



# Immigration Legislation and Issues in the 111<sup>th</sup> Congress

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## Summary

The Speaker of the House and the Senate Majority Leader have pledged to take up comprehensive immigration reform legislation at some point in the 111<sup>th</sup> Congress. It is unclear what the components of any immigration reform proposals that Congress may consider will be. In the past, comprehensive bills have addressed border security, enforcement of immigration laws within the United States (interior enforcement), employment eligibility verification, temporary worker programs, permanent admissions and, most controversially, unauthorized aliens in the United States.

The 111<sup>th</sup> Congress has considered various immigration issues and has enacted a number of targeted immigration provisions. It has passed legislation (P.L. 111-8, P.L. 111-9, P.L. 111-68, P.L. 111-83) to extend the life of several immigration programs—the E-Verify electronic employment eligibility verification system, the Immigrant Investor Regional Center Program, the Conrad State J-1 Waiver Program, and the special immigrant visa for religious workers—all of which are currently authorized until September 30, 2012. Among the other subjects of legislation enacted by this Congress are refugees (P.L. 111-8, P.L. 111-17) and border security (P.L. 111-5, P.L. 111-32, P.L. 111-83).

This report discusses these and other immigration-related issues that have seen legislative action or are of significant congressional interest. Department of Homeland Security (DHS) appropriations are addressed in CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, and, for the most part, are not covered here.

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## Introduction

Comprehensive immigration reform was debated in the 109<sup>th</sup> and 110<sup>th</sup> Congresses, but no comprehensive legislation was enacted.<sup>1</sup> The Speaker of the House and the Senate Majority Leader have pledged to take up immigration reform legislation in the 111<sup>th</sup> Congress. It is unclear what the components of any immigration reform proposals that Congress may consider will be. In the past, comprehensive bills have addressed border security, enforcement of immigration laws within the United States (interior enforcement), employment eligibility verification, temporary worker programs, permanent admissions and, most controversially, unauthorized aliens in the United States. Any consideration of immigration reform legislation will undoubtedly be complicated by competing legislative priorities and by the economic downturn.

The 111<sup>th</sup> Congress has already considered some immigration-related measures and has enacted a number of targeted immigration provisions. It has passed legislation (P.L. 111-8, P.L. 111-9, P.L. 111-68, P.L. 111-83) to extend the life of several immigration programs—the E-Verify electronic employment eligibility verification system, the Immigrant Investor Regional Center Program, the Conrad State J-1 Waiver Program, and the special immigrant visa for religious workers—all of which are currently authorized until September 30, 2012. Among the other subjects of legislation enacted by this Congress are refugees (P.L. 111-8, P.L. 111-17) and border security (P.L. 111-5, P.L. 111-32).

This report discusses these and other immigration-related issues that have seen legislative action or are of significant congressional interest. Department of Homeland Security (DHS) appropriations are addressed in a separate report<sup>2</sup> and, for the most part, are not covered here.

## Electronic Employment Eligibility Verification

Employment eligibility verification and worksite enforcement have been mainstays of recent debates over comprehensive immigration reform. They are widely viewed as essential components of a strategy to reduce unauthorized immigration.

Under Section 274A of the Immigration and Nationality Act (INA),<sup>3</sup> it is unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are further required to participate in a paper-based (I-9) employment eligibility verification system in which they examine documents presented by new hires to verify identity and work eligibility, and to complete and retain I-9 verification forms. Employers violating prohibitions on unlawful employment may be subject to civil and/or criminal penalties. Enforcement of these provisions is termed “worksite enforcement.” While all employers must meet the I-9 requirements, they also may elect to participate in the E-Verify

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<sup>1</sup> See archived CRS Report RL33125, *Immigration Legislation and Issues in the 109<sup>th</sup> Congress*, coordinated by Andorra Bruno, and archived CRS Report RL34204, *Immigration Legislation and Issues in the 110<sup>th</sup> Congress*, coordinated by Andorra Bruno (hereafter cited as archived CRS Report RL34204).

<sup>2</sup> CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake and Chad C. Haddal.

<sup>3</sup> Act of June 27, 1952, ch. 477; 66 Stat. 163; codified as amended at 8 U.S.C. §1101 et seq. The INA is the basis of current immigration law.

electronic employment eligibility verification system. E-Verify is administered by DHS's U.S. Citizenship and Immigration Services (USCIS). Participants in E-Verify electronically verify new hires' employment authorization through Social Security Administration (SSA) and, if necessary, DHS databases.<sup>4</sup>

At the start of the 111<sup>th</sup> Congress, E-Verify was scheduled to expire on March 6, 2009. Prompted by the approaching expiration, the House and Senate considered several provisions related to electronic employment eligibility verification and enacted a series of extensions. The Omnibus Appropriations Act, 2009 (P.L. 111-8) extended E-Verify until September 30, 2009, and the Continuing Appropriations Resolution, 2010 (P.L. 111-68, Division B, §128) extended the program until October 31, 2009. With the enactment of the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83, §547), E-Verify is currently authorized until September 30, 2012. This extension represents a compromise between the House-passed version of the underlying bill (H.R. 2892), which would have extended the program until September 30, 2011, and the Senate-passed version which would have made E-Verify permanent.

