alien no longer has a well-founded fear of persecution upon return due to a change of conditions in the alien's country of nationality or habitual residence;
(2) There is a showing of fraud in the alien's application such that he was not eligible for asylum at the time it was granted; or
(3) The alien has committed any act that would have been grounds for denial of asylum under 8 C.F.R. § 208.14(c).

A grant of withholding may be revoked on grounds similar to those for revoking asylum:

(1) The alien is no longer entitled to withholding of deportation due to a change of conditions in the country to which deportation was withheld;
(2) There is a showing of fraud in the alien's application such that he was not eligible for
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lum must be denied and the bases on which withholding must be denied.

Under the new regulations, both Asylum Officers and IJs must deny applications for asylum and withholding if the alien, having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community. In addition, withholding must be denied by the Asylum Officer or Immigration Judge if there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to arrival in the United States.

The regulations barring asylum and withholding in the case of an applicant with a criminal background are harsher in this regard than is the Convention. While the Convention would exclude an alien from refugee status only where there are serious grounds for considering that the alien has committed a serious non-political crime outside the country of refuge prior to entry, the new United States asylum regulations would preclude an alien from being granted asylum status on the basis of conviction of a particularly serious crime within the United States.

The regulatory bar to withholding retains the flaw existing in the statutory bars to withholding under INA Section 243(h)(2): It allows a refugee to be expelled for commission of a serious non-political crime, where the United Nations Convention would allow expulsion only upon conviction by final judgment of a particularly serious crime.

C. Changes in the United States' Laws Pertaining to Refugees under the Immigration Act of 1990

1. Congressional Concern with Crimes and Immigration

Congress has become increasingly concerned with the relationship between immigration and crimes, and that concern has resulted in three major pieces of legislation concerning aliens and crimes in the

withholding of deportation at the time it was granted;
(3) The alien has committed any other act that would have been grounds for denial of withholding of deportation under 8 C.F.R. § 208.16(c)(2).


52. 8 C.F.R. § 208.16(c)(2)(iii) (1991). Further mandatory grounds for denial are, for asylum, that the applicant has been firmly resettled, 8 C.F.R. § 208.14(c)(2) (1991), and, for both asylum and withholding, the existence of reasonable grounds for regarding the alien as a danger to U.S. security, 8 C.F.R. § 208.14(c)(3) (1991) (asylum); 8 C.F.R. § 208.16(c)(2)(iv) (1991) (withholding). Neither asylum nor withholding is available to an alien who has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (asylum); INA § 243(h)(2)(a), 8 U.S.C. § 1253(h)(2)(a); 8 C.F.R. § 208.16(c)(2)(i) (withholding).

53. 8 C.F.R. § 208.14(c)(1).
last five years. The most recent piece of legislation in the area, the Immigration Act of 1990, seriously affects refugees.

Criminal convictions, and in some cases "serious reasons" for believing that the alien has committed an offense of particular gravity, have three major immigration consequences for the alien. First, criminal convictions are a basis for finding an alien excludable from the United States. Secondly, an alien may be found deportable (that is, may be ordered to leave the United States) on the basis of criminal convictions. Finally, an alien may be refused discretionary relief from exclusion or deportation based at least in part on criminal convictions or commission of a criminal act. These consequences are in addition to any criminal sentence imposed by the conviction.

Commencing in about 1986, Congress began to show an increased interest in aliens with criminal convictions and an increased reluctance to extend immigration benefits to those aliens. The Anti-Drug Abuse Act of 1986 broadened the range of drug violations for which an alien could be excluded or deported from the United States, required the INS to establish a pilot program in four cities to identify alien criminals, and required the executive branch to act expeditiously to


55. Under current law, as amended by the Immigration Act of 1990, an alien is excludable, that is, ineligible to enter the United States, if he has been convicted of or has admitted to committing acts constituting essential elements of a crime of moral turpitude, other than offenses falling under a "petty offense" exception, or if he has been convicted of two or more offenses, other than purely political offenses, regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were five years or more. In addition, an alien is excludable if he has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to a controlled substance or if the consular or immigration officers know or have reason to believe he is or was an illicit trafficker in controlled substances. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (1988 & Supp. II 1990).

56. An alien is deportable if he has been convicted of a crime involving moral turpitude committed within five years after entry to the U.S. and either sentenced to confinement or confined for a year or more, or, if at any time after entry, has been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, or who is convicted of an aggravated felony, as defined in INA § 101(a)(43) at any time after entry. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. II 1990); see also infra text accompanying notes 83-86. He is also deportable if he at any time after entry has been a narcotic drug addict or has been convicted of a violation of or a conspiracy to violate any laws relating to a controlled substance, other than a single offense involving possession of thirty grams or less of marijuana. INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1988 & Supp. II 1990).

57. For example, the discretionary relief of suspension of deportation, under INA § 244(a), requires a showing of good moral character. INA § 244(a), 8 U.S.C. § 1254(a) (1988 & Supp. II 1990). Certain criminal convictions, including a conviction for an aggravated felony as defined in section 101(a)(43) of INA, 8 U.S.C. 1101(a)(43) bars a person from being deemed of good moral character under INA § 101(f), 8 U.S.C. § 1101(f). A second form of relief from deportation, voluntary departure, is unavailable to persons convicted of an aggravated felony. INA § 244(e)(2), 8 U.S.C. § 1254(e)(2) (Supp. II 1990).


59. Id. § 1751; see also New Drug Law Broadens Excludability and Deportability of Alien Drug Offenders, 63 INTERPRETER RELEASES 1151 (1986).

60. Id. § 1751.
establish a comprehensive information system on all drug arrests of foreign nationals in the United States so that the information might be communicated to the U.S. Embassies.\(^61\) In addition, Section 701 of the Immigration Reform and Control Act of 1986 (IRCA)\(^62\) required the INS to initiate deportation proceedings promptly against aliens convicted of deportable crimes.\(^63\)

Pursuant to these two laws, the INS began its Alien Criminal Apprehension Program (ACAP), described in the program's field procedures manual as "an aggressive pilot program with one objective — to remove criminal aliens from the street, from the community, and ultimately, from the United States in as expeditious a manner as is possible, consistent with due process requirements."\(^64\) In addition, the Executive Office for Immigration Review (EOIR) began holding deportation hearings against alien criminals in state and federal prisons, under its institutional hearing program.\(^65\)

Despite the INS' efforts, Congress continued to express concern over the impact of aliens on crime in the United States.\(^66\) The U.S. General Accounting Office (GAO) issued two reports critical of the INS' ability to find and deport criminal aliens.\(^67\) When additional proposals for legislation aimed at controlling alien crime were presented, the INS' "well-documented inability to arrest, detain and deport dangerous alien felons" was cited as the impetus for the proposals.\(^68\)

Congress' continued concern resulted in the enactment of the Anti-Drug Abuse Act of 1988,\(^69\) described as a "sweeping anti-drug bill."\(^70\) The Anti-Drug Abuse Act of 1988 added INA Section 241(a)(4)(B), providing for deportation for conviction of an "aggravated felony".\(^71\) "Aggravated felony" was defined in the Act as murder, any drug traf-

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\(^{61}\) Id. § 2011.


\(^{64}\) INS Increases Efforts Against Criminal Aliens, 65 INTERPRETER RELEASES 955, 955 (1988).

\(^{65}\) Id. at 956.

\(^{66}\) An influential commentator has criticized the INS for its failure to take drug deportation cases seriously, saying that if the Service had been enforcing the laws already on the books, there would have been no need for Congress to act in the first place. Remarks of Warren R. Leiden, Executive Director, American Immigration Lawyers' Association, reported in Final Anti-Drug Bill Less Anti-Alien, 65 INTERPRETER RELEASES 1092 (1988).


\(^{70}\) Senate Passes Sweeping Anti-Drug Bill, 65 INTERPRETER RELEASES 1063 (1988).

ficking crime as defined in 18 U.S.C. Section 924(c)(2), any illicit traffic-
ficking in any firearms or destructive devices as defined in Section 921
of the same title, and any attempt or conspiracy to commit any such
act, committed within the United States.72 Aliens convicted of aggra-
vated felonies were to be taken into INS's custody upon completion of
their criminal sentence73 and conclusively presumed deportable.74 Their
depортation hearings were to take place in correctional facilities “in a
manner which ensures expeditious deportation, where warranted, fol-
lowing the end of the alien’s incarceration for the underlying sen-
tence.”76 Aliens convicted of aggravated felonies could seek judicial re-
view of their deportation orders in a U.S. Court of Appeals, but had to
do so within sixty days of the order of deportation76 as opposed to the
ninety days in which other aliens may seek judicial review of a deporta-
tion order.77

As severe as the Anti-Drug Abuse Act of 1988 was, it was not as
“anti-alien” as the preliminary proposals for the legislation.78 Under
those proposals, aliens convicted of an aggravated felony would have
been ineligible for asylum.79 This provision was deleted from the Anti-
Drug Abuse Act conference bill. What Congress declined to do in the
Anti-Drug Abuse Act of 1988, however, was accomplished in Section
515 of the Immigration Act of 1990 — that is, the effective denial of
asylum and withholding to aliens convicted of aggravated felonies.

By the next year, 1989, congressional concern over the INS’s failure
to find and deport criminal aliens was “at an all-time high.”80 Legisla-
tive proposals to restrict benefits extended to aliens with criminal con-
victions and to ensure deportation of such aliens began once again to be
introduced.81 Those proposals culminated in the Immigration Act of

72. Id. § 7342 (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)).
73. Id. § 7343(a)(4) (amending INA § 242(a)(2), 8 U.S.C. § 1252(a)(2)).
74. Id. § 7347 (creating INA § 242A(c), 8 U.S.C. § 1252A(c)).
75. Id. § 7347 (creating INA § 242A(a), 8 U.S.C. § 1252A(a)).
76. Id. § 7347(b) (amending INA § 106(a)(1), 8 U.S.C. § 1105(a)(1)).
79. INS Increases Efforts Against Criminal Aliens, 65 INTERPRETER RELEASES 955, 956
(1988).
Alth-
ough members of Congress criticized the INS’ performance on detention and deportation of
convicted aliens, the General Accounting Office believed that the INS was doing a reasonable job,
given the lack of sufficient funding to carry out all its responsibilities. Id.
81. See, e.g., Title IV of H.R. 4300, 101st Cong., 2d Sess. (1990), (Removal of Criminal
Aliens); Rep. Morrison Introduces Immigration Reform Bill, 67 INTERPRETER RELEASES 349, 352
Act of 1990); Administration Proposes Tough New Criminal Alien Bill, 67 INTERPRETER RE-
LEASES 577 (1990); S. 1970, 101st Cong., 2d Sess. (1990); Congress Seeks Tougher Criminal
(Comprehensive Crime Control Act of 1990); House Approves Tough Criminal Alien Bill, 67
INTERPRETER RELEASES 1155 (1990). Some of the provisions of H.R. 5269 were incorporated into
the final version of the Immigration Act of 1990.
The Immigration Act of 1990 is "the most sweeping reform of our legal immigration system since 1952." It greatly increased the impact of convictions for drug-related and violent crimes on aliens seeking refuge in the United States. The Act first set out a new definition of the term "aggravated felony" by amending the language set forth in the Anti-Drug Abuse Act of 1988. Under the 1990 Act,

\[\text{\textbf{[t]he term "aggravated felony" means murder, any illicit trafficking in any controlled substance (as defined in Section 802 of Title 21), including any drug trafficking crime as defined in Section 924(c)(2) of title 18, or any illicit trafficking in any firearms or destructive devices as defined in Section 921 of such title, any offense described in Section 1956 of Title 18 (relating to laundering of monetary instruments), or any crime of violence (as defined in Section 16 of Title 18, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. Such term applies to offenses described in the previous sentence whether in violation of Federal or State law, and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous fifteen years.}\]

This amendment greatly extends the types of crimes considered to be "aggravated felonies". Most notably, the term "aggravated felony" now includes crimes of violence for which a sentence of at least five years is actually imposed.

83. The Immigration Act of 1990, however, does much more than restrict benefits and ensure deportability of aliens with criminal convictions. It also modified, inter alia, the categories of immigrant visas and the number of visas available; made changes in non-immigrant visas; contained specific provisions benefiting immigrants from Hong Kong; revised the grounds for exclusion and deportation; provided for administrative naturalization and for naturalization of certain Filipino war veterans; and established a "temporary safe haven" to protect nationals of certain designated countries who are fleeing internal armed conflict, natural disaster, or other extraordinary circumstances. See generally American Immigration Lawyers' Association, Understanding the Immigration Act of 1990 (Paul Wickham Schmidt, ed., 1991).
84. See supra text accompanying note 72.
86. Section 16 of Title 18, referred to in INA § 101(a)(43), defines a crime of violence as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in course of committing the offense.
The Immigration Act of 1990 also sets out a number of adverse immigration consequences for aliens convicted of aggravated felonies. For refugees, Section 515, which affects applications for both asylum and withholding by aggravated felons, carries the most severe immigration consequences. Section 515 bars an alien who has been convicted of an aggravated felony from applying for or being granted asylum. Moreover, while Section 515 does not prohibit an aggravated felon from applying for withholding of deportation, it considers an aggravated felony a “particularly serious crime” for purposes of the exclusion ground set forth in Section 243(h)(2)(B) of INA.

