

# CRS Report for Congress

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## Immigration Legislation and Issues in the 109<sup>th</sup> Congress

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# Immigration Legislation and Issues in the 109<sup>th</sup> Congress

## Summary

As in the past several years, security concerns are figuring prominently in the development of and debate on immigration legislation in the 109<sup>th</sup> Congress. In May 2005, the REAL ID Act became law as Division B of the FY2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13). It contains a number of immigration and identification document-related provisions intended to improve homeland security. Among these are provisions to make changes to the Immigration and Nationality Act (INA) with respect to asylum and other forms of relief from removal; to expand the terrorism-related grounds for alien inadmissibility and deportation; and to set standards for state-issued drivers' licenses and personal identification cards, if such documents are to be accepted for federal purposes.

The security-related issue of immigration enforcement continues to be on the congressional agenda. Bills have been introduced concerning the roles of state and local law enforcement agencies (including H.R. 1817, S. 1362, S. 1438, H.R. 2092, H.R. 3137, H.R. 3333, and H.R. 3938), the U.S. military (including S. 1815 and H.R. 1986), and civilian patrols (S. 1823, H.R. 3622, and H.R. 3704) in the enforcement of immigration law. Another area of congressional interest is the enforcement of INA prohibitions on employing unauthorized workers. Among the bills addressing this issue are H.R. 98, S. 1033/H.R. 2330, S. 1438, H.R. 3333, and H.R. 3938.

In addition to their enforcement provisions, S. 1033/H.R. 2330, S. 1438, and H.R. 3333 propose varying types of immigration reform. All three would overhaul existing guest worker programs and/or establish new programs. S. 1033/H.R. 2330 and S. 1438 also would make major changes to the permanent immigration system. Other related bills have been introduced to revise guest worker programs (including S. 359/H.R. 884) and permanent admissions (including H.R. 1219 and H.R. 3700). The 109<sup>th</sup> Congress has held a number of hearings on immigration reform issues and has enacted limited provisions on temporary and permanent employment-based immigration as part of P.L. 109-13.

Among the other immigration bills receiving action thus far in the 109<sup>th</sup> Congress are measures on alien victims of domestic violence (S. 1197 and H.R. 3402), trafficking in persons (S. 1197, H.R. 3402, and H.R. 972), and refugees (H.R. 3057 and H.R. 3010). Department of Homeland Security (DHS) appropriations and immigration legislation related to Hurricane Katrina are covered in other products and are not discussed here.

This report will be updated as legislative developments occur.

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# Immigration Legislation and Issues in the 109<sup>th</sup> Congress

## Introduction

Since the September 11, 2001 terrorist attacks, policymakers have linked the issue of immigration, particularly unauthorized immigration, to homeland security. This linkage was cemented with the passage of the Homeland Security Act of 2002 (P.L. 107-296), which shifted primary responsibility for immigration policy from the former Immigration and Naturalization Service (INS) to a new Department of Homeland Security (DHS). As in the past several years, security concerns are figuring prominently in the development of and debate on immigration legislation in the 109<sup>th</sup> Congress. In May 2005, the REAL ID Act became law as Division B of the FY2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (P.L. 109-13). It contains a number of immigration and identification document-related provisions intended to improve homeland security.

The security-related issue of immigration enforcement continues to be on the congressional agenda. The roles of state and local law enforcement agencies, the U.S. military, and civilian patrols in the enforcement of immigration law have been topics of much recent discussion. In addition, the enforcement of the prohibitions in the Immigration and Nationality Act (INA)<sup>1</sup> on employing unauthorized workers seems to be of particular congressional interest. These and other enforcement-related issues are the subject of various pending bills.

Broad immigration reform proposals, including the “Secure America and Orderly Immigration Act” (S. 1033/H.R. 2330) and the “Comprehensive Enforcement and Immigration Reform Act of 2005” (S. 1438), have been introduced in the 109<sup>th</sup> Congress. Reflecting concerns about homeland security and law enforcement, as well as about the economy and humanitarian issues, they address immigration enforcement, guest worker programs, and legal immigration reform, among other issues. A number of immigration reform-related hearings have been held this Congress, including a July 2005 Senate Judiciary Committee hearing on reform proposals. While S. 1033/H.R. 2330 and S. 1438 remain pending, Congress has enacted limited provisions on temporary and permanent employment-based immigration. It also has taken action on legislation concerning alien victims of domestic violence and trafficking in persons. This report discusses these and other immigration-related issues that have seen legislative action or are of significant congressional interest. DHS appropriations and immigration legislation related to

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<sup>1</sup> Act of June 27, 1952, ch. 477; 66 Stat. 163; 8 U.S.C. 1101 *et seq.* The INA is the basis of current immigration law.

Hurricane Katrina are covered in other products and are not discussed here.<sup>2</sup> The final section of the report lists enacted legislation and selected bills receiving action.

## REAL ID Act

During the 108<sup>th</sup> Congress, a number of proposals concerning immigration and identification-document security were introduced, some of which were enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). At the time that law was adopted, some congressional leaders reportedly agreed to revisit certain immigration and document-security issues in the 109th Congress that had been dropped from the final version of the legislation. The REAL ID Act (P.L. 109-13, Division B), enacted into law on May 11, 2005, contains a number of the dropped provisions, along with some new proposals.<sup>3</sup> This discussion focuses on titles I, II, and III of the REAL ID Act. Titles IV and V, which deal with nonimmigrant and immigrant workers, are covered respectively in the temporary and permanent immigration sections of this report.