P.L. 111-83 also includes language on E-Verify that was in both the House-passed and Senate-passed versions of H.R. 2892 to prohibit any funds made available to the DHS Office of the Secretary and Executive Management under the act to be used for any new DHS hires who are not verified through E-Verify (§533). Other E-Verify provisions in the House-passed or Senate-passed versions of H.R. 2892 were not enacted in P.L. 111-83. The omitted language includes two Senate-passed provisions. One would have allowed any employer participating in E-Verify to verify the employment eligibility of existing employees. The other Senate provision would have directed federal departments and agencies to require, as a condition of contracts they enter into, that the contractors use E-Verify to verify the employment eligibility of all individuals hired during the term of the contract to work in the United States and all individuals (whether new hires or existing employees) assigned to perform work in the United States under the contract.<sup>5</sup>

Other bills introduced in the 111<sup>th</sup> Congress would more broadly change existing law on employment verification. For example, the Secure America Through Verification and Enforcement Act of 2009 (SAVE Act; H.R. 3308) would make E-Verify permanent and would phase in a requirement that all employers use it to verify the employment authorization of new hires and current employees. A similar bill of the same name (S. 1505) has been introduced in the Senate.

## **Border Security**

DHS is charged with protecting U.S. borders from weapons of mass destruction, terrorists, smugglers, and unauthorized aliens. Border security involves securing the many means by which people and things can enter the country. Operationally, this means controlling the official ports of

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<sup>4</sup> See CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

<sup>5</sup> A similar DHS rule, applicable as of September 8, 2009, requires certain federal contracts to contain a new clause committing contractors to use E-Verify to verify that all of the contractors' new hires, and all employees directly performing work under federal contracts are authorized to work. See U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification," *73 Federal Register* 67651-67705, November 14, 2008.

entry (POE) through which legitimate travelers and commerce enter the country, and patrolling the nation's land and maritime borders to safeguard against and interdict illegal entries.

Border security is an important immigration issue for the 111<sup>th</sup> Congress. There has been much debate about whether DHS has sufficient resources to fulfill its border security mission. A number of bills have been introduced that would add resources for Customs and Border Protection (CBP), the lead agency at DHS charged with securing U.S. borders at and between official ports of entry (POE). *At* ports of entry, CBP officers are responsible for conducting immigration, customs, and agricultural inspections on entering aliens. *Between* ports of entry, the U.S. Border Patrol (USBP), a component of CBP, enforces U.S. immigration law and other federal laws along the border. In the course of discharging its duties, the USBP patrols over 8,000 miles of U.S. international borders with Mexico and Canada and the coastal waters around Florida and Puerto Rico. The following discussion focuses on key provisions on border resources that have been enacted by the 111<sup>th</sup> Congress and selected other provisions that are pending.

## **Resources at Ports of Entry**

The American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5) provides an emergency supplemental appropriation of \$680 million for CBP during FY2009. The funding for CBP includes \$160 million for salaries and expenses, of which \$100 million is designated for the procurement and deployment of nonintrusive inspection technology and \$60 million is designated for the procurement and deployment of tactical communications equipment and radios. The act includes \$420 million for the construction and modification of ports of entry.

In response to the drug-related violence on the Mexican side of the Southwest border, Congress has appropriated additional resources for border activities. Title VI of the FY2009 Supplemental Appropriations Act (P.L. 111-32) contains \$140 million to support activities along the Southwest border with Mexico in response to reports of increasing drug-related violence. This funding includes \$40 million for CBP for various activities and \$5 million for CBP Air and Marine to support additional air operations along the Southwest border. Moreover, the FY2010 DHS Appropriations bill (P.L. 111-83), includes funding for 50 additional CBP Officers and 10 support positions to enhance the Southwest border outbound operations.

## **Resources Between Ports of Entry**

Legislation related to USBP resources has garnered some attention in the 111<sup>th</sup> Congress. For example, P.L. 111-83 funds the hiring in FY2010 of an additional 100 Border Patrol agents (and 23 associated support personnel), and the ARRA includes \$100 million for the deployment of SBInet technology to the border.<sup>6</sup> The Administration has requested \$574 million for the deployment of SBInet-related technologies and infrastructures in FY2011, a decrease of \$226 million over the FY2010 enacted level of \$800 million. This reduction has occurred, in part, because the management and deployment of SBInet has come under scrutiny.<sup>7</sup> DHS Secretary

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<sup>6</sup> SBInet is the so-called "virtual fence" currently being installed along the Southwest border of the United States. For more information, see CRS Congressional Distribution Memorandum "SBInet: Background, Implementation, and Issues," by Chad C. Haddal (available upon request).