There are other adverse consequences for aliens convicted of aggravated felonies as defined in Section 501. Conviction of an aggravated felony is, as it was under the Anti-Drug Abuse Act of 1988, a ground for deportation. Moreover, two important ways of ameliorating the effect of a criminal conviction — the judicial recommendation against deportation and executive pardons — are no longer of assistance to aggravated felons. The judicial recommendation against deportation,


87. Section 515 of the Immigration Act of 1990 provides as follows:

(a) In General.

(1) Section 208 (8 U.S.C. § 1158) is amended by adding at the end the following new subsection: “(d) an alien who is convicted of an aggravated felony, notwithstanding subsection (a), may not apply for or be granted asylum.”

(2) Section 243(h)(2) (8 U.S.C. § 1253(h)(2)) is amended by adding at the end the following: “For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.”

(b) Effective Dates.

(1) The amendment made by subsection (a)(1) shall apply to applications for asylum made on or after the date of the enactment of this Act.

(2) The amendment made by subsection (a)(1) shall take effect on the date of the enactment of this Act and shall apply to convictions entered before, on, or after the date of the enactment of this Act.

Immigration Act of 1990 § 515 (amending INA § 208, 8 U.S.C. § 1158 by creating new subsection INA § 208(d) and amending INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) by clarifying INA § 243(h)(2) subparagraph (b)). While no effective date is specified for subparagraph (a)(2) of section 515, the BIA has held that the effective date is November 29, 1990, the date of enactment of the Immigration Act of 1990. Matter of U-M-, Int. Dec. 3152 at 8 (BIA June 5, 1991).

The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(13), 105 Stat. 1733 (Dec. 12, 1991) [hereinafter Technical Amendments Act of 1991], has amended the effective date provisions contained in section 515(b) of the Immigration Act of 1990. Following those amendments, the prohibition on applications for and grants of asylum in the case of aggravated felons applies to convictions entered before, on, or after the enactment date of the Immigration Act of 1990 (that is, November 29, 1990) and to applications for withholding of deportations made on or after such date. The equating of “aggravated felony” with “particularly serious crime” for purposes of INA § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B), applies to convictions entered before, on, or after the enactment date of the Immigration Act of 1990 and to applications for withholding of deportations on or after that date.

88. Immigration Act of 1990 § 515(a)(1) (codified at INA § 208(d), 8 U.S.C. § 1158(d)).

89. Id. § 515(a)(2) (amending INA § 243(h)(2), 8 U.S.C. § 1253(h)(2)).


whereby judges in criminal cases could recommend that convictions for non-drug related offenses not be used as grounds for deportation, was eliminated by the 1990 Act.\textsuperscript{92} Executive pardons, which, prior to the Immigration Act of 1990, could erase a non-drug related conviction for deportation purposes,\textsuperscript{93} were eliminated for aggravated felons.\textsuperscript{94} Moreover, most types of discretionary relief from deportation and exclusion are no longer available to aggravated felons.\textsuperscript{96}

The Immigration Act of 1990 left unchanged many of the procedural provisions of the Anti-Drug Abuse Act of 1988.\textsuperscript{96} Aliens convicted of aggravated felonies must be detained in INS custody following completion of their criminal sentences,\textsuperscript{97} unless they are either aliens for whom departure cannot be effected\textsuperscript{98} or aliens who are lawfully admitted and who can demonstrate that they are not a threat to the community and are likely to appear before any scheduled hearings.\textsuperscript{99} Exclusion and deportation hearings for aggravated felons must be expedited and, if possible, must take place prior to completion of the criminal sentence.\textsuperscript{100}

92. Immigration Act of 1990 § 505 (amending INA § 241(b), 8 U.S.C. § 1251(b)).
93. INA § 241(b), 8 U.S.C. § 1251(b).
94. Immigration Act of 1990 § 505 (amending INA § 241(b), 8 U.S.C § 1251(b)).
95. The Immigration Act of 1990 § 509(a) amended the definition of “good moral character,” in INA § 101(f), 8 U.S.C. § 1101(f) (1988 & Supp. II 1990), thereby precluding a person convicted of an aggravated felony from being found to have good moral character, a prerequisite for various forms of discretionary relief, including voluntary departure under INA § 244(e), 8 U.S.C. § 1254(e) (1988 & Supp. 1990), and suspension of deportation under INA § 244 (a)-(d), 8 U.S.C. § 1254 (a)-(d) (1988 & Supp II 1990). In addition, the Immigration Act of 1990 § 511 amended INA § 212(c), 8 U.S.C. § 1182(c) to prohibit § 212(c) relief for permanent resident aliens who have been convicted of an aggravated felony and have served a term of imprisonment of at least five years.
98. Immigration Act of 1990 § 504(b) (creating INA § 236(e)(2), 8 U.S.C. § 1226(c)(2)).
99. The Technical Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1733 (amending INA § 241(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), as added by section 504(a)(5) of the Immigration Act of 1990). The history of this provision is an involved one. It began with the requirement, imposed by section 7343 of the Anti-Drug Abuse Act of 1988, see supra note 72, that aggravated felons must be taken into INS custody upon completion of their criminal sentence without the possibility of release. This provision was ameliorated by section 504(a)(5) of the Immigration Act of 1990, which amended INA § 242(a)(2)(b), 8 U.S.C. § 1252(a)(2)(B), to provide that the Attorney General release from custody aliens lawfully admitted for permanent residence on bond or other conditions, if the Attorney General determined that the alien was not a threat to the community and was likely to appear before any scheduled hearings. Section 306(a)(4) of the Technical Amendments Act of 1991 has once again amended INA § 242(a)(2), 8 U.S.C. § 1252(a)(2)(B), this time to provide that the Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony unless the alien demonstrates that he is not a threat to the community and is likely to appear before any scheduled hearings. While not as harsh as the requirement imposed by the anti-Drug Abuse Act of 1988, the provision in the Technical Amendments Act of 1991 is more restrictive than that in the Immigration Act of 1990.
100. Anti-Drug Abuse Act of 1988 § 7347(b), amended by Immigration Act of 1990 § 502. The detention and expedited hearing provisions of the Immigration Act of 1990 are not new. Although these provisions have been tightened by the Immigration Act of 1990, both were originally included in the Anti-Drug Abuse Act of 1988. Those provisions have a particularly severe
Aliens found deportable by a final administrative decision have only thirty days in which to seek judicial review in a U.S. Circuit Court of Appeal, as contrasted with the ninety days available to aliens not convicted of aggravated felonies. Moreover, aliens convicted of aggravated felonies are not granted the automatic stay of deportation, upon filing a petition for review with a U.S. Circuit Court, which is available to aliens not convicted of an aggravated felony.

The following two sections of this Article will argue that Section 515 of the Immigration Act of 1990 is in violation of United States obligations under the United Nations Convention and Protocol, that it is at odds with United Nations practice under the Convention, and that it is in violation of the Due Process Clause of the United States Constitution. Before embarking on those arguments, it may be enlightening to consider the practical effect of Section 515 on an individual case. Cases will certainly arise where asylum or withholding applicants have criminal propensities such that those propensities and the need to protect the community outweigh any harm the refugee may suffer. Just as certainly, however, there will be cases where the denial of an opportunity to apply for asylum, or to show that a particular crime should not be considered a particularly serious one for purposes of withholding, is inappropriate and wrong.

An illustrative case is that of the applicant for asylum and withholding in *Chao Yang v. INS.* In that case, Chao Yang, an alien born in

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impact on aliens seeking discretionary relief from deportation or exclusion, two forms of which are asylum and withholding of deportation. For example, an alien seeking asylum or withholding of deportation must prepare a detailed application and attach any supporting evidence he may have. The gathering of information and evidence to support the application is considerably hampered by detention. In addition, for some types of discretionary relief, for example, § 212(c) relief (under INA § 212(c), 8 U.S.C. § 1182(c)), reformation is a favorable factor. Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988). It is virtually impossible to show reformation within the short period of time allowed between conviction and deportation or exclusion hearing under the Immigration Act of 1990. Moreover, deportation and exclusion hearings are complicated proceedings for which an alien has a right to be represented by counsel, though at no expense to the government. INA § 292, 8 U.S.C. § 1362 (1988). Detention and the resulting difficulty in communicating with potential counsel and inability to work to obtain money to pay counsel greatly impedes the alien's ability to obtain counsel.

104. Civil No. 3-90-CV-300 (D. Minn. June 27, 1990), reported in *Court Declares Aggravated Felon Detention Provision Unconstitutional,* 67 Interpreter Releases 720 (1990). The facts of the case as stated here were taken from the Interpreter Releases article. From a telephone conversation with Chao Yang's attorney, Howard Sam Myers, III, the author learned that Chao Yang was placed in deportation proceedings in which he applied for asylum and withholding of deportation. By order of August 2, 1991, the Immigration Judge granted the application for asylum and denied withholding of deportation, but noted that, should Chao Yang be convicted of another serious drug offense and again be placed in deportation proceedings, he would be statutorily ineligible for asylum under the Immigration Act of 1990. The INS has appealed the Immigration Judge's order, and the case is currently pending before the Board of Immigration Appeals. No. A27-750-789. The author wishes to thank Mr. Myers for providing her with a copy of the Immigration Judge's decision and with a copy of the brief filed with the BIA on
Laos and a member of the Hmong tribe, fought in Vietnam in a special resistance guerrilla group financed by the United States government and supervised by the Central Intelligence Agency. He became permanently disabled as a result of chest and leg injuries suffered while he was attempting to rescue a downed American pilot. He was later admitted to the United States as a refugee and became a permanent resident.

Chao Yang never received proper long-term medical treatment for his combat injuries, which led to persistent pain and discomfort. In accordance with the customs of the Hmong, he self-medicated by smoking opium. This led to his arrest for importation of opium in April, 1989, and to his conviction of the crime of importing opium, in violation of 21 U.S.C. Sections 952(a) and 960(a)(1). He received a minimal sentence of six months confinement in the Federal Medical Center at Rochester, Minnesota, and three years of supervised release.

Under Section 515, Chao Yang would be considered an aggravated felon and would not be allowed to apply for asylum. His conviction would meet the definition of aggravated felony under Section 501 and would therefore be deemed a particularly serious crime, thereby prohibiting the granting of withholding of deportation. He would have no opportunity under the statute as written to present the particular circumstances of his case.

IV. VALIDITY OF SECTION 515 UNDER THE UNITED NATIONS CONVENTION AND PROTOCOL

The United Nations Convention and Protocol contain broad requirements. Although implementation of those requirements, including the procedures for determining who is a refugee, is left to the contracting states, the UNHCR has issued a *Handbook on the Procedures and Criteria for Determining Refugee Status* (*Handbook*) "for the guidance of governments."

105. THE REFUGEE, supra note 7, at 22, 140-48; HANDBOOK, supra note 8, ¶ 189.

106. HANDBOOK, supra note 8, at 1. The *Handbook* is a principal source of guidance and has been cited by U.S. courts determining asylum and withholding claims. It is based on the UNHCR's experience, including the practice of countries in regard to the determination of refugee status, exchanges of views between the UNHCR and the competent authorities of the contracting states, and the literature devoted to the subject. Id. It has been commended by various governments. Report of the 30th Session of the Executive Committee of the High Commissioner's Programme, U.N. Executive Committee of the High Commissioner's Programme, 30th Sess. ¶ 68, U.N.Doc. A/AC.96/572 (1979); Report of the 31st Session of the Executive Committee of the High Commissioner's Programme, U.N. Executive Committee of the High Commissioner's Programme, 31st Sess. ¶ 36, U.N. Doc. A/AC.96/588 (1980). The *Handbook* is also cited in various decisions of the federal courts of the United States and the Board of Immigration Appeals, including INS v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987); McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984); Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985); Matter of Mogharrabi, 19 I&N
Because the Convention prohibits refoulement, but does not establish a right to apply for asylum, a discussion of the validity of Section 515 under the Convention and Protocol centers on the effect of Section 515 upon Section 243(h) of the INA, which is the equivalent under United States law of the Convention's non-refoulement provision. In the context of non-refoulement, then, the Convention and Handbook together set out three requirements which United States refugee law, particularly given Section 515, does not appear to meet. The first requirement, discussed earlier in this Article, prohibits expelling a refugee, or denying non-refoulement, for convictions of offenses which are not particularly serious. Expulsion of a refugee for a serious non-political crime committed outside the United States is not allowed under the Convention, although it would allow a state to refuse refugee status to such a person. In contrast, the United States, through statutory and regulatory provisions, allows the expulsion of a refugee for commission of a serious non-political crime.

A second and related issue is the definition of "particularly serious crime". As discussed below, aggravated felonies, which are equated under Section 515 with "particularly serious crimes," are in some cases less serious than what the UNHCR would define as a "particularly serious crime".