### Changes to Laws on Asylum and Other Forms of Relief from Removal

The REAL ID Act makes a number of changes to INA provisions concerning asylum and other forms of relief from removal. It provides express statutory guidelines regarding burden of proof, eligibility, and credibility standards in relief from removal cases. In most cases, no statutory standards existed prior to the REAL ID Act; instead, standards were established by regulation and (sometimes conflicting) case law. In some areas, the guidelines established by the REAL ID Act are arguably more stringent than under preexisting law (e.g., pursuant to the act an asylum applicant must now show that one of the five grounds for asylum eligibility was or will be *at least one central reason* for his persecution, a higher standard than previously employed in some federal circuits); in other cases, the REAL ID Act simply codifies existing regulation or case law. The act also eliminates the annual caps on the number of persons granted asylum who may have their status adjusted to legal permanent residents (LPRs), and on the number of persons who may enter the United States as refugees/asylees on account of persecution for resistance to coercive population control methods (a special asylum category).<sup>4</sup>

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<sup>2</sup> See, respectively, CRS Report RL32863, *Homeland Security Department: FY2006 Appropriations*, by Jennifer E. Lake and Blas Nuñez-Neto; and CRS Report RL33091, *Hurricane Katrina-Related Immigration Issues and Legislation*, by Ruth Ellen Wasem.

<sup>3</sup> For a detailed discussion of the REAL ID Act, see CRS Report RL32754, *Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005*, by Michael John Garcia, Margaret Mikyung Lee, and Todd Tatelman.

<sup>4</sup> For further information on asylum, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

## **Judicial Review**

The REAL ID Act expressly limits federal habeas review and certain other non-direct judicial review for certain matters relating to the removal of aliens under INA §242, while permitting appellate court review of constitutional claims and questions of law. These measures appear to be in response to Supreme Court jurisprudence, which had previously interpreted the general limitations on judicial review contained in INA §242 as not precluding federal courts from exercising their habeas corpus jurisdiction review over removal-related decisions concerning aliens who had been detained pending removal.

## **Terrorism-Related Grounds for Exclusion and Removal**

The REAL ID Act expands the terrorism-related grounds for alien inadmissibility and deportation, as well as the meaning of certain terms used in the INA to describe terrorist activities or entities, to cast a wider net over groups and persons who provide more discrete forms of assistance to terrorist organizations, particularly with respect to fund-raising and soliciting membership in those organizations. The REAL ID Act makes activities such as espousal of terrorist activity and receipt of military-type training from or on behalf of a terrorist organization grounds for exclusion. It also significantly expands the terrorism-related grounds for deportation so that they are identical to the terrorism-related grounds for inadmissibility. At the same time, the REAL ID Act provides the Secretary of State and the Secretary of Homeland Security with authority to waive certain terrorism-related INA provisions that would otherwise make a particular alien inadmissible or cause a group to be designated as a terrorist organization.<sup>5</sup>

## **Expediting the Construction of Barriers at the Border**

The REAL ID Act provides the Secretary of Homeland Security with authority to waive the application of any legal requirements when he believes such a waiver is necessary to ensure the expeditious construction of certain barriers and roads along U.S. land borders, including a 14-mile wide fence near San Diego. The act provides that federal judicial review of waiver decisions or actions by the Secretary is limited to those claims alleging a violation of the U.S. Constitution.<sup>6</sup>

## **Improving Border Infrastructure and Technology Integration**

The REAL ID Act includes measures to improve border infrastructure and technology integration between state and federal entities. DHS is required to conduct a study on border security vulnerabilities, establish a pilot program to test ground surveillance technologies on the northern and southern borders, and implement a plan to improve communications systems and information-sharing between federal, state,

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<sup>5</sup> For additional information, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

<sup>6</sup> For additional information, see CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.

local, and tribal agencies on matters relating to border security. DHS is also required to submit reports to Congress concerning the implementation of these requirements.

## **Requirements Concerning State-Issued Drivers' Licenses and ID Cards**

The REAL ID Act contains a number of provisions relating to the improved security of state-issued drivers' licenses and personal identification (ID) cards. It requires states to adopt certain practices and procedures regarding the verification of documents used to obtain drivers' licenses and ID cards, and establishes minimum issuance standards for state-issued drivers' licenses and personal identification cards, if such documents are to be accepted for official federal purposes. States must also verify an applicant's legal status in the United States before issuing a driver's license or personal identification card that may be accepted for any federal purpose, and may only issue aliens temporary drivers' licenses or ID cards which expire on the date when the aliens' legal presence in the United States is due to end. If a state opts not to conform with REAL ID Act guidelines, the act nevertheless requires the state's drivers' licenses and ID cards to contain certain identifying features that alert federal officials that such documents are not to be accepted for any official federal purposes. Further, all states are required to maintain a motor vehicle database that contains specified information regarding persons issued drivers' licenses and ID cards, and this database must be made accessible to all other states. The deadline for state compliance with all applicable provisions of the REAL ID Act is three years after enactment (May 11, 2008), though the Secretary of Homeland Security is authorized to extend this deadline for any state that presents an adequate justification for its noncompliance.