<sup>7</sup> For example, see U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Border Security: Moving Beyond the Virtual Fence*, hearing on SBInet cost, deployment and internal assessment, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 20, 2010 (Washington: GPO, 2010).

Napolitano has ordered a department-wide assessment of the SBInet technology project, but continues to support the deployment of border supervision and protection technologies.<sup>8</sup>

Additionally, P.L. 111-83 imposes reporting requirements on the Secretary of Homeland Security to identify “additional Border Patrol sectors that should be utilizing Operation Streamline programs” and the resources needed to make the program more effective,<sup>9</sup> and to report on improvements of cross-border inspection processes. Finally, the House has passed H.R. 1148, which would direct DHS to conduct a program in the maritime environment for the mobile biometric identification of suspected individuals. This program would test the feasibility and cost of expanding DHS biometric identification capabilities to the maritime environment.

## **Barriers at the Border**

Congress has repeatedly shown interest in the deployment of barriers along the U.S. international land border.<sup>10</sup> In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which, among other provisions, explicitly gave the Attorney General broad authority to construct barriers along the border and specified where fencing was to be constructed. In 2008, Congress included provisions in P.L. 110-161 requiring DHS to construct reinforced fencing or other barriers along not less than 700 miles of the Southwest border, in locations where fencing is deemed most practical and effective. In carrying out this requirement, the Secretary is further directed to identify either 370 miles or “other mileage” along the Southwest border where fencing would be most practical and effective in deterring smugglers and illegal aliens, and to complete construction of fencing in identified areas. Although no legislation that would amend this requirement has moved beyond committee referral, border fencing continues to be a source of contention in Congress as numerous Members have called for the deployment of at least 700 miles of double-layered fencing designed to delay and deter pedestrian crossings.<sup>11</sup>

## **Unauthorized Immigration**

Unauthorized immigration remains a vexing issue for policy makers. The number of unauthorized aliens living in the United States in early 2009 has been estimated at about 11 million.<sup>12</sup> While many observers believe that the unauthorized alien population is decreasing, the sheer number of such aliens commands attention and has elicited a range of ideas about the appropriate policy response. Some legislative proposals for addressing the unauthorized population focus on enforcement and include provisions on border security, worksite and other interior enforcement,

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<sup>8</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *The Homeland Security Department's Budget Submission for Fiscal Year 2011*, hearing, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., February 24, 2010.

<sup>9</sup> Operation Streamline is a program that brings low-level criminal charges for illegal entry against unauthorized aliens apprehended in certain sectors along the Southwest border—with exceptions made for some humanitarian cases.

<sup>10</sup> See CRS Report RL33659, *Border Security: Barriers Along the U.S. International Border*, by Chad C. Haddal, Yule Kim, and Michael John Garcia.

<sup>11</sup> For example, see Senator John McCain, “McCain, Kyl Announce Border Security Plan,” press release, April 19, 2010, <http://www.johnmccain.com/blog/post/mccain-kyl-announce-border-security-plan/>.

<sup>12</sup> U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker, January 2010 (estimate of 10.8 million in January 2009).

and employment eligibility verification. H.R. 3308 and S. 1505 in the 111<sup>th</sup> Congress are examples of these types of proposals.

Other policy makers take a different approach and support some type of legalization program for unauthorized aliens—which they often term “earned adjustment”—sometimes in combination with enforcement measures. Legalization programs were included in some of the comprehensive immigration reform bills considered in the 109<sup>th</sup> and 110<sup>th</sup> Congresses, and are featured in some measures before the 111<sup>th</sup> Congress, such as the Comprehensive Immigration Reform for America’s Security and Prosperity (CIR ASAP) Act of 2009 (H.R. 4321). Other bills before the 111<sup>th</sup> Congress containing legalization programs include similar Senate and House Agricultural Job Opportunities, Benefits, and Security (AgJOBS ) Acts of 2009 (S. 1038, H.R. 2414) and the DREAM Act bills discussed in the next section.