The third requirement on which the United States appears to differ with United Nations practice is the Handbook's requirement of proportionality, which includes an instruction to balance the seriousness of the crime against the severity of the persecution in the country of origin, as well as an instruction to weigh all factors, both supporting a finding of seriousness and mitigating against such a finding, in determining whether a crime is serious or particularly serious. Although the BIA refused to require a balancing between persecution and crime, even prior to the Immigration Act of 1990, the effect of the process of exercising discretion, at least for asylum applications, served as a means of accomplishing the Handbook's goal of proportionality. Under the Immigration Act of 1990, however, the exercise of discretion by the Board and the IJs in applications for asylum and withholding involving an aggravated felony has been almost completely eliminated.


107. See supra text accompanying notes 39-52.
108. Convention, supra note 4, art. 33(2).
109. Id. art. 1(F)(b).
110. INA § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C); 8 C.F.R. § 208.16(c)(2)(iii).
111. Handbook, supra note 8, ¶ 156.
112. Id. ¶ 157.
A. Comparison of the Definition of "Particularly Serious Crime" under the Convention and Protocol and under United States Law

The United Nations Convention Pertaining to the Status of Refugees does not define either "serious non-political crime" or "particularly serious crime." While the Handbook does not define "particularly serious crime," some guidance can be obtained by extrapolating from the Handbook's definition of "serious crime". In addition, commentators have given further guidance as to the definition of "particularly serious crime".

The Handbook states that, for purposes of the Convention, a "serious crime" under Article I(F) must be a capital crime or a very grave punishable act. Similarly, Atle Grahl-Madsen has proposed that "serious non-political crime" be defined as "any offence for which the maximum penalty in the majority of countries of western Europe and North America is imprisonment for more than five years or death."

It is noteworthy that this definition of "serious" crime, at least in terms of length of sentence, is the equivalent of the United States definition of "particularly serious" crime under Immigration Act of 1990 Sections 515(a)(2) and 501.

The Handbook further requires that, in determining whether a crime is serious or non-serious, all relevant factors, including mitigating and aggravating circumstances, must be taken into account. In the case of an applicant who has been convicted of a serious non-political crime and who has already served his sentence or been granted a pardon or amnesty, there is a presumption that he no longer falls under Article I(F), unless it can be shown that his criminal character still predominates. According to Grahl-Madsen:

[W]e will do more justice to the wording of Article I F (b) if we consider each case on its merits. It is an established practice in criminal law that just as a person who is guilty of a high crime,
such as murder, may get a comparatively light sentence because of mitigating circumstances; a person who has perpetrated a technically lesser crime may get a really severe sentence because of aggravating circumstances. It seems that what is called for is an evaluation along similar lines.118

An illustration of the application of the *Handbook's* principles was given by the UNHCR in 1980, when the United States requested the UNHCR's advice on requests for asylum by Cubans who appeared to have criminal backgrounds. The UNHCR proposed that, in the absence of any political factors, the following offenses could be presumed to be serious crimes: homicide, rape, child molesting, wounding, arson, drug trafficking, and armed robbery. In addition, provided other factors were present, the following could also be considered serious crimes: breaking and entering (burglary), stealing (theft and simple robbery), receiving stolen property, embezzlement, drug possession and use, and assault.119

The UNHCR also provided factors which would support a finding of seriousness and factors which would tend to rebut a presumption or finding of serious crime. Factors which would support a finding of seriousness included use of weapons, injury to persons, value of property involved, the type of drugs involved, and evidence of habitual criminal conduct.120 Elements which would tend to rebut a presumption or finding of "serious crime" included the offender's minority, parole, elapse of five years since conviction or completion of sentence, general good character, being only an accomplice to the crime, and other circumstances surrounding the commission of the offense, for example, provocation and self-defense.121 The foregoing definitions and examples are of "serious non-political crimes," and it must be assumed that a particularly serious crime would be something graver than the above-listed offenses.122

While the Convention and *Handbook* do not explain what types of crimes would constitute a "particularly serious crime" for purposes of Article 33(2), they do provide procedural guidelines for determining when a conviction for a particularly serious crime exists. The Conven-

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118. GRAHL-MADSEN, supra note 114, at 295, 297-98.
119. THE REFUGEE, supra note 7, at 62-63.
120. Id. at 62.
121. Id. at 62-63.
122. In fact, the BIA has explained the distinction:

At the outset, it should be clear that a "particularly serious crime" is not the equivalent of a "serious nonpolitical crime." Further, a "particularly serious crime" is more serious than a "serious nonpolitical crime," although many crimes may be classified both as "particularly serious crimes" and as "serious nonpolitical crimes."

tion provides that expulsion of refugees shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself and to appeal to competent authority. Expulsion is to be invoked only in extreme cases. Here also, commentators have stressed the importance of proportionality.

United States refugee law, prior to the Immigration Act of 1990, included no statutory or regulatory definition of “serious non-political crime” or “particularly serious crime.” The BIA had provided guidelines, through its decisions, for determining whether a particular crime fell within those categories. In general, a particularly serious crime was not considered the equivalent of a serious nonpolitical crime, but was deemed more serious than a serious nonpolitical crime even though many crimes were classifiable as both particularly serious crimes and serious nonpolitical crimes.

While certain crimes were, on their face, particularly serious or not particularly serious, the Board held that the record would generally have to be analyzed on a case by case basis. The determination of whether a conviction was for a particularly serious crime turned on whether the crime was one that represented a danger to the community. Among the factors to be considered (the Frentescu factors) were the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicated that the alien would be a danger to the community. Crimes against persons were more likely to be categorized as “particularly serious crimes,” but the Board envisioned instances in which crimes against property would also be considered particularly serious.

Crimes that have been found to be particularly serious include robbery, armed robbery, burglary of a dwelling which included aggra-

123. Convention, supra note 4, art. 32(2).
124. Id.
125. HANDBOOK, supra note 8, ¶ 154.
126. THE REFUGEE, supra note 7, at 96.
128. Id. at 247.
131. Id.
vating circumstances, possession of cocaine for sale, and possession of heroin with intent to distribute. Except under unusual circumstances, a single conviction for a misdemeanor offense is not a “particularly serious crime” for purposes of INA Section 243(h)(2)(B). Burglary with intent to commit theft has also been found not to constitute a particularly serious crime.

In at least one circuit, the BIA has been held to use of the Frentescu factors, rather than being allowed to determine, from the face of the conviction, whether a crime is particularly serious. In Beltran-Zavala v. INS, an alien was convicted under Section 11360(a) of the California Health and Safety Code after pleading guilty to selling $10.00 worth of marijuana, a felony, to undercover police officers and sentenced to two years probation. The BIA found that the conviction supported a per se determination that Beltran-Zavala had committed a particularly serious crime and declined to explore the facts underlying his petition for asylum and withholding. The United States Court of Appeals for the Ninth Circuit reversed and remanded for application of the Frentescu factors. The status of Beltran-Zavala following the Immigration Act of 1990 however, is unclear. As the Ninth Circuit observed in Beltran-Zavala “[INA Section 243(h)(2)(B) does not necessarily erect] classes of crimes that are per se particularly serious. If Congress wanted to erect per se classifications of crimes precluding immigration and naturalization benefits, it knew how to do so.” Congress erected just such a classification in the Immigration Act of 1990. If that classification is upheld, it does not appear that Beltran-Zavala would be allowed to qualify for asylum, and his application for withholding would have to be summarily dismissed.

In comparing the guidelines set forth in the Handbook and BIA decisions, the Board’s interpretations of “serious non-political crime” and “particularly serious crime” appear to be broader than those set out in

137. Mahini v. INS, 779 F.2d 1419 (9th Cir. 1986).
138. Matter of Juarez, 19 I&N Dec. 664 (BIA 1988) (where the alien was convicted of a misdemeanor offense of assault with a deadly weapon, and the offense was not deemed a particularly serious crime by the BIA).
140. See supra text accompanying note 130.
141. Beltran-Zavala v. INS, 912 F.2d 1027, 1031-32 (9th Cir. 1990).
142. 912 F.2d at 1029.
144. Beltran-Zavala, 912 F.2d at 1029.
145. Id. at 1031.
146. Id. at 1032.
the *Handbook*. At least one respected authority has made the same observation. Boardmember Heilman, a member of the BIA, has observed that:

[The term “serious crime”] has enjoyed in several instances a very expansive interpretation. In addition, it has, as a general matter, been interpreted to reach well beyond the categories of offenses suggested in the *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, whose more limited application of this provision strikes me as more in keeping with the nature of the asylum provisions. The *Handbook* would apply this language only to a “capital crime or a very grave punishable act.”

With the advent of the Immigration Act of 1990, the definition of particularly serious crime in the refugee context has been broadened, drawing it still further away from that envisioned under the Convention.

B. Interpretation of the Phrase “Having Been Convicted of a Particularly Serious Crime, Constitutes a Danger to the Community” under Section 243(h) of the Immigration and Nationality Act

Section 243(h)(2)(B) of the INA provides that withholding is not available to an alien who, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.” Under the BIA’s interpretation of this language, once it is determined that the alien has been convicted of a particularly serious crime, it necessarily follows, without need for a separate determination, that he is a danger to the community.

Refugee advocates argue that, with the advent of Section 515 of the Immigration Act of 1990, the BIA’s interpretation of INA Section 243(h)(2)(B) is no longer correct. They point to the distinction between Congress’ treatment of asylum and its treatment of withholding of deportation. Section 515 absolutely precludes an aggravated felon from applying for asylum. However, rather than absolutely precluding aggravated felons from applying for withholding, Congress provided that a person convicted of an aggravated felony is considered to have com-

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149. INA § 243(h), 8 U.S.C. § 1253(h).
mitted a particularly serious crime for purposes of INA Section 243(h)(2)(B). Congress did not specify that an "aggravated felony" constituted a "particularly serious crime, conviction of which makes the alien a danger to the community." In order to give meaning to this distinction between Congress' treatment of asylum and withholding, it is argued that Congress meant to absolutely bar aggravated felons from asylum, but to bar them from withholding only if they are a danger to the community.151

This argument has been rejected by the BIA. In Matter of Kofa,152 a Liberian citizen who had been convicted of distribution of cocaine and of possession with intent to distribute cocaine applied for asylum and withholding of deportation after the initiation of deportation proceedings against him. Immigration Judge John F. Gossart, Jr. denied Mr. Kofa's request to file an asylum application, finding that it was precluded by INA Section 208(d). After considering the legislative history of Section 515, however, the IJ concluded that Mr. Kofa should have the opportunity to show that, despite his convictions, he did not constitute a threat to the community of the United States. However,

[t]he Court does . . . agree that under the amended provision of Section 243(h)(2)(B) and in conjunction with 8 CFR Section 208.14(c)(1), Congress now intends that the preclusion be treated as a two prong standard, requiring not only that the respondent be convicted of a particularly serious crime, but also that he constitutes a danger to the community of the United States.153

The IJ accepted Mr. Kofa's application for withholding and scheduled an evidentiary hearing to allow Mr. Kofa the opportunity to present evidence that he no longer constitutes a threat to the community.154 Following the evidentiary hearing, the IJ found that Mr. Kofa was no longer a danger to the community and scheduled a hearing on his application for withholding.155

The INS appealed to the BIA from the IJ's decisions that Mr. Kofa

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153. Lawsuit Challenges Automatic Denial of Persecution Claims for Aggravated Felons, supra note 151, at 1013.


155. Id.
no longer constituted a threat to the community. On appeal, the Board reversed the decision of the IJ. It noted that Congress is presumed to know the prior construction of a statute and pointed out that Congress, aware that the BIA had interpreted Section 243(h)(2)(B) to mean that an alien convicted of a particularly serious crime is necessarily a danger to the community, had not changed the statutory language of Section 243(h)(2)(B) so as to modify the BIA's interpretation. The Board concluded that Congress intended in Section 515 of the Immigration Act of 1990 to preclude aggravated felons from withholding of deportation.

The issue of the correct interpretation of the withholding provisions of Section 515 will in all likelihood be raised in petitions for judicial review in the federal circuit courts, and the determination of that issue will make a tremendous difference to the effect of this section on refugees. If the two-pronged standard is accepted, it will provide a measure of security for those refugees in the most dire circumstances, that is, those who can establish a clear probability of persecution upon return to their countries of origin, if they can establish that, despite their convictions of aggravated felonies, they do not constitute a danger to the community. For example, an alien such as Chao Yang, whose case was described earlier, would, under the above-described interpretation, be allowed an opportunity to show that he is not a danger to the community and thus is not ineligible for withholding.

C. The United Nations Requirement of Proportionality

As noted above, the Handbook requires a weighing of all relevant factors in determining whether a crime is a serious one. The Handbook also prescribes a weighing process in determining whether a serious crime, if established, should preclude the granting of refugee status. Under that weighing process, a balance must be struck between the nature of the offense and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, the crime committed must be very grave in order to exclude him from obtaining refugee status.