## **Role of State and Local Law Enforcement**

Since the attacks of September 11, many have called on state and local law enforcement agencies to play a larger role in the enforcement of federal immigration laws. Some question, however, whether state and local law enforcement officers possess adequate authority to enforce all immigration laws — that is, both the *civil* violations (e.g., lack of legal status, which may lead to removal through an administrative system) and *criminal* punishments (e.g., alien smuggling, which is prosecuted in the courts). The Department of Homeland Security Authorization Act for FY2006 (H.R. 1817), as passed by the House, would authorize state and local law enforcement personnel to apprehend, detain, or remove aliens in the United States in the course of carrying out routine duties. It would also make clear that this authority has never been displaced or preempted by Congress and would reaffirm (notwithstanding any other law and the section's explicit authorization) the existing general authority for state and local law enforcement personnel to carry out the above mentioned activities. S. 1362 and S. 1438, as introduced in the Senate, and H.R. 3137, H.R. 3333, and H.R. 3938, as introduced in the House, would all provide similar authority to state and local law enforcement officers.

S. 1362, S. 1438, H.R. 3137, H.R. 3333, and H.R. 3938 also have many other provisions dedicated solely to immigration enforcement issues, particularly at the



state and local level. For example, these five bills would, among other things: (1) require the names of certain immigration violators to be entered into the National Crime Information Center, a database normally accessible to state and local law enforcement officers;<sup>7</sup> (2) regulate the transfer of illegal aliens from state to federal custody; and (3) require DHS to reimburse state and local law enforcement agencies for the cost incurred to incarcerate and transport illegal aliens in their custody. Other provisions in one or more of these bills would make illegal presence in the United States a criminal offense; provide certain immunities to state and local law enforcement officers and agencies carrying out federal immigration law; and prohibit certain federal funds from reaching states or localities that have a law or policy that prohibits their officers from enforcing federal immigration law or assisting federal immigration officials.

All the above mentioned bills would appear to enhance the role of state and local law enforcement in the enforcement of immigration law. On the other hand, H.R. 2092, as introduced in the House, would appear to limit the role of state and local law enforcement by repealing a current immigration law that allows the Secretary of Homeland Security to enter into agreements with states for the enforcement of immigration law.<sup>8</sup>

## **Patrolling the U.S. International Border**

DHS is charged with protecting our nation's borders from weapons of mass destruction, terrorists, smugglers, and unauthorized aliens. There has been much debate in the 109<sup>th</sup> Congress concerning whether DHS has sufficient resources to adequately fulfill its mission. A variety of bills have been introduced that would supplement DHS resources by involving the military or civilians in patrolling the U.S. border. In addition, as discussed above, there are pending bills to authorize state and local law enforcement agencies to enforce immigration laws.

### **U.S. Military Patrols**

The National Defense Authorization Act for Fiscal Year 2006 (H.R. 1815), as passed by the House, includes a provision (§1035) to authorize the U.S. Military to be deployed to the border to assist DHS in preventing the entry of terrorists, drug smugglers, and unauthorized aliens at and between official ports of entry. U.S. military personnel would be deployed to the border only at the request of the Secretary of Homeland Security and only after completing a training course on border law enforcement. Military personnel would have to be accompanied by DHS law enforcement personnel once deployed, and would not be authorized to conduct

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<sup>7</sup> Provisions in the Gang Deterrence and Community Protection Act of 2005 (H.R. 1279), as passed by the House, would also require information on certain immigration violators to be entered into the National Crime Information Center.

<sup>8</sup> For further discussion of this issue, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen R. Viña, and Karma Ester.

searches, seizures, or other similar law enforcement activities, or to make arrests. H.R. 1815 would not supersede the Posse Comitatus Act, which prohibits the use of the U.S. military to perform civilian governmental tasks unless explicitly authorized to do so.<sup>9</sup> This provision was also introduced as a stand-alone bill, H.R. 1986.

## **Civilian Patrols**

Several bills in the 109<sup>th</sup> Congress would create civilian border patrolling organizations. In the Senate, S. 1823 would establish a pilot Volunteer Border Marshal Program. This program would use volunteer state peace officers who would be assigned to the Border Patrol and charged with assisting in “identifying and controlling illegal immigration and human and drug trafficking.” In the House, H.R. 3704 would create a Border Patrol Auxiliary that would be deployed to the border and charged with notifying the Border Patrol about unauthorized aliens attempting to cross into the United States. These auxiliaries would be vested with the same powers as Border Patrol agents. DHS would be charged with recompensing members of the auxiliaries for their travel, subsistence, and vehicle operation expenses. H.R. 3622 would authorize state governments to create a militia called the Border Protection Corps (BPC) in order to prevent the illegal entry of individuals and to take individuals who have entered illegally into custody. DHS would be responsible for recompensing the states for all the expenses incurred in the establishment and operation of their BPCs.

## **Employment Eligibility Verification and Worksite Enforcement**

Under the INA, it is unlawful for an employer to knowingly hire, or recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are required to participate in a paper-based employment eligibility verification system, commonly referred to as the I-9 system, in which they examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms. In addition, employers may elect to participate in an electronic employment eligibility verification system, established under a 1996 law. Participants in the Basic Pilot program electronically verify new hires’ employment authorization through Social Security Administration (SSA) and DHS databases. Employers violating prohibitions on unlawful employment may be subject to civil and/or criminal penalties.<sup>10</sup> DHS’s Immigration and Customs

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<sup>9</sup> For a detailed explanation of the Posse Comitatus Act (18 U.S.C. 1385), please see CRS Report RS20590, *The Posse Comitatus Act and Related Matters: A Sketch*, by Jennifer Elsea; and CRS Report RS21012, *Terrorism: Some Legal Restrictions on Military Assistance to Domestic Authorities Following a Terrorist Attack*, by Charles Doyle and Jennifer Elsea.