## Unauthorized Students

Unauthorized alien students compose a subpopulation of the larger unauthorized alien population in the United States. Legislation commonly referred to as the “DREAM Act” (whether or not a particular bill carries that name) has been introduced in the past several Congresses to provide relief to this group in terms of both educational opportunities and immigration status. In the aftermath of failed efforts to enact comprehensive immigration reform in the 110<sup>th</sup> Congress, some supporters of comprehensive reform argued for an incremental approach, in which components of reform, such as DREAM Act legislation, would be pursued individually.<sup>13</sup> An attempt in the Senate to enact a DREAM Act bill in the 110<sup>th</sup> Congress (S. 2205) was unsuccessful.<sup>14</sup>

Similar, but not identical, DREAM Act bills (S. 729, H.R. 1751)<sup>15</sup> have been introduced in the House and Senate this Congress. Both bills would repeal a provision of current law that restricts the ability of states to provide postsecondary educational benefits to unauthorized aliens. They also would enable eligible unauthorized students to adjust to legal permanent resident (LPR) status in the United States through an immigration procedure known as “cancellation of removal.” Cancellation of removal is a discretionary form of relief authorized by the INA that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien’s status is adjusted to that of an LPR. There would be no limit under either bill on the number of aliens who could be granted cancellation of removal/adjustment of status.<sup>16</sup>

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<sup>13</sup> Other supporters of comprehensive reform opposed this approach, arguing that it would stymie efforts to enact a comprehensive bill. For both points of view, see, for example, Fawn Johnson, “Student Immigration Bill May Presage Other Senate Votes,” October 23, 2007, CongressDailyPM, <http://www.nationaljournal.com/congressdaily>; and Michael Sandler, “Even Limited Immigration Measures Appear Off the Table for Now,” October 24, 2007, <http://www.cq.com>.

<sup>14</sup> See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno (hereafter cited as CRS Report RL33863).

<sup>15</sup> S. 729 is the Development, Relief, and Education for Alien Minors (DREAM) Act of 2009; H.R. 1751 is the American Dream Act.

<sup>16</sup> See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*.



## **U.S. Refugee Program**

The admission of refugees to the United States is a perennial immigration issue. Refugee admission and resettlement are authorized by the INA.<sup>17</sup> Under the INA, a refugee is a person who is outside his or her country and who is unable or unwilling to return 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. Refugees are processed and admitted to the United States from abroad. The Department of State (DOS) handles overseas processing of refugees, and DHS/USCIS makes final determinations about eligibility for admission.<sup>18</sup> After one year in refugee status in the United States, refugees are required by law to apply to adjust to LPR status (see “Other Legislation Receiving Action” section below for related legislation).

The Foreign Relations Authorization Act, Fiscal Years 2010 and 2011 (H.R. 2410, Division A, Title II, Subtitle C), as passed by the House, proposes to make various changes to the U.S. refugee admissions and resettlement program. It would authorize the admission of refugees at the start of a fiscal year, as specified, in the absence of a timely presidential determination setting the refugee ceiling for that year. It would direct DOS to expand the training of U.S. embassy and consular personnel and nongovernmental organizations to enable them to refer individuals to the refugee admissions program. It also would require DOS to establish overseas programs in the English language and in cultural and work orientation for refugees who have been approved for U.S. resettlement.

Special legislative provisions facilitate relief for certain refugee groups. The “Lautenberg amendment,” first enacted in 1989 and regularly extended, requires the Attorney General (now the Secretary of DHS) to designate categories of former Soviet and 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. 111-8 (Division H, Title VII, §7034(g)) extended the Lautenberg amendment through FY2009, and the Consolidated Appropriations Act, 2010 (P.L. 111-17, Division F, Title VII, §7034(f)), further extends the amendment through FY2010.

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. The amendment, as revised, has been regularly extended. P.L. 110-161 (Division J, §634(f)) extended the amendment through FY2009, and P.L. 111-8 (Division H, Title VII, §7034(d)) extends it through FY2010.

Beyond the formal refugee program, other immigration mechanisms have been established over the years to facilitate the admission to the United States of foreign nationals who have worked for

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<sup>17</sup> The Refugee Act (P.L. 96-212, March 17, 1980) amended the INA to establish procedures for the admission of refugees to the United States.

<sup>18</sup> For additional information on the U.S. refugee program, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno (hereafter cited as CRS Report RL31269).

or been closely associated with the U.S. government, including the U.S. military. The 111<sup>th</sup> Congress has created one such program for refugee-like Afghans as part of P.L. 111-8 (see “Special Immigrants” section below).