156. Id.
157. Id. at 7.
158. Id. at 8. The Board remanded the case to the Immigration Judge for further proceedings consistent with its decision. Id. at 10. On remand, the Immigration Judge, pursuant to the Board's decision, found Mr. Kofa ineligible for withholding and ordered him deported. Memorandum dated Jan. 24, 1992, from Evangeline Abriel concerning conversation with Margaret Gleason, counsel for Mr. Kofa, on Nov. 21, 1991 (Memorandum on file with the Georgetown Immigration Law Journal).
159. See supra text accompanying note 104.
160. See supra text accompanying notes 116-21.
161. HANDBOOK, supra note 8, ¶ 156.
162. Id. Guy Goodwin-Gill comments that:
The BIA has rejected the balancing test required under the *Handbook*, at least in regard to a determination of eligibility for withholding under INA Section 243(h)(1). The Board has stated that, "we reject any interpretation of the phrases 'particularly serious crime' and 'serious non-political crime' in Sections 243(h)(2)(B) and (C), respectively, which would vary with the nature of evidence of persecution."\(^{163}\) To do so, held the Board, would transform a statutory exclusion clause into a discretionary consideration.

It cannot be strongly argued that the BIA's rejection of the *Handbook's* balancing process for withholding claims is contrary to the letter of the *Handbook*, because the *Handbook* itself directs its pronouncement of the balancing test only to a determination of whether a person is excluded from refugee status under Article I(F) of the Convention. The *Handbook* does not directly require a balancing test in a determination of whether a particularly serious crime exists which would justify a refugee's expulsion from the country of refuge under Article 33(2) of the Convention.

The U.S. Court of Appeals for the Ninth Circuit used similar reasoning in finding that the balancing approach is not necessary in withholding claims:

However, we do not agree with Ramirez's view that the *Handbook's* standard for evaluating eligibility for withholding relief should be the same in a situation of a final conviction of a serious crime in the United States, Section 243(h)(2)(B), as in a situation where there is reason to believe an alien committed a crime outside the United States, Section 243(h)(2)(C). The BIA's rejection of this balancing approach is reasonable because Congress already struck the balance when it phrased the exception to withholding eligibility in mandatory rather than discretionary language.\(^{164}\)

Thus, both the BIA and the Ninth Circuit have refused to apply in withholding cases a test which balances the seriousness of the convic-

\(^{163}\) Ramirez-Ramos v. INS, 814 F.2d 1394, 1398 (9th Cir. 1987).

\(^{164}\) Ramirez-Ramos v. INS, 814 F.2d 1394, 1398 (9th Cir. 1987).
tion with the severity of the anticipated persecution, reasoning that the exclusion in INA Section 243(h)(2)(B) of persons convicted of particularly serious crimes is phrased in mandatory language. That mandatory language states that withholding of deportation "shall not apply to any alien if the Attorney General determines that . . . the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 165

The same reasoning does not apply in applications for asylum, which are granted or denied in the discretion of the adjudicator. 166 The Board has enumerated the factors to be weighed by the IJ in exercising his discretion to grant or deny asylum. 167 While those factors were not identical to the balancing test enunciated in the Handbook, they did serve to categorize a conviction as only one of various factors that must be weighed in the exercise of discretion and thereby provided a measure of proportionality. 168

With the advent of the July 1990 asylum regulations, however, the exercise of discretion by IJs has been greatly reduced. Under those regulations, IJs are required to deny applications for both asylum and withholding if the alien, having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community. 169 Applications for withholding must also be denied if there are serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to arrival in the United States. 170

For purposes of United States refugee law, the opposite of the discretionary weighing process described above is "pretermittence" of asylum and withholding claims: that is, the refusal to hear any evidence beyond that establishing the existence of a disqualifying crime or conviction. In Matter of Gonzalez, which preceded issuance of the July 1990 asylum regulations, the BIA prohibited pretermittence of asylum

168.

[A]n immigration judge should not refuse to conduct a full evidentiary hearing and consider the evidence of record in its totality simply because an applicant for asylum is ineligible for withholding of deportation under the provisions of section 243(h)(2) of the Act. The nature and gravity of the conviction may militate heavily against an applicant for asylum, and in cases may ultimately be the determinative factor, but it is not the only evidence that should be received and considered by an immigration judge or this Board in evaluating whether an otherwise eligible applicant warrants a grant of asylum as a matter of discretion.

169. See supra notes 48-53 and accompanying text.
171. 8 C.F.R. § 208.16(c)(2)(ii), (iii) (1991).
claims before the IJ. The decision did not, however, prohibit pretermi-
tence of withholding claims before the IJ. At least one federal court
has upheld the BIA's determination that, in a claim for withholding of
deportation, there need be no inquiry into the merits of the claim and
no balancing test if a determination is made that a statutory bar exists
under Section 243(h)(2)(B) or (C) of the INA.\textsuperscript{173}

Under the July 1990 asylum regulations, pretermittance of asylum
and withholding claims has been administratively approved. The regu-
lations provide that an evidentiary hearing extending beyond issues re-
lated to the basis for a mandatory denial of the application is not nec-
essary once the IJ has determined that such a denial is required.\textsuperscript{174}
This provision has been decried by refugee advocates.\textsuperscript{175}

Aside from the asylum regulations, pretermittance of asylum and
withholding claims presented by applicants who have been convicted of
"aggravated felonies" has now been endorsed by Congress. Under Sec-
tion 515 of the Immigration Act of 1990, an aggravated felon may not
even apply for asylum, thereby completely eliminating any possibility
of employing the \textit{Frentescu} factors, the \textit{Gonzalez} holding, or the bal-
ancing test of Paragraph 156 of the \textit{Handbook}. For withholding
claims, already subject under jurisprudence and regulation to
pretermittance on the merits of the claim if a statutory bar is estab-
lished, the equating of "particularly serious crime" with "aggravated
felony" precludes any determination under \textit{Frentescu} or Paragraph 156
of the \textit{Handbook}.\textsuperscript{176}

\section*{V. Validity of Section 515 under the United States
Constitution}

Under Section 515 of the Immigration Act of 1990, an alien who has
been convicted of an aggravated felony, as defined in Section 501 of the
Act, is deemed to be ineligible for asylum and is given no opportunity
to introduce other factors bearing on his claim to asylum. Aggravated
felonies are also deemed to be "particularly serious crimes" under INA
Section 243(h)(2), which prohibits a grant of withholding. These provi-
sions raise serious constitutional questions as well as questions of com-
pliance with the Convention.\textsuperscript{177}

\textsuperscript{173} Arauz v. Rivkind, 845 F.2d 271 (11th Cir. 1988). "[T]he only finding required by section
1253(h)(2)(B) is that the alien has been convicted of a 'particularly serious crime.'" \textit{Id.} at 275.

\textsuperscript{174} 8 C.F.R. \textsection 236.3(c) (1991); 8 C.F.R. \textsection 242.17(c)(4) (1991).

\textsuperscript{175} \textit{See} Arthur Helton, \textit{Asylum Rules Revisited: An Analysis}, 65 \textit{INTERPRETER RELEASES}
367, 369 (1988); Arthur Helton, \textit{Final Asylum Rules: Finally}, 67 \textit{INTERPRETER RELEASES} 789,

\textsuperscript{176} The applicant for withholding, however, retains the hope that he may be able to establish
that, despite his conviction of an aggravated felony, he is not a danger to the community. \textit{See}
\textit{supra} text accompanying notes 149-55.

\textsuperscript{177} \textit{See} Daniel Hoyt Smith, \textit{Criminal Alien Provisions}, in \textit{UNDERSTANDING THE IMMIGRA-
Decisions reviewing congressional legislation concerning the entry and expulsion of aliens for constitutional compliance show a fundamental dichotomy.\textsuperscript{178} On the one hand, Congress has plenary power over immigration matters\textsuperscript{179} and may enact "rules that would be unaccept-

\textsuperscript{178} For purposes of this Article, I examine Congress’ authority to enact legislation concerning admission and exclusion of aliens and the courts’ willingness to review that legislation for constitutional sufficiency. It should be noted in this regard that courts distinguish between review of legislation pertaining to the admission and expulsion of aliens, on the one hand, and legislation affecting other areas pertaining to aliens, on the other. See Jean v. Nelson, 727 F.2d 957, 972-73 (11th Cir. 1984), modified on other grounds, 472 U.S. 846 (1985). Courts reviewing the former have most often used a deferential standard of review. See, e.g., Shaughnessy v. Mezei, 345 U.S. 206 (1953); Knauff v. Schaugnnessy, 338 U.S. 537 (1950) (aliens may be excluded on security grounds without hearing); Anetekhai v. INS, 876 F.2d 1218 (5th Cir. 1989) (upholding under minimum scrutiny section 5(b) of the Immigration Marriage Fraud Amendments of 1986 as not violative of due process). But see Manwani v. INS, 736 F. Supp. 1367 (W.D.N.C. 1990) (Section 5(b) of the Immigration Marriage Fraud Amendments of 1986 held violative of due process and equal protection under the strict scrutiny test). Courts reviewing the latter have been willing to employ a stricter standard if the legislation affects a fundamental right or significant benefit. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (Texas statute denying public education to undocumented children held unconstitutional). The Court did not clearly identify the test it used to review the legislation, but its language indicates that an intermediate level of scrutiny was employed. The Court noted that “the discrimination contained in Section 26.031 can hardly be considered rational unless it furthers some substantial goal of the State.” Id. at 224; see also Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discriminatory application of San Francisco's laundry regulations against resident Chinese aliens held unconstitutional as both a deprivation of due process and a violation of equal protection). But see Matthews v. Diaz, 426 U.S. 67 (1976) (upholding denial of Medicare benefits to aliens holding permanent resident status for less than five years under rational basis test).

This article does not discuss other crucial issues concerning the application of the Constitution to aliens. Chief among these issues is the distinction between the procedural due process afforded aliens in exclusion proceedings and that afforded aliens in deportation proceedings. Excludable aliens, despite physical presence in the United States under INS detention or under “parole,” are nevertheless considered under a legal fiction to be “knocking at the door” of the United States. They are accorded, with regard to their right to enter the United States, “only those rights that would be unaccept-

\textsuperscript{179} Fiallo v. Bell, 430 U.S. 787, 792 (1977) (section of INA allowing mother of child born out of wedlock to obtain U.S. permanent residence for child, while not allowing natural father of
able if applied to citizens." On the other hand, no act of Congress can violate the Constitution," and "[U.S. Supreme Court] cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."

This dichotomy is demonstrated in constitutional challenges raised during recent years to two particular provisions of the INA. In response to the enactment of Section 5(b) of the Immigration Marriage Fraud Amendments (Section 5(b)), which provided that no visa may be granted on the basis of a marriage entered into during deportation or exclusion proceedings until the alien spouse has resided outside the United States for two years, many U.S. citizens and permanent residents and their alien spouses filed petitions for declaratory and injunctive relief, claiming that Section 5(b) violated their right to equal protection under the law and was in violation of their procedural and illegitimate child to obtain U.S. residence for child, does not violate equal protection or due process because it is within the plenary power of Congress). See also Ping v. U.S., 130 U.S. 581 (1889) (The Chinese Exclusion Case); Knauff v. Schaugnnessy, 338 U.S. 537 (1950); Schaugnnessy v. Mezei, 345 U.S. 206 (1953). This grant of broad power is known as the "plenary power doctrine".

180. Fiallo, 430 U.S. at 792. See also Morrobel v. Thornburgh, 744 F. Supp. 725 (E.D. Va. 1990) (section 242(a)(2) of the INA, prohibiting Attorney General from releasing from detention an alien convicted of an aggravated felony, is not violative of due process); Anetekhai v. INS, 876 F.2d 1218 (5th Cir. 1989) (section 5(b) of Immigration Marriage Fraud Amendments of 1986, imposing two year foreign residency requirement prior to issuing visa to alien based upon marriage entered into during exclusion or deportation proceedings, does not violate equal protection or due process).

181. Landon v. Plasencia, 459 U.S. 21 (1982) (a returning resident is entitled to due process rights at exclusion hearing); Almeida-Sanchez v. U.S., 413 U.S. 266 (1973) (searches or arrests made away from the border or its functional equivalent must meet Constitutional standard).

182. Fiallo, 430 U.S. at 793 n.5. See also Carlson v. Landon, 342 U.S. 524, 537 (1952).

183. INA § 204(g), 8 U.S.C. § 1154(g), [originally designated as § 204(h) and redesignated as (g) by § 162(b) of the Immigration Act of 1990] (added by § 5(b) of Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 5(b), 100 Stat. 3537, 3543 (Nov. 10, 1986)).

184. The effect of section 204(h) was ameliorated by section 5(a) of the Immigration Act of 1990. Section 5(a) added INA § 245(e)(3), 8 U.S.C. § 1255(e)(3), which provides that section 204(h) shall not apply to a marriage if the alien establishes by clear and convincing evidence that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place, that the marriage was not entered into for the purpose of procuring the alien's entry as an immigrant, and that no fee or other consideration was given, other than the INS filing fee or attorney fees.

185. Although only the Fourteenth Amendment, which applies to state action, has an equal protection clause, classifications under federal law may violate equal protection if they violate the equal protection component of the Fifth Amendment's due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954). See also Leader v. Blackman, 744 F. Supp. 500, 505 n.7 (S.D.N.Y. 1990).

Section 515 is also questionable under the equal protection component of the due process clause. An alien convicted of a crime of violence and sentenced to five years imprisonment is precluded from applying for asylum, while an alien convicted of the same crime, but sentenced to less than five years imprisonment, may apply and have that conviction weighed against any evidence of positive factors he presents. This is because a crime of violence for which a sentence of less than five years is imposed is not an "aggravated felony." An alien convicted of a crime abroad who completes his sentence fifteen years prior to his application for asylum is not precluded from applying for asylum, while an alien who is convicted of a comparable crime in the United States has no such statute of limitations.