<sup>10</sup> INA §274A, 8 U.S.C. §1324a. For further discussion of these legal provisions, see CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by Alison M. Smith.

Enforcement (ICE) has primary responsibility for the enforcement of these provisions, termed worksite enforcement.

Employment eligibility verification and worksite enforcement are current areas of congressional interest. Chief among the reasons for this is the large and growing number of unauthorized aliens in the United States, the majority of whom are in the labor force. According to estimates by the Pew Hispanic Center, in 2004 the unauthorized alien population totaled about 10.3 million and the unauthorized alien working population totaled about 6.3 million.<sup>11</sup> Particularly since the 2001 terrorist attacks, security concerns have been raised about having such a large unauthorized population. In addition, the issue of worksite enforcement has gained attention recently in connection with guest worker proposals. President Bush has expressed support for a new temporary worker program and has called for increased workplace enforcement as part of the program. Some major guest worker proposals have been introduced in the 109<sup>th</sup> Congress as part of larger immigration reform bills, which also contain worksite enforcement-related provisions.

A number of bills related to employment eligibility verification and worksite enforcement are before the 109<sup>th</sup> Congress. Several bills (H.R. 19, H.R. 688, H.R. 1587, H.R. 1770, and H.R. 2049) would require all, or specified groups of, employers to conduct employment eligibility verification through the Basic Pilot program or a similar system. H.R. 98, which was the subject of a May 2005 hearing by the House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims, would require Social Security cards to include an encrypted machine-readable electronic identification strip unique to the bearer. Under the bill, new hires would have to present their cards to their employers, who would use them to verify the worker's identity and work authorization. Verification of work authorization would be conducted by accessing an employment eligibility database to be established by DHS, which would contain DHS and SSA data.

Broader immigration proposals before the 109<sup>th</sup> Congress likewise contain provisions on employment eligibility verification and worksite enforcement. S. 1033/H.R. 2330 would direct SSA to establish a new employment eligibility confirmation system through which employers would verify new hires' identity and work authorization. The new system is to utilize machine-readable documents containing encrypted electronic information as a central feature. SSA also would be tasked with designing and maintaining an employment eligibility database, which would include specified information about work-authorized noncitizens. As described below, S. 1033/H.R. 2330 would establish two new temporary worker visas. Employers of these workers would be required to verify their identity and work authorization through the new database. S. 1033/H.R. 2330 would further direct SSA to develop a plan to phase out the current I-9 system and place all workers into the new database.

While S. 1033/H.R. 2330 would establish a new employment eligibility verification system, S. 1438 would make various changes to current verification

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<sup>11</sup> Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, Pew Hispanic Center, June 14, 2005, at [<http://www.pewhispanic.org>].

requirements. It would require SSA to issue machine-readable, tamper-resistant Social Security cards. These cards would become the only acceptable documents for evidencing employment authorization. To establish identity, an individual would have to provide either a U.S. Government-issued identification document containing a biometric identifier or a state-issued driver's license or identification document that conforms with REAL ID Act guidelines. Under S. 1438, participation in the Basic Pilot program, which would be renamed, would be mandatory, and there would be sanctions for noncompliance. In addition, S. 1438 would increase resources for worksite enforcement, subject to the availability of appropriations, and would increase existing monetary penalties for employers who violate INA prohibitions on unlawful employment.

H.R. 3938 contains some similar provisions to S. 1438. Like S. 1438, it would require SSA to issue machine-readable, tamper-resistant Social Security cards. These cards, which under H.R. 3938 would contain a digitized photograph, would be required for commencing work. H.R. 3938 would rename the Basic Pilot program and make participation mandatory, and sanction employers for noncompliance. It also would increase resources for worksite enforcement, subject to the availability of appropriations, and would increase existing monetary penalties for employers who violate INA prohibitions on unlawful employment. In addition, unlike S. 1438, it would direct DHS to establish an employment eligibility database containing DHS and SSA data, which would become the basis for a new employment eligibility verification system to replace the renamed Basic Pilot program.

Like both S. 1438 and H.R. 3938, H.R. 3333 would rename the Basic Pilot program and make participation mandatory, and sanction employers for noncompliance. Also like these bills, it would increase existing monetary penalties for employers who violate INA prohibitions on unlawful employment. Under H.R. 3333, employers would be required to verify that current employees, as well as new hires, are authorized to work. In addition, H.R. 3333 contains a number of provisions related to Social Security accounts and cards.