## **Refugee Resettlement Funding**

The Department of Health and Human Services’ Office of Refugee Resettlement (HHS/ORR), within the Administration for Children and Families, administers an initial transitional assistance program for temporarily dependent refugees and Cuban/Haitian entrants. P.L. 111-17 (Division D, Title II) provides \$730.9 million for refugee assistance for FY2010. For FY2011, the President has requested \$877.6 million for refugee assistance. Needy refugees are also eligible for federal public assistance programs.<sup>19</sup>

## **Haitian Migration**

The devastation caused by the January 12, 2010, earthquake in Haiti is focusing world attention on the humanitarian crisis and prompting U.S. leaders to reconsider current policies on Haitian migration.<sup>20</sup> On January 15, 2010, DHS Secretary Janet Napolitano announced that Haitians who were in the United States at the time of the earthquake would be given Temporary Protected Status (TPS), a temporary status that provides protection from removal.<sup>21</sup> A separate DHS program to grant humanitarian parole to enter the United States to certain Haitian children who were in the process of being adopted by U.S. residents prior to the earthquake ended in April 2010.

A related issue for Congress concerns Haitians with approved petitions to immigrate to the United States who are waiting for visas to become available.<sup>22</sup> The Haitian Emergency Life Protection Act of 2010 (S. 2998/H.R. 4616) would amend the INA to allow Haitian nationals whose petitions for a family-sponsored immigrant visa were approved on or before January 12, 2010, to obtain a nonimmigrant (temporary) V visa. The V visa, which is currently available only to certain spouses and children of LPRs who are themselves petitioning for LPR status, enables beneficiaries to legally enter the United States to wait for their petitions to be approved or their visas to become available.

## **Special Immigrants**

The permanent employment-based immigration system consists of five preference categories.<sup>23</sup> The fourth preference category is known as “special immigrants.” Over the years, the special

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<sup>19</sup> See CRS Report RL31269, *Refugee Admissions and Resettlement Policy*.

<sup>20</sup> See CRS Report RS21349, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem, and CRS Report R41023, *Haiti Earthquake: Crisis and Response*, by Rhoda Margesson and Maureen Taft-Morales.

<sup>21</sup> For more background on TPS, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

<sup>22</sup> For information on the system of permanent admissions, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

<sup>23</sup> The five categories, in order from first preference to fifth preference, are (1) priority workers; (2) professionals (continued...)

immigrant category has been used to confer immigration benefits on particular groups. There are various subcategories of special immigrants under current law. The 111<sup>th</sup> Congress has acted to extend an existing special immigrant program for religious workers and to create a new one for certain Afghans employed by, or on behalf of, the U.S. government.

## **Religious workers**

Ministers of religion and religious workers make up the largest number of special immigrants. Religious work is currently defined as habitual employment in an occupation that is primarily related to a traditional religious function and that is recognized as a religious occupation within the denomination. While the INA provision for the admission of ministers of religion is permanent, the provision admitting religious workers has always had a sunset date. The provision is currently set to expire on September 30, 2012, in accordance with P.L. 111-83 (§568(a)).

## **Afghan Allies**

P.L. 111-8 (Division F, Title VI) authorizes DHS or DOS, in consultation with DHS, to provide special immigrant status to certain nationals of Afghanistan. An Afghan is eligible if he or she was employed by or on behalf of the U.S. government in Afghanistan on or after October 7, 2001, for not less than one year; provided documented valuable service to the U.S. government; and has experienced “an ongoing serious threat as a consequence of the alien’s employment by the United States government.” This special immigrant program is capped at 1,500 principal aliens (excluding spouses and children) annually for FY2009 through FY2013. It is modeled on a special immigrant program established for Iraqis in the 110<sup>th</sup> Congress.<sup>24</sup>

## **Other Issues and Legislation**

### **Immigrant Investor Regional Center Program**

There is currently one immigrant visa set aside specifically for foreign investors (immigrant investors) coming to the United States. Immigrant investors comprise the fifth employment-based preference category, and the visa is commonly referred to as the EB-5 visa. In 1992, a pilot program was authorized under the EB-5 visa category to achieve the economic activity and job creation goals of that category by encouraging investment in economic units known as Regional Centers.<sup>25</sup> These Regional Centers were designed to more easily facilitate investment, as well as target investment toward specific geographic areas. This pilot program has been extended

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(...continued)

holding advanced degrees or aliens of exceptional ability; (3) skilled workers, professionals, and unskilled workers; (4) special immigrants; and (5) employment creation investors. See CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

<sup>24</sup> See archived CRS Report RL34204.