Although section 515 raises questions of compliance with equal protection, those issues are not
substantive due process rights. Similar actions for declaratory and injunctive relief were filed by aliens who, after being convicted of an aggravated felony, were detained by the INS without bail under Section 7343 of the Anti-Drug Abuse Act of 1988 (Section 7343), which provided that aggravated felons must be taken into INS detention upon completion of their criminal sentences and could not be released pending exclusion or deportation proceedings. The dispositions of these constitutional challenges are instructive in predicting the result of the constitutional challenges which will certainly arise to Section 515 of the Immigration Act of 1990. The success or failure of the challenges turned in each case upon two factors: whether the challenge was deemed by the courts to involve a constitutionally protected right and the court’s willingness or unwillingness to apply the test set forth in Fiallo v. Bell.

A. Is there a Constitutionally Protected Right to Apply for Asylum and Withholding of Deportation?

For both substantive and procedural due process analysis of congressional legislation, the standard of review employed by courts varies de-
pending on the quality of the individual right or liberty affected by the legislation. For substantive due process review, at least outside the area of admission and expulsion of aliens, courts will strictly scrutinize legislation concerning a fundamental right to ensure that it is necessary to promote a compelling governmental interest. Where no such fundamental right or significant benefit is involved, the law need only be rationally related to any legitimate end of government. Procedural due process is not itself an independent right, but is rather the condition precedent to the deprivation of a life, liberty, or property interest. Therefore, for both substantive and procedural due process analyses, it is necessary to inquire whether there is a right to apply for asylum and/or withholding and, if so, what is the nature of that right.

The Constitution and its Amendments set out no right to apply for asylum or withholding. However, the Supreme Court has recognized rights not specifically stated in the Constitution or its Amendments as fundamental because they are "implicit in the concept of ordered liberty." The Court has recognized still other rights, such as education, as "sufficiently absolute and enduring," requiring that legislation impairing those rights be examined under an intermediate scrutiny test to determine whether it may fairly be viewed as furthering a substantial state interest.

The Fifth Circuit, analyzing the detention of Haitian asylum seekers under an INS policy for procedural due process compliance, commented in a footnote that Supreme Court cases involving due process challenges in the deportation context broadly suggest that there is a liberty interest affected by deportation. The court noted that:

As far back as The Japanese Immigrant Case, we read: "[T]his

190. Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1037 (5th Cir. 1982), disapproved on other grounds, Jean v. Nelson, 727 F.2d 957, 976, n.27 (11th Cir. 1984).
191. See generally, ROTUNDA ET AL., supra note 189, at 79-86.
192. Bowers v. Hardwick, 478 U.S. 186, 193, reh'g denied, 478 U.S. 1039 (1986). The rights recognized as fundamental by the Court include the right to vote, Dunn v. Blumstein, 405 U.S. 330, 336 (1972), and the right to privacy, Griswold v. Connecticut, 381 U.S. 479, 484 (1965). But see San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), in which residents of Texas challenged the state's reliance on local property taxation to finance the public school system. The Supreme Court, rejecting the claim that education was a fundamental right, explained that a fundamental right must be explicitly or implicitly guaranteed by the Constitution.
193. Plyler, 457 U.S. at 218 n.16
194. Id. at 217-18, 223-24.
court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at sometime, to be heard, before such officers, in respect of the matters upon which that liberty depends . . . ."

Again in *Bridges v. Wixon* (citation omitted), a challenge by petition for writ of habeas corpus to the legality of a deportation order based on a finding that the alien was a member of and affiliated with the Communist Party, the Court affirmed: "Here the liberty of an individual is at stake . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual 'and deprives him of the right to stay and live and work in this land of freedom.'" And in *Wong Yang Sung v. McGrath* (citation omitted), there is the recognition that "[a] deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands into which aliens may be returned, perhaps to life itself."

Similarly, it can be argued that asylum and withholding contain a liberty interest originating under the Fifth Amendment or that they are at least interests "sufficiently absolute and enduring" to warrant constitutional protection. Both are forms of protection against deportation and, like deportation, involve issues basic to human liberty and happiness. Realistically viewed, the right to seek asylum and withholding of deportation is a right to seek safety, liberty, and even life in lieu of persecution, imprisonment, and death in one's homeland. Asylum has been recognized as a fundamental human right by the Universal Declaration of Human Rights, and withholding as a rule of customary international law. The significance of these forms of refugee protection warrants their consideration as rights deserving of the due process guarantees of the Fifth Amendment.

Aside from the type of rights and benefits discussed above, legislative enactments can create substantive entitlements to particular govern-
ment benefits which are constitutionally protected as liberty or property interests under the Fifth Amendment.\(^{199}\) Under this reasoning, the Fifth Circuit, in *Haitian Refugee Center v. Smith*,\(^ {200}\) found that Congress, through the Refugee Act of 1980, had created a constitutionally protected right to petition the government for asylum and that that legislation had defined a private interest triggering due process safeguards.\(^ {201}\)

In *Jean v. Nelson*,\(^ {202}\) however, the Eleventh Circuit retreated from its predecessor circuit's\(^ {203}\) pronouncement of a right to apply for asylum. Even though legislation can create substantive entitlements to particular government benefits which are protected as liberty or property interests under the due process clause, said the court, there is a distinction between legislation which actually grants an entitlement and legislation under which a statutory benefit is clearly at the discretion of an agency. The latter type of legislation does not create a substantive interest protected by the Constitution.\(^ {204}\) The Court stated:

> [I]t is clear that the Refugee Act does not create an entitlement to asylum . . . . Because the Act creates only a right to petition for asylum, it carries with it no guarantee of securing the substantive relief sought . . . . The grant of asylum does not, therefore,

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200. 676 F.2d 1023 (5th Cir. 1982).

201. Id. at 1037-38. See also Martin, supra note 178, at 187. The Court noted the following:

> [W]e find in the federal regulations establishing an asylum procedure . . . . when read in conjunction with the United States’ commitment to resolution of the refugee problem as expressed in the United Nations Protocol Relating to the Status of Refugees and in 8 U.S.C. Section 1253(h), a clear intent to grant aliens the right to submit and an opportunity to substantiate their claim for asylum.

> If this commitment [U.S. accession to the U.N. Protocol Relating to the Status of Refugees] is to have any substance at all, it must mean at least that the alien is to be allowed the opportunity to seek political asylum . . . . Congress, through a designated agency [the INS], chose to implement the policy expressed in the Protocol by creating in the alien the right to submit and substantiate a claim of risk of persecution should he be deported to his country.

> Whether this minimal entitlement be called a liberty or property interest, we think it is sufficient to invoke the guarantee of due process.


create an interest protected by the due process clause.\textsuperscript{208}

Thus, the Eleventh Circuit found that, because asylum under Section 208 of the INA is granted in the discretion of the Attorney General, the statute does not create a substantive entitlement protected under due process. The Court relied upon \textit{Hewitt v. Helms}\textsuperscript{206} in making this determination. There, a convicted inmate protested his placement in administrative segregation. The Supreme Court found that there was no per se protected liberty interest in remaining with the general prison population, but that the mandatory language in the Pennsylvania statute, concerning the procedures for placing an inmate in administrative segregation, created a protected liberty interest.

Asylum does not fit neatly into the mandatory/discretionary language framework set out in \textit{Hewitt}. Section 208 of the INA provides that the Attorney General \textit{shall} provide a procedure for an alien physically present in the United States to apply for asylum, which \textit{may} be granted in his discretion if he determines that the alien is a refugee. Thus, the statute contains both mandatory and discretionary language. The right to apply for asylum is set out in unmistakably mandatory terms.

In determining whether there is a protected interest in applications for asylum and withholding, the distinction between asylum and withholding, discussed earlier,\textsuperscript{207} again comes into play. Regardless of whether the discretionary language of the asylum statute keeps it from being considered a substantive entitlement meriting due process protections, withholding of deportation cannot be dismissed under that reasoning. Section 243(h) of the INA provides that the Attorney General \textit{shall not} deport or return any alien to a country if the Attorney General determines that the alien's life or freedom would be in danger in that country.\textsuperscript{208} This is the sort of explicit mandatory language which should be held to create a protected liberty interest.\textsuperscript{209}

The Supreme Court has recently noted, without mentioning the mandatory/discretionary language distinction of \textit{Hewitt} and \textit{Jean}, that denial of an important benefit to an alien requires constitutionally fair

\textsuperscript{205} \textit{Id.} at 982 (citation omitted) (citing \textit{Haitian Refugee Center}, 676 F.2d 1023, 1038-39, n.37). In a footnote to this statement, the court continued:

This conclusion affirms what we stated in note 27, \textit{supra}, i.e., that we disavow any language used by [\textit{Haitian Refugee Center v. Smith}] that might be read to suggest that excludable aliens have constitutional rights under the fifth amendment with regard to their application for admission, asylum, or parole within this country.

\textit{Id.} at 982 n.34.

\textsuperscript{206} 459 U.S. 460 (1983).

\textsuperscript{207} See \textit{supra} text accompanying notes 22-34.

\textsuperscript{208} INA \$ 243(h), 8 U.S.C. \$ 1253(h).

procedures. In *McNary v. Haitian Refugee Center*,\(^\text{210}\) aliens and refugee organizations filed a suit for declaratory judgment against the INS to challenge the Service's procedures for determining applications for the Special Agricultural Worker (SAW) amnesty program.\(^\text{211}\) The INS contended that, under the INA, judicial review of denials of SAW applications could be had only after the alien had renewed his application in exclusion or deportation proceedings.\(^\text{212}\) The Court held that the language of the statute could not be read to prohibit lawsuits challenging an agency's procedures for making determinations.\(^\text{213}\) While Justices Rehnquist and Scalia, dissenting, found it unlikely that any constitutional claim was involved,\(^\text{214}\) Justice Stevens, writing for the Court, said that:

> [T]he successful applicant for SAW status acquires a measure of freedom to work and to live openly without fear of deportation or arrest that is markedly different from that of the unsuccessful applicant. Even disregarding the risk of deportation, the impact of a denial on the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures in the application process.\(^\text{215}\)

Amnesty was certainly an important benefit, granting certain aliens in the United States the opportunity to become permanent residents. Asylum and withholding, however, must be viewed as much greater benefits because they provide safety against persecution and death in the refugee's homeland. If amnesty can be viewed as a benefit sufficiently important to require constitutionally fair procedures, then asylum and withholding, being of greater importance to the individual, must also be accorded such constitutional protection.

**B. The Applicability of *Fiallo v. Bell* in Reviewing Section 515 for Substantive Due Process Compliance**

Our inquiry now turns to the standard of review applicable in determining whether Section 515 complies with substantive due process. For

\(^{212}\) Section 210(e)(3)(A) of theINA provides as follows:

(3) Judicial Review.-

(A) Limitation to Review of Exclusion or Deportation.-

There shall be judicial review of such a denial [of an application for SAW benefits] only in the judicial review of an order of exclusion or deportation under section 106 [of the INA].


\(^{213}\) *Haitian Refugee Center*, 498 U.S. at ___, 111 S. Ct. at 899.
\(^{214}\) 498 U.S. at ___, 111 S. Ct. at 902.
\(^{215}\) 498 U.S. at ___, 111 S. Ct. at 895.
purposes of this inquiry, the author assumes that there is a constitutionally protected right to apply for asylum and withholding, arising either under the Fifth Amendment or through statutory enactment.

In *Fiallo v. Bell*, the Supreme Court emphasized the limited scope of judicial inquiry into immigration legislation[^216] and stated that a statute concerning an alien's residence in or expulsion from the United States will pass constitutional muster if it is based upon a "facially legitimate and bona fide reason."[^217] In *Fiallo*, unwed fathers and their natural offspring challenged as unconstitutional the INA provision which allowed U.S. citizen mothers to confer immediate relative status on their illegitimate children, but did not allow U.S. citizen fathers to confer that status on their illegitimate children.[^218] The appellants asserted that the provision violated their rights to equal protection under the law, by discriminating against them on the basis of marital status, sex, and illegitimacy, and their rights to due process of law, by establishing an unwarranted conclusive presumption of the absence of strong ties between natural fathers and their illegitimate children.[^219] The statute was upheld.[^220]

Using the *Fiallo* test of a facially legitimate and bona fide reason, most of the courts reviewing Section 5(b) of the Immigration Marriage Fraud Amendments and some of the courts reviewing Section 7343 of the Anti-Drug Abuse Act of 1988 found that those sections did not violate substantive due process. Congress' determination in Section 7343 that it would not tolerate the presence of aggravated felons in the United States was held to be a facially legitimate and bona fide reason for requiring their detention without bail upon completion of their criminal sentences.[^221] Similarly, Section 5(b) was found to be "a legitimate preventive measure designed to deter fraudulent citizen/alien marriages during the pendency of deportation proceedings."[^222] "Congress logically could have concluded that aliens who are engaged in deportation proceedings are more likely than aliens not so situated to enter into fraudulent marriages as a means of avoiding expulsion from the United States."[^223]

[^217]: Id. at 787, 794-95.
[^218]: Id. at 791-92.
[^219]: Id. at 791.
[^220]: Id. at 799-800. The effect of the provision challenged in *Fiallo* was ameliorated by Section 315(a) of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(a), 100 Stat. 3359, 3439 (codified at INA § 101(b)(2), 8 U.S.C. § 1101(b)(2)) which allows illegitimate children to confer immigration benefits on and obtain immigration benefits through their natural fathers, if the father has or had a bona fide parent-child relationship with the child.
[^222]: Azizi v. Thornburgh, 908 F.2d 1130, 1134 (2d Cir. 1990).
[^223]: Anetekhai v. INS, 876 F.2d 1218, 1222 (5th Cir. 1989).
Under the *Fiallo* test, it appears that virtually any legislation concerning the admission or expulsion of aliens will withstand substantive due process review. The plenary power doctrine, of which *Fiallo* is an example, has been sharply criticized for its undue deference to Congress, however, and a handful of federal district courts reviewing Section 7343, as well as two federal courts reviewing Section 5(b), have declined to apply the *Fiallo* standard.