## **Temporary Immigration**

The INA provides for the temporary admission of various categories of foreign nationals, who are known as nonimmigrants. Nonimmigrants are admitted for a temporary period of time and a specific purpose. They include a wide range of visitors, including tourists, foreign students, diplomats, and temporary workers. The latter group is the subject of major legislation and considerable interest in the 109<sup>th</sup> Congress. The main nonimmigrant category for temporary workers is the H visa. Among the visa classifications in the H visa category are the H-1B visa for professional specialty workers, the H-2A visa for agricultural workers, and the H-2B visa for nonagricultural workers. Foreign nationals also may be temporarily admitted to the United States for work- or business-related purposes under other nonimmigrant

categories, including the B-1 visa for business visitors, the E visa for treaty traders and investors, and the L-1 visa for intracompany transfers.<sup>12</sup>

## Guest Worker Programs

The H-2A and the H-2B visa programs mentioned above are the two main programs for temporarily importing low-skilled workers, sometimes referred to as guest workers. The 109<sup>th</sup> Congress revised the H-2B program for nonagricultural workers as part of P.L. 109-13. The H-2B language, added as a Senate floor amendment and retained, as modified, in the final conference agreement as Title IV of Division B, was based on S. 352/H.R. 793. For FY2005 and FY2006, these provisions exempt aliens who have been counted toward the H-2B cap in any of the past three years from being counted again. They also cap at 33,000 the number of H-2B slots available during the first six months of a fiscal year. In addition, they require DHS to submit specified information to Congress on the H-2B program on a regular basis; impose a new fraud-prevention and detection fee on H-2B employers; and authorize DHS to impose additional penalties on H-2B employers in certain circumstances.

Bills known as AgJOBS (S. 359/H.R. 884) propose to overhaul the H-2A program for agricultural workers. Among other provisions, these bills would streamline the process of importing H-2A workers and make changes to existing H-2A requirements regarding minimum benefits, wages, and working conditions. They also would establish a legalization program for agricultural workers who meet specified requirements.

H.R. 3333 would eliminate all the current “H” visa subcategories, including the H-2A and H-2B visas, and replace them with a single H visa covering aliens coming temporarily to the United States to perform skilled or unskilled work. H visa holders could not change to another nonimmigrant status or adjust to LPR status in the United States. Under H.R. 3333, the new H visa program could not be implemented until the Secretary of Homeland Security makes certain certifications to Congress, including that a congressionally mandated automated entry-exit system is fully operational.<sup>13</sup>

Also before the 109<sup>th</sup> Congress are proposals to create new temporary worker visas under the INA. S. 1033/H.R. 2330 would establish new H-5A and H-5B visas. The H-5A visa would cover aliens coming temporarily to the United States *initially* to perform labor or services “other than those occupational classifications” covered under the H-2A or specified high-skilled visa categories. The H-5B visa would cover certain aliens present and employed in the United States since before May 12, 2005. S. 1033/H.R. 2330 includes special provisions through which eligible H-5A and H-5B workers could apply to adjust to LPR status.

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<sup>12</sup> For an overview of nonimmigrant admissions, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

<sup>13</sup> For information on the entry-exit system issue, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Viña.

S. 1438 would establish a new “W” temporary worker visa under the INA. The W visa would cover aliens coming temporarily to the United States to perform temporary labor or service other than that covered under the H-2A or specified high-skilled visa categories. (S. 1438 would repeal the H-2B category.) In addition, S. 1438 would authorize DHS to grant a new status — Deferred Mandatory Departure (DMD) status — to certain aliens present in the United States since July 20, 2004, and employed since before July 20, 2005. Aliens could be granted DMD status for up to five years. S. 1438 would not provide aliens in W status or DMD status with any special pathway to LPR status.<sup>14</sup>

## Permanent Immigration

In addition to the admission of temporary workers and other temporary visitors, the INA provides for the admission of foreign nationals to the United States as LPRs. Four elements underlie U.S. policy on permanent immigration: the reunification of families, the admission of immigrants with needed skills, the protection of refugees, and the diversity of admissions by country of origin. Various measures to revise permanent admissions have been introduced, but only one has been enacted thus far in the 109<sup>th</sup> Congress. Some, such as the enacted measure on visas for nurses, are narrowly targeted at particular aspects of the permanent immigration system. Others, including S. 1033/H.R. 2330, S. 1438, and H.R. 3700, would broadly change permanent admissions.<sup>15</sup>

### Recaptured Visa Numbers for Nurses

During Senate floor consideration of the FY2005 Emergency Supplemental Appropriations bill, an amendment was added to make up to 50,000 permanent employment-based visas available for foreign nationals coming to work as nurses. This provision was accepted by the conferees and enacted as §502 of P.L. 109-13, Division B, Title V.

### Elimination of Diversity Visas

The Security and Fairness Enhancement for America Act of 2005 (H.R. 1219) would amend the INA to eliminate the diversity visa lottery. The purpose of the diversity visa lottery is, as the name suggests, to encourage legal immigration from countries other than the major sending countries of current immigration to the United States. H.R. 1219 has been marked up by the House Immigration subcommittee.<sup>16</sup>

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<sup>14</sup> For further information and analysis, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

<sup>15</sup> For additional background and analysis, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

<sup>16</sup> For more information, see CRS Report RS21342, *Immigration: Diversity Visa Lottery*, by Ruth Ellen Wasem and Karma Ester.