<sup>25</sup> §610 of P.L. 102-395. A Regional Center is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation, and increased domestic capital investment. For more information on Regional Centers for immigrant investors, see CRS Report RL33844, *Foreign Investor Visas: Policies and Issues*, by Alison Siskin and Chad C. Haddal.

multiple times, most recently through September 30, 2012, by the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83, §548). The Senate-passed version of the act had included language to permanently reauthorize the EB-5 Regional Center Program but this language was not included in the conference agreement. On July 22, 2009, the Senate Judiciary Committee held a hearing to assess the Regional Center Program.<sup>26</sup>

## **Widow Penalty in Permanent Admissions**

A provision of P.L. 111-83 (§568(c)) repeals the so-called “widow penalty.” This penalty was the termination of a pending immigrant relative petition for an alien spouse and of a related, pending application for LPR adjustment of status or an immigrant visa, upon the death of the U.S. citizen spouse, when the couple had been married less than two years. In cases where only the first half of the process had been completed (*i.e.*, the immigrant relative petition had been approved), the petition could be revoked where the related application for LPR status had not been granted or where the alien spouse had not been admitted into the United States on an immigrant visa.<sup>27</sup> This penalty resulted from USCIS’s interpretation of the statutory definition of “immediate relative.” USCIS interpreted the definition to mean that an alien spouse ceased to be married to a U.S. citizen and to be an “immediate relative” of a U.S. citizen upon the death of the U.S. citizen spouse.<sup>28</sup> Where a couple had been married at least two years at the time of a U.S. citizen’s death, however, USCIS converted the immigrant petition filed by a U.S. citizen for an alien spouse into a self-petition by the surviving spouse.<sup>29</sup>

The new law enables the surviving alien spouse of a deceased U.S. citizen to self-petition for an immigrant visa/adjustment to LPR status regardless of the length of the marriage as long as the petition is filed within two years of the U.S. citizen’s death and the surviving alien spouse has not remarried. As of the date of this report, USCIS has not issued new regulations, although it has issued revised guidelines implementing the new law.<sup>30</sup> USCIS may extend its practice of converting any pending petitions filed by a U.S. citizen spouse before death into a self-petition for the surviving alien spouse, to include the petitions of previously ineligible alien spouses who were married for less than two years. An alien whose U.S. citizen spouse died before P.L. 111-83 was enacted, and who was previously ineligible to self-petition because of the widow penalty, can

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<sup>26</sup> U.S. Congress, Senate Committee on the Judiciary, *Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program*, hearing on S.Amdt. 1407 to H.R. 2892, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., July 22, 2009.

<sup>27</sup> 8 C.F.R. §205.1(a)(3) provides for automatic revocation where the beneficiary of an immigrant petition for an immediate relative has not begun his/her journey to the United States (on an immigrant visa) or has not received a final decision on an LPR application. So if the U.S. citizen spouse died while the alien spouse was in transit to the United States, the surviving spouse would be admitted as an immigrant into the United States upon arrival.

<sup>28</sup> INA §201(b)(2)(A)(i) defines “immediate relative” (codified at 8 U.S.C. §1151(b)(2)(A)(i)). Under 8 C.F.R. §205.1(a)(3)(i)(C)(2), an immigrant petition for an alien spouse is automatically revoked upon the death of the U.S. citizen, but may be reinstated at the discretion of the agency if the alien spouse requests humanitarian reinstatement of the immigrant petition and has a qualified relative who agrees to be a substitute sponsor.

<sup>29</sup> See 8 C.F.R. §§204.2(i)(1)(iv), 205.1(a)(3)(i)(C)(1).

<sup>30</sup> Donald Neufeld, Acting Associate Director, Office of Domestic Operations *et al.*, USCIS, *Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children [REVISED]*, December 2, 2009, <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/Widower120209.pdf>. This memorandum amended the relevant sections of the USCIS Adjudicator’s Field Manual (AFM) and established procedures for handling petitions with pending administrative or judicial proceedings as well as petitions that had already been denied administratively and were not the subject of pending litigation.

now self-petition as long as the petition is filed within two years of October 28, 2009,<sup>31</sup> and the alien has not remarried.

In addition to repealing the widow penalty, the new law (P.L. 111-83, §568(d)) provides similar relief for surviving relatives who were the beneficiaries or derivative beneficiaries of pending or approved petitions for an immigrant visa/adjustment to LPR status immediately before the death of the relative who was the petitioner or primary beneficiary of the petition. Instead of being terminated or revoked, petitions will be adjudicated despite the death of the relative, as long as the surviving relatives resided in the United States at the time of the death and have continued to reside in the United States. Surviving relatives include the spouse, parent, or minor child of a U.S. citizen; other relatives of a U.S. citizen/LPR eligible for family preference immigrant visas; dependents/derivative beneficiaries of an employment-based immigrant; refugee or asylee relatives; and a dependent/derivative beneficiary of a T (trafficking) or U (crime victim) visa non-immigrant.