Several federal district courts, in striking down Section 7343 on due process grounds, declined to follow the *Fiallo* standard and instead applied the test set forth in *U.S. v. Salerno*. Each court reached its rejection of the *Fiallo* test through slightly different reasoning. In *Kellman v. District Director, I.N.S.*, the U.S. District Court for the Southern District of New York acknowledged the *Fiallo* standard and the limited extent of judicial review, but emphasized that *Fiallo*, rather than foreclosing all judicial review, instead recognized a limited judicial responsibility under the Constitution. In *Leader v. Blackman*, the same court did not mention *Fiallo*, but reviewed Section 7343 for substantive due process using the *Salerno* standard. The U.S. District Court for the Eastern District of Michigan, in *Paxton v. INS*, also acknowledged *Fiallo*, but found that in the context of a denial of an opportunity to determine the appropriateness of detention, the *Fiallo* standard was not appropriate. In *Probert v. INS*, as in *Kellman*, the court acknowledged *Fiallo*, but emphasized that the decision did not foreclose all judicial review and that "no act of Congress can

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224. One of the sharpest criticisms of the plenary power doctrine is that of Professor Louis Henkin. Professor Henkin has written that:

The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during our fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects. Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional.


225. 481 U.S. 739, 749-51 (1987). The issue in *Salerno* was whether pretrial detention under the Bail Reform Act of 1984 violated substantive due process rights.

227. Id. at 627.
229. Id. at 507.
231. Id. at 1264.
authorize a violation of the Constitution.\textsuperscript{233}

The two steps of the \textit{Salerno} test are (1) whether the restriction on liberty is impermissible punishment or permissible regulation, and (2) whether the restriction on liberty is excessive in relation to the regulatory goal Congress sought to achieve.\textsuperscript{234} Applying that test, the \textit{Leader} court found that deportation was a regulatory measure, rather than punishment, and that it was permissible, given the legislative intent to prevent the release on bail of those deemed to present a significant risk to society.\textsuperscript{235} Nonetheless, the detention failed the second prong because the failure to provide a prompt detention hearing was excessive in relation to the regulatory goal.\textsuperscript{236} The court stated that:

\begin{quote}
In the case at bar, the statute states that “the Attorney General shall not release such felon from custody.” We believe that this mandate is precisely the type of impermissible imputation of a threat to society which \textit{Carlson}\textsuperscript{237} did not countenance.\textsuperscript{238}
\end{quote}

A similar result was reached in \textit{Probert v. INS}\textsuperscript{239} and again in \textit{Paxton v. INS}.

Courts evaluating Section 515 for substantive due process compliance must determine whether the deferential standard of \textit{Fiallo v. Bell} should be applied, or whether the fuller review under \textit{Palko} and \textit{Sa-
is the appropriate test. Section 515 implicates what should be considered a fundamental right — the right to seek safety from persecution — and a decision to apply a lesser standard of review should not be lightly made.

If reviewed under the Salerno test, Section 515 may not withstand substantive due process scrutiny. Under the reasoning of Leader, Paxton, and Probert, deportation would be a regulatory measure, rather than punishment. The court must then consider whether the regulation is excessive in relation to Congress' regulatory goal of eradicating crime. It seems axiomatic that the complete denial of an opportunity to apply for a particular benefit, such as the denial of an opportunity to apply for asylum found in Section 515, is excessive in regard to almost any goal. The broad definition of aggravated felonies found in Section 501 of the Immigration Act of 1990, and Section 515's equating of particularly serious crimes with that definition of aggravated felonies for purposes of withholding of deportation also appears to reach farther than is necessary to accomplish Congress' goal of crime control. Moreover, the effect of Section 515 will not be limited to those aliens who will commit crimes in the United States. It will also affect some aliens who will never commit further crimes and who should not be considered dangers to the community.

There are also existing means for accomplishing Congress' goal. Under INA Section 208, asylum is to be granted in the discretion of the Attorney General, exercised after consideration of all relevant factors. Criminal convictions have often been the basis for discretionary denials of asylum. Section 243(h) mandates denial of withholding if the alien, having been convicted of a particularly serious crime in the United States, constitutes a danger to the community. The determination of whether a crime is a particularly serious one, prior to the enactment of Section 515, was made after application of factors delineated by the BIA and the judiciary in a series of decisions. These provisions provide for denial of asylum and withholding to those aliens convicted of particularly serious crimes which would render them dangers to the community, while still allowing some consideration of the circumstances of the crime to be weighed.

A different approach was taken by the courts in Manwani v. INS.

244. INA § 243(h), 8 U.S.C. § 1253(h).
245. See supra text accompanying notes 131-39.
and Escobar v. INS,247 reviewing Section 5(b) of the 1986 Immigration Marriage Fraud Amendments.248 Those courts also declined to apply Fiallo, but did so under an analysis different from those used by the courts reviewing Section 7343. The Manwani and Escobar courts distinguished between substantive enactments, that is, statutes that define categories of admissible aliens or grant benefits, and procedural enactments, implementing those categories or benefits.249 The courts found that Section 5(b)'s imposition of a two-year foreign residency requirement prior to obtaining a visa based upon a marriage entered into during deportation or exclusion proceedings constituted a procedure designed to stem illegal entry, rather than a statute defining categories of admissible aliens.250 Where such an enactment is involved, the courts reasoned, Fiallo was inapplicable because Fiallo involved a substantive provision and because Fiallo itself emphasized that "Government procedures designed to stem the illegal entry of aliens" are subject to traditional constitutional scrutiny.251

Both the Manwani and Escobar courts found that Section 5(b) implicated constitutionally protected rights of both the U.S. citizen or resident spouse and the alien spouse, which could be deprived only after procedures meeting the requirements of procedural due process.252 Thus, the analysis required in reviewing Section 5(b) was one of procedural due process. The courts found that this analysis should be made using the test set forth in Matthews v. Eldridge.253

The decision in Manwani that Section 5(b) was a procedural rather than a substantive enactment was based upon the Supreme Court's decision in Cleveland Board of Education v. Loudermill.254 Loudermill was a civil service employee dismissed because of dishonesty in filling out his employment application.255 Under an Ohio statute, classified civil service employees were entitled to retain their positions "during good behavior and efficient service and could not be dismissed except for misfeasance, malfeasance, or nonfeasance."256 The statute went on to set out procedures for dismissal, which did not include a hearing

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248. INA § 204(g), 8 U.S.C. § 1154(g), [originally designated as § 204(h) and redesignated as (g) by § 162(b) of the Immigration Act of 1990] (added by § 5(b) of Immigration Marriage Fraud Amendments of 1986).
249. Manwani, 736 F. Supp. at 1375; Escobar, 896 F.2d at 567.
250. Manwani, 736 F. Supp. at 1375; Escobar, 896 F.2d at 567.
252. Manwani, 736 F. Supp. at 1379-83; Escobar, 896 F.2d at 568-70.
255. Id. at 535.
256. Id. at 538-39.
prior to discharge.\textsuperscript{257} Loudermill pursued administrative review of his discharge and, on judicial review, argued that the failure to provide him a hearing prior to discharge violated his procedural due process rights.\textsuperscript{258} There was no dispute among the parties that the statute involved created a property right in continued employment.\textsuperscript{259} The Board of Education argued, however, that the property right was defined by, and conditioned on, the legislature's choice of procedures for its deprivation.\textsuperscript{260} The Supreme Court rejected this argument, stating that:

\begin{quote}
[T]he Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."\textsuperscript{261}
\end{quote}

The courts in Anetekhai and Azizi, which found that, under Fiallo, Section 5(b) passed constitutional muster, considered, but refused to endorse, the argument that Section 5(b) was procedural.\textsuperscript{262} Rather, both courts found that, instead of setting out a procedure for the granting of a right, Section 5(b) was a substantive rule which established two classes of aliens: those who marry prior to and those who marry after commencement of deportation proceedings.\textsuperscript{263}

Section 515 can also be reviewed under the analysis employed in Manwani and Loudermill. Under that analysis, it can be argued that Section 515 is not a substantive enactment, but is instead a procedural enactment modifying the statutorily granted entitlements of asylum and withholding. Thus, Section 515 would be reviewable for procedural due process under the test set forth in Matthews v. Eldridge.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{257} Id. at 539 n.6.
\item \textsuperscript{258} Id. at 536.
\item \textsuperscript{259} Id. at 539.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Id. at 541 (citation omitted).
\item \textsuperscript{262} Azizi v. Thornburgh, 908 F.2d 1130, 1135 (2d Cir. 1990); Anetekhai v. INS, 876 F.2d 1218, 1223 (5th Cir. 1989).
\item \textsuperscript{263} Anetekhai, 876 F.2d at 1223; Azizi, 908 F.2d at 1135. See also Morrobel v. Thornburgh, 744 F. Supp. 725, 727 (E.D. Va. 1990).
\item \textsuperscript{264} Application of the Matthews test to Section 515 is discussed in the following Section of this article. See infra text accompanying and following note 280.
\end{itemize}
Like the statute in Loudermill, Section 515 takes away, without providing for any type of hearing, what is at least a statutory benefit, that is, the right to apply for asylum and withholding.\(^{266}\) Congress has not abolished the right to apply for asylum; it has retained it, with the exception of persons who meet the definition of "aggravated felon". Nor has Congress abolished withholding of deportation. Rather, it has established a conclusive definition of "particularly serious crime," the conviction of which excludes an alien from the protections of withholding. Like the statutes complained of in Loudermill and Manwani, Section 515 impermissibly attempts to redefine the interest in question—by the procedures for its deprivation. In the present situation, the interest in applying for asylum and withholding is redefined by the applicant's conviction of an aggravated felony.\(^{265}\)

C. Does Section 515 Comply with Procedural Due Process?

Procedural due process requires that before the government abridges or burdens a constitutionally protected right, a meaningful hearing must be afforded.\(^{267}\) Again, the position is taken in this Article that there is a constitutionally protected right to apply for asylum and withholding, arising either under the Fifth Amendment or through statutory enactment.

Courts upholding Section 5(b) of the Immigration Marriage Fraud Amendments and Section 7343 of the Anti-Drug Abuse Act of 1988 on procedural due process grounds did not find that there was no right to a hearing, but rather found that the issues in such a hearing were limited to whether the statute was properly invoked. Thus, an alien falling under Section 5(b) is entitled to a hearing to demonstrate whether his marriage was really entered into during deportation or exclusion proceedings.\(^{268}\) An alien challenging his detention under Section 7343 is entitled to a hearing to determine whether he was in fact an aggravated felon.\(^{269}\) An alien challenging Section 515’s prohibition on applications for asylum, where the applicant has a conviction of an aggravated felony, or Section 515’s equating of aggravated felony with particularly serious crime under Section 243(h) will no doubt be entitled to a similar hearing to determine whether the conviction in question is indeed an aggravated felony.\(^{270}\)

\(^{265}\) See Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982), discussed supra, at text accompanying note 201.

\(^{266}\) Manwani, 736 F. Supp. at 1382.

\(^{267}\) Id.

\(^{268}\) Anetekhai, 876 F.2d at 1223.