**S. 1033/H.R. 2330**

S. 1033/H.R. 2330 would make significant revisions to the permanent legal admissions sections of the INA. Specifically, Title VI of the legislation would remove immediate relatives of U.S. citizens from the calculation of the 480,000 annual cap on family-based visas for LPR status, thereby providing additional visas to the family preference categories. It also would lower the income requirements for sponsoring a family member for LPR status from 125% of the federal poverty guidelines to 100%, and recapture for future allocations those LPR visas that were unused due to processing delays from FY2001 through FY2005. In addition, it would increase the annual limit on employment-based LPR visa categories from 140,000 to 290,000 visas, and raise the current per-country limit on LPR visas from an allocation of 7% of the total preference allocation to 10% of the total preference allocation (which would be 480,000 for family-based and 290,000 for employment-based under this bill).

**S. 1438**

Title X of S. 1438 would make significant changes to the INA provisions on the diversity visa and permanent employment-based admissions. It would eliminate the diversity visa. It would reduce the allocation of visas to persons of “extraordinary” and “exceptional” abilities and persons having advanced professional degrees (i.e., first and second preferences), and increase the number of visas to unskilled workers from a statutory cap of 10,000 annually to a level of 36% of the 140,000 ceiling for employment-based admissions (plus any other unused employment-based visas). Also with respect to employment-based immigration, it would recapture for future allocations those employment-based visa numbers that were unused from FY2001 through FY2005.

**H.R. 3700**

Title I of H.R. 3700 would substantially overhaul permanent admissions to the United States. Among other provisions, it would reduce the worldwide level of employment-based immigrants from 140,000 to 5,200 annually, and would limit the 5,200 employment-based visas to persons of “extraordinary” and “exceptional” abilities and persons having advanced professional degrees. In addition, it would eliminate the family preference visa categories and the diversity visa.

## **Immigrant Victims**

The INA includes a variety of provisions to assist aliens who have been victims of specified types of illegal activities, including domestic violence and trafficking. Many of these provisions were enacted as part of the (1) Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322), which included the original Violence Against Women Act (VAWA); (2) Victims of Trafficking and Violence Protection Act of 2000 (VTVPA; P.L. 106-386), which included VAWA 2000; and (3) Trafficking Victims Protection Reauthorization Act of 2003 (P.L. 108-193).

## **Battered Aliens**

Special INA provisions benefit aliens who have been battered or subjected to extreme cruelty by their U.S. citizen or LPR spouses or parents. These provisions, for example, establish special procedures and rules for battered aliens with respect to: petitioning to obtain LPR status; adjusting to LPR status in the United States; and obtaining relief from removal or deportation.

The Department of Justice Authorization bill (H.R. 3402), as passed by the House, and the Violence Against Women Act of 2005 (S. 1197), as passed by the Senate, would amend and, in many cases, broaden existing protections for battered immigrants. For example, under current law, battered spouses and children of citizens or LPRs who meet specified criteria are treated differently than most other prospective family-based immigrants, who must be the beneficiaries of immigrant visa petitions filed by their family members. Battered aliens are allowed to file immigrant visa petitions on their own behalf, which is known as VAWA self-petitioning. H.R. 3402 and S. 1197 would make self-petitioning available to the battered parents of citizens, and to aliens who enter the United States on K nonimmigrant visas as fiancé(e)s of U.S. citizens if the fiancé(e) or the fiancé(e)'s child is battered by the citizen. There are significant differences, however, between the K visa provisions in the two bills. Under S. 1197, in order for an alien who entered on a K visa to be eligible for self-petitioning or for certain other forms of relief, the alien would have to have married the citizen. H.R. 3402 would not require a marriage, and would generally afford battered K visa holders the protections available to battered spouses and children. In addition, both bills would place new requirements on the K visa, and S. 1197 would establish rules and associated penalties for international marriage brokers.

Among their other myriad provisions, H.R. 3402 and S. 1197 would amend existing battered alien rules regarding removal or deportation. Both would amend the INA and analogous provisions in VAWA 2000 to provide for a stay of removal pending final disposition of the motion, when an alien files a motion to reopen a removal or deportation case in order to file a VAWA self-petition or cancellation of removal application. Cancellation of removal is a discretionary benefit that an alien can apply for during removal proceedings. If cancellation of removal is granted, the alien's status is adjusted to that of an LPR. H.R. 3402 also would amend the INA's special cancellation of removal rule for battered aliens to state that aliens with a prima facie case for relief shall not be removed or deported until the application is approved or all opportunities for appeal are exhausted. Under H.R. 3402, aliens granted cancellation of removal under the special rule would be exempt from the 4,000 annual numerical limitation on cancellation of removal.

## **Trafficking Victims**

Although several bills have been introduced in the 109<sup>th</sup> Congress regarding victims of trafficking (including H.R. 2092, H.R. 2876, and H.R. 3171), only H.R. 3402, S. 1197, and H.R. 972 have received any action. Most of the other pending bills have similar provisions to H.R. 3402 and S. 1197.



H.R. 972, the Trafficking Victims Protection Reauthorization Act of 2005, has been ordered reported by the House International Relations Committee. H.R. 972 would authorize appropriations for existing grant programs under VTVPA, as well as create several new grant programs including grants to develop, expand, or strengthen trafficking victims assistance programs for U.S. citizens and LPRs, and grants to strengthen law enforcement programs to investigate and prosecute domestic trafficking involving U.S. citizens and LPRs. The bill would also create a pilot program to establish three residential treatment facilities for trafficking victims who are minors.