Prior to the repeal of the widow penalty, several lawsuits, including a class-action lawsuit, challenged the widow penalty on the grounds that, under the INA, a widowed, surviving spouse still qualifies as an immediate relative for the purpose of an immigrant petition and related, pending LPR/visa application, and that therefore the petition should not be terminated.<sup>32</sup> Some of these lawsuits reportedly are still pending.<sup>33</sup> The class action lawsuit has been settled in accordance with new USCIS guidelines implementing the new statute, essentially ordering plaintiffs claims to be processed in accordance with the new statute, as implemented under USCIS guidelines. Class members whose petitions/applications have been denied may have their cases reopened without filing a new application or formal motion with the accompanying fees.<sup>34</sup> Class members are persons with petitions/applications pending or adjudicated by administrative or judicial action in the Ninth Circuit or persons who were residing in the Ninth Circuit at the time of the citizen spouse's death.<sup>35</sup>

The new statute resolves the issue presented in a petition for certiorari arising in the Third Circuit that was pending before the U.S. Supreme Court.<sup>36</sup> The issue presented by the petition was whether a non-citizen spouse is automatically disqualified from classification as a "spouse" under the "immediate relative" provision of the INA,<sup>37</sup> notwithstanding a duly filed petition by the citizen spouse, where the couple was married for less than two years at the time of the citizen's

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<sup>31</sup> This is the date on which P.L. 111-83 was enacted, eliminating the widow penalty. P.L. 111-83, §583(c)(2)(B)(i).

<sup>32</sup> *Hootkins v. Napolitano*, No. CV 07-5696 CAS (MANx), 2009 U.S. Dist LEXIS 3243, 2009 WL 57031 (C.D. Cal. Jan. 6, 2009) (order granting plaintiffs' motion for class certification of a class within the Ninth Circuit, but not nationwide). The court granted and denied in part the plaintiffs' claims, *Hootkins v. Napolitano*, 645 F. Supp. 2d 856 (C.D. Cal. 2009). The court granted relief to plaintiffs residing in the Ninth and Sixth Circuits, applying the precedents in those circuits. However, it denied relief to plaintiffs residing outside those circuits, specifically denying relief to plaintiffs residing in the Third Circuit, in accordance with that circuit's precedent. See *infra* note 38, discussing circuit split. An appeal in the *Hootkins* case was pending in the Ninth Circuit before a settlement was negotiated.

<sup>33</sup> See, e.g., litigation described at <http://www.ssad.org/litigation.html>.

<sup>34</sup> Final Order and Judgment Approving Class Action Settlement, *Hootkins v. Napolitano*, No. CV 07-5696 CAS (MANx) (April 5, 2010). See generally *Hootkins* settlement agreement information and, in particular, Stipulation And Agreement Of Settlement And Release ¶14, at the USCIS website, <http://www.uscis.gov>. Materials also available at <http://www.ssad.org/litigation/classaction.html>.

<sup>35</sup> *Id.*

<sup>36</sup> *Robinson v. Napolitano*, No. 09-94, petition for cert. filed (U.S. July 23, 2009), dismissed December 23, 2009.

<sup>37</sup> INA §201(b)(2)(A)(i), codified as amended at 8 U.S.C. § 1151(b)(2)(A)(i).

death and immigration officials had not yet acted on the petition.<sup>38</sup> The new statute reportedly enabled the petitioner in this case to obtain lawful permanent resident status.<sup>39</sup> The petition was subsequently dismissed upon the joint motion of all parties to the case, pursuant to the Court rules.<sup>40</sup>

In response to the new statute and the litigation, USCIS has issued (1) a memorandum providing updated guidance for processing immigrant/LPR petitions of surviving spouses of deceased U.S. citizens and amending the USCIS Adjudicator's Field Manual, (2) a fact sheet, and (3) an updated petition form.<sup>41</sup>

## Waivers for Foreign Medical Graduates

Foreign medical graduates (FMGs) may enter the United States on J-1 nonimmigrant visas in order to receive graduate medical education and training. Such FMGs must return to their home countries after completing their education or training for at least two years before they can apply for certain other nonimmigrant visas or LPR status, unless they are granted a waiver of the foreign residency requirement. States are able to request waivers on behalf of FMGs under a temporary program, known as the Conrad State Program. Established by a 1994 law, this program initially applied to aliens who acquired J status before June 1, 1996. The Conrad State Program has been extended several times, most recently by P.L. 111-83 (§568(b)), which makes the program applicable to aliens who acquire J before September 30, 2012.

## Alien Smuggling

Some contend that the smuggling of aliens into the United States constitutes a significant risk to national security and public safety. Because smugglers facilitate the illegal entry of persons into the United States, some maintain that terrorists may use existing smuggling routes and organizations to enter undetected. In addition to generating billions of dollars in revenue for criminal enterprises, alien smuggling can lead to other collateral crimes.<sup>42</sup> The main alien smuggling statute (INA §274) delineates the criminal penalties, asset seizure rules, and prima facie evidentiary requirements for smuggling offenses.