\(^{270}\) See 8 C.F.R. §§ 236.3(c), 242.17(c)(4) (1991) (providing that an Immigration Judge need not hold an evidentiary hearing extending beyond issues related to the basis for a mandatory denial of asylum or withholding, once the Immigration Judge has determined that such a denial is
Due process requires, however, not just an opportunity to be heard, but a meaningful opportunity to be heard. The hearings envisioned by *Anetekhai* and *Morrobel* and by the asylum regulations do nothing more than allow an alien to show that he does not fall under a particular statutory presumption. They do not allow him to present the facts of his case so that an independent analysis may be made of whether those facts justify deprivation of the right to apply for asylum and withholding. "[P]rocedural due process cannot be satisfied merely by the opportunity for a hearing where the result of that hearing is statutorily preordained."271

In contrast, a meaningful hearing as envisioned by the *Manwani* court went much further than determining whether or not the marriage was entered into while deportation or exclusion proceedings were pending, thereby placing the marriage under the provisions of Section 5(b). *Manwani* envisioned a "timely and meaningful hearing on the validity of the marriage."272

In *Manwani*, the court, reviewing Section 5(b), found that, instead of providing a meaningful hearing, Section 5(b) imposed an irrebuttable presumption that every marriage entered into during deportation proceedings is fraudulent, unless it survives a two-year separation or exile.273 Irrebuttable presumptions which involve the exercise of fundamental rights have been held to violate due process.274

The statutory scheme of Section 515 creates a similar irrebuttable presumption that all crimes defined as "aggravated felonies" are particularly serious crimes. It does not take into account persons who were

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The Fifth Circuit in *Anetekhai v. INS* relied on the district court decision in *Escobar* when it concluded that Section 5(b) requires only that plaintiffs be afforded a hearing to determine whether Section 5(b) "was properly triggered..." *Anetekhai*, 876 F.2d at 1223. This approach would render the constitutional protection meaningless and is contrary to the principle of Bell v. Burson, [402 U.S. 535, 541 (1971)], *Stanley v. Illinois*, 405 U.S. 645 [1972], and *Israel v. INS*, [785 F.2d 738 (9th Cir. 1986)]. The analysis begs the constitutional question since it addresses only what the statute itself provides and ignores the constitutional right that is at stake. In any case, the foundation for *Anetekhai*'s conclusion has been eviscerated by the D.C. Circuit's reversal of the district court decision on which *Anetekhai* relied.

274. *Stanley v. Illinois*, 405 U.S. at 656 (1972); *Manwani*, 736 F. Supp. at 1387. *But see Weinberger v. Salfi*, 422 U.S. 749 (1974) (upholding a provision of the Social Security Act which excluded from survivor benefits widows and stepchildren whose relationship to the deceased wage earner had existed for less than nine months prior to his death). In *Weinberger*, the District Court had concluded that the duration of relationship requirement constituted an unconstitutional conclusive presumption that marriages not meeting the requirement were entered into for the purpose of securing Social Security benefits. *Id.* at 767-68. The Court in *Weinberger* held that *Stanley* was not controlling in that case, distinguishing between the important rights involved in *Stanley* (the right to conceive and to raise one's children) and the "noncontractual claim to receive funds from the public treasury," which enjoyed "no constitutionally protected status." *Id.* at 772.
convicted in the United States many years ago and who have had no further criminal activity, nor does it consider convicted persons who show no likelihood of ever committing crimes in the future.\textsuperscript{276} When the presumption is employed, refugees are excluded from the protection of asylum and withholding of deportation.

The courts finding Section 5(b) and Section 7343 violative of procedural due process,\textsuperscript{276} as well as at least one court upholding Section 7343,\textsuperscript{277} have done so under the three-part test of Matthews v. Eldridge.\textsuperscript{278} The test requires the court to weigh three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest through the procedures currently used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{279}

Applying the first Matthews step to Section 515, the private interest at stake is the alien's right to seek asylum and withholding and not to be subjected to return to a place where his life and liberty are in jeopardy. This is a weighty interest, the "highest possible."\textsuperscript{280} Against this interest must be balanced the risk of its erroneous deprivation under current procedures. Here, the lack of a hearing creates a grave risk of returning a refugee to persecution, on the basis of a conviction which would not be deemed particularly serious by the UNHCR.

In the second Matthews step, one must also consider the value of additional or substitute procedural safeguards. Here, a hearing before an IJ, allowing the judge to determine whether the crime of which the alien was convicted was a particularly serious one within the meaning of the Handbook rather than according to the statutory definition, would be of value. It would ensure that those aliens who are not in

\textsuperscript{275} Under the interpretation of the withholding provisions of Section 515 argued in Urbina v. INS, Docket No. 91-70400 on the docket of the United States Court of Appeals for the Ninth Circuit, and Matter of Kofa, No. A29-690-266, and rejected by the BIA in Matter of Kofa, Int. Dec. 3163 (BIA Nov. 5, 1991); see supra text accompanying notes 151-58, however, an applicant for withholding would have the opportunity to present evidence to establish that, despite his conviction of an aggravated felony, he is not a danger to the community and thus not excluded from a grant of withholding.


\textsuperscript{278} Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976). The Matthews test is no stranger to deportation proceedings, having been utilized by the Supreme Court in Landon v. Plascencia, 459 U.S. 21, 34 (1982), in determining the procedures due a returning permanent resident alien in exclusion proceedings. See also Davis, 749 F. Supp. at 51.

\textsuperscript{279} Matthews, 424 U.S. at 335.

\textsuperscript{280} Martin, supra note 178, at 190.
truth a danger to the United States community would not be forced to return to persecution.

Turning to the third step of the Matthews test, the government's interest in curtailing crime in the United States is also a weighty one. Its interest in refusing the opportunity to apply for asylum and the opportunity to establish that a particular crime, classified as an aggravated felony under Section 501 of the Immigration Act of 1990, should not be considered a particularly serious crime for purposes of withholding, however, is less clear. The safeguard of a meaningful hearing, in which all relevant facts of the applicant's case would be presented to the IJ, would not be an untoward fiscal or administrative burden for two reasons. First, these same hearings were held prior to the enactment of the Immigration Act of 1990, except when the alien was convicted of one of a small number of crimes which were deemed particularly serious on their face, thus allowing pretermittence of a hearing on withholding claims. Allowing those hearings would simply continue a procedure already in place. Second, there is the significance of the right to apply for asylum and the danger to the refugee if he is not allowed to have his application considered. When these interests are weighed against the relatively minor burdens to the government in providing hearings, the individual's interests must prevail.

In determining what process is due in the adjudication of an asylum or withholding claim by a refugee who has been convicted of an aggravated felony, it is also appropriate to consider the provisions of the Convention and the UNHCR Handbook on Criteria and Procedures for Determining Refugee Status. Article 32(2) of the Convention provides that a refugee may be expelled only in execution of a decision reached in accordance with due process of law. Except where compelling reasons of national security require otherwise, the refugee is to be allowed to submit evidence to clear himself and to appeal to and be represented before competent authority.281 The Handbook also sets out certain basic requirements which procedures for determination of refugee status should satisfy. Those requirements include a reasonable time to appeal for a formal reconsideration of a decision not recognizing him as a refugee.282

The procedures in effect prior to the Immigration Act of 1990 for determining asylum and withholding for aliens with criminal convictions appear, with the exception of the allowance of pretermittence of claims, to comply with those envisioned by the UNHCR. The abolition

281. Convention, supra note 4, art. 32(2). See also The Refugee, supra note 7, at 82, 168-69.

of any meaningful hearing to determine asylum and withholding for such aliens after the Immigration Act of 1990, however, falls far short of the requirements of the Convention and *Handbook* and fails to comply with the United States Constitution's requirement of procedural due process.

VI. **Recommendations for Representation of Refugees with Criminal Convictions**

For attorneys representing aliens with criminal backgrounds who are seeking asylum or withholding, the representation must be carefully handled. It should be argued that Section 515 violates the United States' obligations under the United Nations Convention and Protocol and violates the Fifth Amendment to the United States Constitution. Beyond that, it is of crucial importance to determine whether the alien has actually been convicted, a determination which is by no means clear-cut. The current BIA definition of conviction has been challenged, and arguments should be made that that definition should not apply. Even if a conviction exists, there may be a method of ameliorating the conviction, either by eliminating it or by reducing the particular crime to something less than an "aggravated felony."

A. **What Constitutes a Conviction for Immigration Purposes?**

1. **Finality of Convictions, Juvenile Delinquency, and First Offender Statutes**

Certain "convictions" are excluded from the definition of conviction for immigration purposes. A conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived. Nor is a conviction for juvenile delinquency considered a conviction for immigration purposes.  

2. **Matter of Ozkok**

Under Section 515 of the Immigration Act of 1990, an alien who has been convicted of an aggravated felony may not apply for asylum, and

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283. An exhaustive treatment of strategies for representing convicted aliens in immigration proceedings is beyond the scope of this article. For a more extensive treatment of this subject, see IMMIGR. L. SERVICE §§ 4:32 - 4:88; 17:18 - 17:36; 17:52 - 17:60; 17:70.6 - 17:70.9 (Law. Cooperative Pub. 1985) (updated frequently).


an aggravated felony is deemed to be a "particularly serious crime," the final conviction of which excludes an alien from the provisions of withholding of deportation. Thus, the definition of the term "conviction" is crucial.

Prior to 1988, the BIA considered a conviction to exist if the following were present: (1) a judicial finding of guilt; (2) action taken by the court which removes the case from the category of those cases which are pending for consideration by the court — a fine, incarceration or suspended sentence, or suspension of imposition of sentence; and (3) the action of the court was considered a conviction by the state for at least some purpose.286

This definition was fashioned to satisfy the requirements of Pino v. Landon.287 There, the Supreme Court found that an alien was not considered convicted of theft, where the alien was sentenced to imprisonment, completed a period of probation, and had his sentence revoked and his case placed "on file," because the conviction had not attained such a degree of finality as to support an order of deportation.

The Board continued to follow Pino v. Landon in at least four decisions between 1955 and 1988.288 Then, in Matter of Ozkok,289 the BIA severely altered its definition of "conviction". There, a permanent resident alien pled guilty to unlawful possession of cocaine with intent to distribute in a Maryland state court. The court stayed the judgment and placed the alien on probation for three years. The judge also ordered performance of community service and payment of a fine and court costs.290 The alien asserted that this was not a conviction. The BIA disagreed and found that a conviction existed.

A central issue in Ozkok was whether the definition of conviction for purposes of immigration law should be based on a single standard or whether it should "depend on the vagaries of state law."291 The Board reasoned that, because of the states' differing methods of ameliorating the consequences of convictions, the standard employed in Matter of L.R. permitted anomalous and unfair results in determining which aliens are considered convicted for immigration purposes. In addition, the Board felt that aliens who were clearly guilty of criminal behavior and whom Congress intended to be considered "convicted" had been permitted to escape the immigration consequences normally attendant

290. Id. at 548.
291. Id. at 551 n.6.
upon a conviction. For those reasons, the Board found that a single standard was necessary and that it was necessary to revise its standard for a final conviction.  

Under the new \textit{Ozkok} standard, a conviction exists for immigration purposes if the alien has had a formal judgment of guilt entered by a court. An alien is also considered convicted where adjudication of guilt has been withheld, if all of the following elements are present: i) a judge or jury has found the defendant guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; ii) the judge has ordered some form of punishment, penalty, or restraint on the defendant's liberty, such as restitution or community service; and iii) a judgment or adjudication of guilt may be entered if the defendant violates the terms of probation or the court's order, without further proceedings regarding guilt or innocence of the original charge.

\textit{Ozkok} was criticized at the time of its issuance as a severe alteration of the longstanding precedent. The BIA itself noted that the \textit{Ozkok} standard represented "a significant departure from many of our previous decisions." The decision has come under attack in at least two federal cases, and will in all likelihood be attacked in future cases.

The principal arguments against \textit{Ozkok} are set out in an excellent brief, filed by the American Immigration Lawyers Association as amicus curiae in \textit{Gordon v. INS}. The authors of the brief present three main arguments for the overturning of \textit{Ozkok}: first, that \textit{Ozkok} violates stare decisis; second, that it is inconsistent with congressional intent; and third, that it improperly announces new principles through adjudication, rather than by regulation.

Concerning the first argument, the BIA, like other adjudicatory bodies, is bound by the decisions of the United States Supreme Court. It

\begin{itemize}
  \item 292. \textit{Id.} at 546.
  \item 293. \textit{Id.} at 550-51.
  \item 294. \textit{Id.} at 551-52.
  \item 296. \textit{Matter of Ozkok, 19 I&N Dec. 546, 552.}
  \item 297. \textit{Gordon v. INS, No. 88-5828 on the docket of the U.S. Court of Appeals for the 11th Circuit; Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir. 1990).}
  \item 298. \textit{Brief of the American of Immigration Law Association as Amicus Curiae for Petitioner Vivonia Gorden, Gorden v. INS, No. 88-5828 on the docket of the United States Court of Appeals for the 11th Circuit [hereinafter Amicus Brief]. The author wishes to acknowledge this very fine brief and to thank its authors, Phillip Alterman and Kenneth Stern, for providing her with a copy. The majority of ideas in this subsection on convictions come from Mr. Alterman and Mr. Stern's brief. They are set out in such detail here because of their value to immigration practitioners. See also Lory Rosenberg, \textit{The Error of Their Ways: Challenging the Administrative Decisions in Matter of Ozkok and Matter of M}, in II IMMIGRATION AND NATIONALITY LAW: 1989 ANNUAL 591 (1989), also referring to the arguments raised in the amicus brief and suggesting that those arguments should be utilized by immigration practitioners in directly opposing the imposition of \textit{Ozkok}. \textit{Id.} at 604.}
  \item 299. \textit{Amicus Brief, supra note 298, at i.}
\end{itemize}
can be argued that the Board, in finding that Mr. Ozkok's deferred adjudication procedure was a conviction, implicitly overruled *Pino v. Landon.*

The second point advanced for the overturning of *Ozkok* is that it is inconsistent with Congressional intent. The Board relies in *Ozkok* upon *Dickerson v. New Banner Institute, Inc.* for the proposition that "Congress did not intend for the definition of a conviction to be dependent upon the vagaries of state law." Yet the decision in *Dickerson* was expressly limited to an interpretation of the term "convicted" as it appears in Sections 922(g)(1) and (h)(1) of the Gun Control Act of 1968, and the Supreme Court noted in *Dickerson* that the term "conviction" does not have the same meaning in every federal statute. Moreover, Congress overruled *Dickerson* in the Firearms Owners' Protection Act. Section 101 of that Act states that:

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter.