The INA includes a nonimmigrant category, known as T status or the T visa, for aliens who are victims of severe forms of trafficking in persons. H.R. 3402, as passed by the House, and S. 1197, as passed by the Senate, would make various changes to the T visa to expand existing protections. Among these changes, it would remove the requirement that there must be a finding of hardship for family members of the trafficking victim (T visa recipient) to be given T visas. In addition, although under current law there is no time limit on the duration of T status, under regulation it is limited to three years. H.R. 3402 and S. 1197 would authorize T status for four years, and allow for additional year-by-year extensions upon certification from selected officials, including state and local law enforcement, that the alien's continued presence in the United States is required to assist in a criminal investigation or prosecution. Unlike S. 1197, H.R. 3402 also would allow for an extension during the pendency of an application to adjust to LPR status. Additionally, S. 1197, but not H.R. 3402, would shorten the time period before aliens with T status could adjust to LPR status, from three to two years. Both bills would allow an alien to change from another nonimmigrant classification to T status, and would remove illegal presence as a reason to deny the change in status.

## Other Legislation and Issues

### Refugees

The worldwide refugee ceiling for FY2005 is 70,000, with 59,000 of these numbers allocated among the regions of the world and the remaining 11,000 comprising an "unallocated reserve" to be used if, and where, additional refugee slots are needed.<sup>17</sup> As of August 31, 2005, actual FY2005 refugee admissions totaled 42,762. For FY2006, the President proposes a worldwide ceiling of 70,000, with 60,000 numbers allocated regionally and 10,000 numbers comprising an unallocated reserve. Refugee numbers that are unused in a fiscal year are lost; they do not carry over into the following year.

The "Lautenberg amendment," first enacted in 1989, requires the Attorney General (now the Secretary of DHS) to designate categories of former Soviet and

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<sup>17</sup> Originally, 50,000 of the 70,000 FY2005 numbers were allocated among the regions and 20,000 comprised an unallocated reserve. In the fourth quarter of FY2005, however, 9,000 of the unallocated numbers were allocated to regions where need was projected to exceed the original ceilings.

Indochinese nationals for whom less evidence is needed to prove refugee status, and provides for adjustment to LPR status for certain former Soviet and Indochinese nationals denied refugee status. P.L. 108-199 amended the Lautenberg amendment to add a new provision, known as the “Specter amendment,” that directs the Attorney General to establish categories of Iranian religious minorities who may qualify for refugee status under the Lautenberg amendment’s reduced evidentiary standard. P.L. 108-447 extended the Lautenberg amendment through FY2005. The FY2006 foreign operations appropriations bill (H.R. 3057), as passed by the Senate, would extend the Lautenberg amendment through FY2006. The House-passed version of the bill does not contain the extension language.

The “McCain amendment,” first enacted in 1996, made the adult children of certain Vietnamese refugees eligible for U.S. refugee resettlement. P.L. 107-185 revised the amendment for FY2002 and FY2003. Among its provisions, this law enabled adult children previously denied resettlement to have their cases reconsidered. In the 109<sup>th</sup> Congress, H.R. 3320 would extend the amendment, as revised, through FY2007.

**Resettlement Funding.** For FY2005, Congress appropriated \$484.4 million for the Department of Health and Human Service’s (HHS) Office of Refugee Resettlement (ORR). The Bush Administration’s request for ORR for FY2006 is \$552.0 million. The FY2006 Labor, HHS, and Education Appropriations bill (H.R. 3010), as passed by the House, would provide \$560.9 million for ORR programs. H.R. 3010, as reported by the Senate Appropriations Committee, would appropriate \$552.0 for ORR, the same as the President’s request.

## Immigration Issues in Free Trade Agreements

Immigration issues often raised in the context of the free trade agreements (FTAs) include whether FTAs should contain provisions that expressly expand immigration between the countries as well as whether FTAs should require that the immigrant-sending countries restrain unwanted migration (typically expressed as illegal aliens). The question of whether the movement of people — especially temporary workers — is subsumed under the broader category of “provision of services” and thus an inherent part of any free trade agreement also arises.

The Australian FTA, signed on May 18, 2004, does not contain any explicit immigration provisions. However, P.L. 109-13 includes a provision that touches on the nexus of H-1B visas and FTAs. Specifically, Division B, Title V, §501 of the law adds 10,500 visas for Australian nationals to perform services in specialty occupations under a new E-3 temporary visa.

The U.S.-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) was signed on August 5, 2004, and implementing legislation was sent to the U.S. Congress on June 23, 2005. Although DR-CAFTA does not contain any

explicit immigration provisions, migration trends from these nations arise as an issue.<sup>18</sup>

## Other Legislation Receiving Action

**State Criminal Alien Assistance Program (SCAAP).** SCAAP provides reimbursement to state and local governments for the direct costs associated with incarcerating undocumented criminal aliens. Bills before the current Congress would authorize appropriations for SCAAP and make changes to the program. One of these bills, S. 188, passed the Senate with an amendment requiring that SCAAP reimbursement funds be used only for correctional purposes. The House companion bill is H.R. 557. The House-passed H.R. 3402 contains a SCAAP provision similar to S. 188. Added to H.R. 3402 as a floor amendment, the provision would authorize the same funding levels as S. 188 and would similarly limit use of the funds for correctional purposes only. Unlike S. 188, it also would require the Justice Department to report to Congress on state and local assistance in incarcerating criminal aliens.<sup>19</sup>

**Unaccompanied Alien Children.** S. 119, as reported by the Senate Judiciary Committee, would create procedures for DHS officers to follow when they encounter an unaccompanied alien child. It would establish new procedures to make it easier for unaccompanied alien children to be placed with family members and other individuals and entities, and would establish conditions for the detention of these children. Among its other provisions, it would require that unaccompanied alien children have counsel to represent them in immigration proceedings, and would require the establishment of a pilot program to study providing guardians *ad litem* to assist unaccompanied alien children involved in immigration proceedings.