The legislative history of the Firearms Owners Protection Act also shows Congress' intent to overrule *Dickerson*:

For instance, the Supreme Court, in *Dickerson v. New Banner Institute, Inc.* construed this definition to include guilty pleas where no final judgment has been rendered by the court. *S. 914,* as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual state courts or legislators have decided to the contrary.

The authors of the amicus brief also argue that *Ozkok* is invalid because it constitutes an improper formulation of a new standard by

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304. *Dickerson,* 460 U.S. at 111 n.6; Amicus Brief, *supra* note 298, at 11.
306. Firearms Owners' Protection Act § 101.
adjudication, rather than by its agency rule-making powers.\textsuperscript{308} Although an agency is not precluded from announcing new principles in an adjudicative proceeding and although the agency has the choice between rule-making and adjudication,\textsuperscript{309} it should use its rule-making powers over adjudication whenever possible.\textsuperscript{310} In addition, there are situations where an agency's reliance on adjudication can amount to an abuse of discretion by administrative decision rather than by regulation.\textsuperscript{311} Rulemaking, as opposed to adjudication, is required where adverse consequences ensuing from such reliance [upon the agency's past decisions] are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding [or where] some new liability [results from] past actions which were taken in good-faith reliance on Board pronouncements [or where] fines or damages [are involved].\textsuperscript{312}

Applying these guidelines, the amicus brief contends that \textit{Ozkok} had severely adverse consequences. The definition of conviction in \textit{Matter of L.R.} had been relied upon by aliens for many years and had led many aliens to forego trial on the merits, while maintaining their innocence, in order to avoid the immigration consequences of a criminal conviction.\textsuperscript{313} Thus, the amicus brief concludes that the BIA's rule-making authority, rather than \textit{Ozkok}-like adjudication, should have been used to change the definition of a conviction for immigration purposes.

3. \textit{Interpretations of Ozkok}

Not all analyses under \textit{Ozkok} have resulted in determinations that a conviction exists. Three recent decisions have determined that where there are further proceedings available on guilt or innocence in a deferred adjudication case, the third prong of \textit{Ozkok} is not met.

In \textit{Matter of Grullon},\textsuperscript{314} criminal charges against an alien were dismissed upon his successful completion of a pretrial intervention program. The Board found that no conviction existed for immigration purposes because the third prong of \textit{Ozkok} was not met; under the law applied in \textit{Grullon}, if a person participating in the program did not fulfill his obligations during probation, his case must revert to normal criminal channels for determination of guilt or innocence.

\textsuperscript{308} Amicus Brief, \textit{supra} note 298, at 20-24.
\textsuperscript{309} \textit{Id.} at 21; \textit{NLRB v. Bell Aerospace Co.}, 416 U.S. 267, 294 (1974).
\textsuperscript{310} Amicus Brief, \textit{supra} note 298, at 20; \textit{SEC v. Chenery Corp.}, 332 U.S. 194, 202 (1947); \textit{NLRB v. Majestic Weaving Co.}, 355 F.2d 854, 860 (2d Cir. 1966).
\textsuperscript{311} Amicus Brief, \textit{supra} note 298, at 21; \textit{Bell Aerospace Co.}, 416 U.S. at 294.
\textsuperscript{312} Amicus Brief, \textit{supra} note 298, at 21 (quoting \textit{Bell Aerospace Co.}, 416 U.S. at 295).
\textsuperscript{313} \textit{Id.} at 20.
\textsuperscript{314} \textit{Int. Dec.} 3103 (BIA April 19, 1989).
Martinez-Montoya v. INS\(^{315}\) involved an application for legalization under the Immigration Reform and Control Act (IRCA).\(^{316}\) The applicant for legalization had pled guilty to a felony charge of forgery in a Texas criminal court. Rather than entering a formal finding or judgment of guilt, however, the Texas court deferred adjudication pursuant to Texas Code of Criminal Procedure Article 42.12,\(^{317}\) and ordered Martinez-Montoya to serve three years of probation and to pay a fine and court costs.\(^{318}\) Under the Texas statute, a defendant could request a final adjudication of his case within thirty days of his plea. If he violated his probation, he could be arrested and detained and is entitled to a hearing to determine whether the court would proceed with an adjudication of the original charge.\(^{319}\) The INS District Director denied Martinez-Montoya's application for amnesty on the ground that he had been convicted of a felony.\(^{320}\) The Legalization Appeals Unit affirmed the decision of the District Director and dismissed the appeal.\(^{321}\)

On judicial review, the Court of Appeals for the Fifth Circuit found that the petitioner had not been convicted within the meaning of Section 245A under the Ozkok standard because, since further proceedings were available on the issue of guilt or innocence under the Texas deferred adjudication procedure, the third prong of Ozkok was not met.\(^{322}\) "It is the alien's opportunity to seek further proceedings on the issue of guilt that distinguishes the Texas scheme from the Maryland deferred adjudication procedure considered in Ozkok."\(^{323}\)

A similar result occurred in Matter of Rodriguez-Perez,\(^{324}\) a decision

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315. 904 F.2d 1018 (5th Cir. 1990).
317. TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 1979).
318. Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir. 1990).
319. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3d (West 1979).
320. Martinez-Montoya, 904 F.2d at 1020.
321. Id. The INS' Legalization Appeals Unit set out its own test for determining whether a conviction exists for legalization purposes: (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere; and (2) the judge has ordered some form of punishment or penalty, including but not limited to a fine or imprisonment.
322. Id. at 1024-25.
323. Id. at 1025.
by an Immigration Judge. There, the INS contended that an alien was deportable because he had been convicted of possession of more than 100 pounds of marijuana.\(^\text{326}\) The alien's record had been sealed, and the only document submitted by the INS in support of its allegation was an "Order Withholding Adjudication." The IJ found that INS had not met the third prong of \textit{Ozkok} which provided that a judgment or adjudication of guilt may be entered if the alien violates the terms of probation, without availability of further proceedings on the issue of guilt or innocence.\(^\text{326}\)

Thus, for alien clients with criminal convictions, counsel must examine the conviction closely to determine whether there exists a possibility of further proceedings on the issue of guilt or innocence. Moreover, counsel for the alien during the criminal proceedings should point out to the criminal judge the serious immigration consequences arising from a criminal conviction and inform the judge of the \textit{Grullon} and \textit{Martinez} rulings.

\section*{B. Amelioration of Convictions}

An alien with a conviction of an aggravated felony may be able to ameliorate his conviction. The methods of amelioration include expungement and grants of post-conviction relief.\(^\text{327}\)

\textit{Matter of Ozkok} set forth the BIA's current approach to expungements. An expungement of a non-drug-related conviction eliminates the conviction for immigration purposes.\(^\text{328}\) An expungement of a drug-related conviction does not eliminate it for immigration purposes.\(^\text{329}\) Foreign expungements are not given effect.\(^\text{330}\)

There is an apparent conflict between the Board's holding in \textit{Matter of Ozkok} and the federal first offender statute.\(^\text{331}\) Section 3607(c) of

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\textit{from the Interpreter Releases article.}
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\(^{325}\) Id.
\(^{326}\) Id.
\(^{327}\) Prior to the Immigration Act of 1990, a convicted alien could also apply for a judicial recommendation against deportation (JRAD) under INA § 241(b). Under this provision, the criminal judge sentencing an alien for a crime of moral turpitude could make, at the time of first imposing judgment or passing sentence or within thirty days thereafter, a recommendation to the Attorney General that the alien not be deported. If such a recommendation were made, the alien could not be deported on the ground of that conviction. Due notice, defined as five days under 8 C.F.R. § 241.1 (1990), had to be given to the interested state, the Immigration and Naturalization Service, and prosecution authorities, and those parties had to be granted an opportunity to make representations in the matter. The JRAD was, by statute, inapplicable to drug offenses. It was eliminated in the Immigration Act of 1990 § 505.

Aliens who are convicted of crimes less than aggravated felonies may be able to ameliorate their conviction through certain pardons, as well. The amelioration of convictions of aggravated felonies through pardon, however, was eliminated by the Immigration Act of 1990 § 505.

\(^{328}\) Matter of Ozkok, 19 I&N Dec. at 552.
\(^{329}\) Id.
that statute provides that where a person under 21 is convicted of an offense described in Section 404 of the Controlled Substances Act and where the proceedings against the person are dismissed after successful completion of probation under 18 U.S.C. Section 3607(a), the court shall enter an expungement order upon the person's request. Matter of Ozkok, however, provides that expungements extinguish only non-drug convictions. Attorneys representing refugees with criminal convictions should point out 18 U.S.C. Section 3607(b), which states that “[a] disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.” From its discussion of 18 U.S.C. Section 3607 in Matter of Deris, the BIA appeared to recognize that a conviction expunged under Section 3607(c) of that statute will not be considered a conviction for immigration purposes. The Board refused to hold that convictions expunged under state equivalents to 18 U.S.C. Section 3607 should not be considered convictions for immigration purposes, however, unless the state statutes were limited to authorizing expungements for simple possession of a dangerous controlled substance.

In addition to expungements, resourceful practitioners have managed to ameliorate their clients’ convictions through a variety of applications for post-conviction relief. Granting of a writ of coram nobis under state or federal law vacates a conviction ab initio. The application for a writ of coram nobis must be based upon an error of fact at the time of the original judgment and a lack of knowledge within the period for application for a new trial.

A second type of application for post-conviction relief, the writ of audita querela, has been used in at least two federal cases to ameliorate convictions so that the aliens would be eligible for legalization under IRCA. In Salgado v. INS, a permanent resident alien pled

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334. Id. at 10. In Matter of Deris, the alien contended that the Maryland first offender statute, Md. Ann. Code art. 27, § 292(b) (1982), was a state counterpart to the then existing federal first offender statute, and that an expungement under the Maryland statute extinguished his conviction for immigration purposes. The Board noted, however, that the Maryland statute authorized expungement for convictions of any law relating to controlled dangerous substances and therefore found that the Maryland statute did not qualify as a state counterpart to the federal first offender statute. Thus, aliens sentenced under the Maryland statute are not exempt from the immigration consequences of a drug conviction. Id. at 12.
338. IRCA § 201 (codified at INA § 245A, 8 U.S.C. § 1255A). The amnesty provisions of IRCA provided that an alien was ineligible for amnesty if he were excludable or deportable for criminal grounds or if he had been convicted of any single felony or of three misdemeanors. INA
guilty to a charge of failing to pay transfer tax on a quantity of marijuana and was sentenced to two years' imprisonment. Upon his release from incarceration, he remained in the U.S., despite having been found deportable in a deportation proceeding. He applied for a writ of audita querela in order to vacate his conviction, for the purposes of becoming eligible for legalization under IRCA. The district court found that the definition of audita querela in Black's Law Dictionary appears sufficiently broad to encompass the scenario presented here where Mr. Salgado seeks 'relief against the consequences of the judgment;' and where a refusal to grant such relief would strip him of access to newly created rights which he would otherwise clearly be entitled to by operation of law.

The court went on to find that the legalization provisions of IRCA constituted a newly created right, granted the writ, and vacated the alien's criminal conviction. A similar result was reached in U.S. v. Ghebreziabher, where a writ of audita querela was used to vacate one misdemeanor count relating to food stamp trafficking.

Given the serious consequences of criminal convictions under the immigration laws, and particularly the harsh consequences to refugees convicted of aggravated felonies, counsel for aliens who have criminal convictions must go beyond the alien's immigration proceedings and examine the criminal record for any possibility of amelioration. Where sufficient time exists prior to a deportation or exclusion hearing, efforts towards amelioration should be the immigration practitioner's first step in representing his client.

VII. CONCLUSION

The United States has made great strides toward the protection of refugees since 1980 with the Refugee Act of 1980, Supreme Court decisions, such as INS v. Cardoza-Fonseca, which seek to interpret

340. Id. at 1266.
341. Id.
342. According to Black's Law Dictionary, the term "audita querela" is defined as:

[A] common law writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense or discharge arising since its rendition and which could not be taken advantage of otherwise.

Black's Law Dictionary 120 (5th ed. 1979); see also Salgado, 692 F. Supp. at 1269.
344. Id. at 1270-71.
United States refugee laws according to the meaning of the United Nations Convention and Protocol, myriad foreign refugee programs, and temporary protected status for victims of disaster. Section 515 of the Immigration Act of 1990, with its denial without meaningful hearing of asylum and withholding, is a regression from this legacy of assistance to refugees. The control of crime in our country is certainly an appropriate and essential congressional goal, but so is our commitment to refugees. A balance between these two competing interests could have been devised, rather than allowing the scales to be completely weighted on the side of crime control.