**Special Immigrant Status for Translators.** H.R. 2293, as reported by the House Judiciary Committee, would authorize DHS to grant LPR status as “special immigrants” to certain nationals of Iraq and Afghanistan who worked with the U.S. Armed Forces as translators, and their spouses and children. The bill would place an annual cap of 50 on the number of principal aliens who could be granted special immigrant status.

**L Intracompany Visas.** H.R. 3648, as ordered reported by the House Judiciary Committee, would place new requirements on the L nonimmigrant visa category, which permits multinational firms to transfer top-level personnel to their locations in the United States for five to seven years. The bill would require the

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<sup>18</sup> For complete discussion and legislative tracking of DR-CAFTA, see CRS Report RL31870, *The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA)*, by J. F. Hornbeck; and CRS Report RL32322, *Central America and the Dominican Republic in the Context of the Free Trade Agreement (DR-CAFTA) with the United States*, coordinated by K. Larry Storrs. For a more general discussion and analysis, see CRS Report RL32982, *Immigration Issues in Trade Agreements*, by Ruth Ellen Wasem.

<sup>19</sup> See CRS Report RS21832, *Immigration: Frequently Asked Questions on the State Criminal Alien Assistance Program (SCAAP)*, by Karma Ester.

Secretaries of State and Homeland Security to each charge fees of \$1,500 to employers filing certain visa applications and nonimmigrant petitions for L visas.

## Legislation

The following are immigration bills or bills with significant immigration provisions that have received legislative action in the 109<sup>th</sup> Congress beyond hearings. All of these measures are discussed earlier in the report.

**P.L. 109-13 (H.R. 1268).** Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. Includes REAL ID Act. Reported by Appropriations Committee (H.Rept. 109-16) on March 11, 2005. Passed House on March 16, 2005. Reported by Senate Appropriations Committee (S.Rept. 109-52) on April 6, 2005. Passed Senate, as amended, on April 21, 2005. House agreed to conference report (H.Rept. 109-72) on May 5, 2005; Senate agreed on May 10, 2005. Signed on May 11, 2005.

**H.R. 972 (C. Smith).** Trafficking Victims Protection Reauthorization Act of 2005. Ordered to be reported by International Relations Committee on October 7, 2005.

**H.R. 1815 (Hunter).** National Defense Authorization Act for FY2006. Includes provisions on U.S. Military patrols at the border. Reported by Armed Services Committee (H.Rept. 109-89) on May 20, 2005. Passed House on May 25, 2005.

**H.R. 1817 (Cox).** Department of Homeland Security Authorization Act for FY2006. Includes provisions on role of state and local law enforcement in enforcement of immigration law. Reported by Homeland Security Committee (H.Rept. 109-71, Part I) on May 3, 2005; by Energy and Commerce Committee (H.Rept. 109-71, Part II) on May 13, 2005; and by Judiciary Committee on (H.Rept. 109-71, Part III) on May 13, 2005. Passed House on May 18, 2005.

**H.R. 2293 (Hostettler).** Amends INA to provide special immigrant status for aliens serving as translators with the U.S. Armed Forces. Reported by Judiciary Committee (H.Rept. 109-99) on May 26, 2005.

**H.R. 3010 (Regula).** Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006. Includes provisions on refugee resettlement funding. Reported by Appropriations Committee (H.Rept. 109-143) on June 21, 2005. Passed House on June 24, 2005. Reported by Senate Judiciary Committee (S.Rept. 109-103) on July 14, 2005.

**H.R. 3057 (Kolbe).** Foreign Operations, Export Financial and Related Programs Appropriations Act, 2006. Includes refugee provisions. Reported by Appropriations Committee (H.Rept. 109-152) on June 24, 2005. Passed House on June 28, 2005. Reported by Senate Appropriations Committee (S.Rept. 109-96) on June 30, 2005. Passed Senate, as amended, on July 20, 2005.

**H.R. 3402 (Sensenbrenner).** Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009. Includes provisions on battered aliens, trafficking victims, and SCAAP. Reported by Judiciary Committee (H.Rept. 109-233) on September 22, 2005. Passed House on September 28, 2005.

**H.R. 3648 (Sensenbrenner).** Amends INA to impose additional fees on immigration services for intracompany transferees. Ordered to be reported by Judiciary Committee on September 29, 2005.

**S. 119 (Feinstein).** Unaccompanied Alien Child Protection Act of 2005. Reported by Judiciary Committee (without written report) on April 14, 2005

**S. 188 (Feinstein).** State Criminal Alien Assistance Program Reauthorization Act of 2005. Reported by Judiciary Committee (without written report) on March 17, 2005. Passed Senate, as amended, on May 23, 2005.

**S. 1197 (Biden).** Violence Against Women Act of 2005. Reported by Judiciary Committee (without written report) on September 12, 2005. Passed Senate, as amended, on October 4, 2005.