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<sup>38</sup> Four federal appellate courts had ruled on the issue, with the U.S. Court of Appeals for the Third Circuit ruling differently than the First, Sixth, and Ninth Circuits, thus creating a circuit split that could have been resolved by the U.S. Supreme Court. The Third Circuit had held that a surviving spouse did not qualify as an immediate relative spouse where the U.S. citizen spouse died before the couple had been married two years. The other circuits had held that the surviving spouse still qualified as an immediate relative and that the immigrant petition should not be terminated or revoked. *Lockhart v. Napolitano*, \_\_\_ F.3d \_\_\_, (6<sup>th</sup> Cir. Jul. 20, 2009); *Taing v. Napolitano*, 567 F.3d 19 (1<sup>st</sup> Cir. 2009); *Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009), *petition for cert. filed* (U.S. Jul. 23, 2009) (No.09-94); *Freeman v. Gonzales*, 444 F.3d 1031 (9<sup>th</sup> Cir. 2006).

<sup>39</sup> Kirk Semple, *A Stamp in a Passport Ends a Long Struggle for Residency*, N.Y. Times, Dec. 22, 2009, available at <http://cityroom.blogs.nytimes.com/2009/12/22/widow-post/?emc=eta1>.

<sup>40</sup> *Robinson v. Napolitano*, No. 09-94, petition for cert. filed (U.S. July 23, 2009), dismissed December 23, 2009, see docket available at <http://origin.www.supremecourtus.gov/docket/09-94.htm>.

<sup>41</sup> See Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children [REVISED], supra note 30. The Fact Sheet, **USCIS To Process Applications of Widow(er)s of Deceased U.S. Citizens**; the updated description of green card procedures for widows/widowers; and the revised form are available at the USCIS website, <http://www.uscis.gov>. Materials also available through <http://www.ssad.org>.

<sup>42</sup>See, for example, U.S. Government Accountability Office, *Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response*, GAO-05-305, May 27, 2005, <http://www.gao.gov>.

The Alien Smuggling and Terrorism Prevention Act of 2009 (H.R. 1029), which has been passed by the House, would amend the alien smuggling provisions of both the INA and Title 18 of the U.S. Code. It would essentially expand the scope of activity prohibited under INA §274. It would, for example, add a provision to INA §274 that would affirmatively assert extraterritorial jurisdiction for acts of alien smuggling that occur outside the United States. This proposal would also heighten the criminal penalties for various smuggling offenses. Furthermore, this bill would alter §2237 of Title 18 of the U.S. Code by increasing the penalties for individuals piloting a maritime vessel who fail to heed the orders of a federal law enforcement officer if the offense is committed in the course of violating INA §274 or certain other provisions related to human trafficking. The SAVE Act (H.R. 3308, S. 1505) would essentially make the same amendments to both the INA and Title 18 of the U.S. Code as H.R. 1029.

## **Other Legislation Receiving Action**

### **Temporary Professional Specialty (H-1B) Workers**

P.L. 111-5 includes a provision (Division A, Title XVI, §1611) that requires H-1B employers receiving Troubled Asset Relief Program (TARP) funding to comply with the more rigorous labor market rules of H-1B dependent companies.<sup>43</sup> This provision is scheduled to sunset in February 2011.

### **Victims of Violence and Trafficking**

The Improving Assistance to Domestic and Sexual Violence Victims Act of 2009 (S. 327) would amend the Violence Against Women Act of 1994 and the Omnibus Crime Control and Safe Streets Act of 1968 to expand victim protections. As reported by the Senate Judiciary Committee, the bill includes provisions related to T nonimmigrants (victims of severe forms of trafficking) and U nonimmigrants (individuals who have experienced substantial physical or mental abuse as a result of having been victims of certain criminal activities).<sup>44</sup>

### **Refugee and Asylee Adjustments of Status**

After living in the United States for one year, aliens admitted as refugees are required to and aliens granted asylum may apply for adjustment to LPR status. Under INA §209, one year of physical presence in the United States is a requirement for asylees and refugees to adjust status. The Refugee Opportunity Act (S. 2960), as reported by the Senate Judiciary Committee, would amend the INA to add an exception to the one-year physical presence requirement for adjustment of status for certain refugees and asylees who are employed overseas for up to one year by the U.S. government or a U.S. government contractor. These aliens would need to meet the other requirements for adjustment to LPR status.

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<sup>43</sup> For further discussion, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.

<sup>44</sup> For information on immigration-related trafficking issues, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Liana Sun Wyler and Alison Siskin.

## **LPR Return of Talent Program**

The Return of Talent Act (S. 2974), as reported by the Senate Judiciary Committee, would amend the INA to establish a program to enable LPRs to temporarily return to their countries of origin to take part in post-conflict or natural disaster reconstruction activities or to temporarily provide medical services in a needy country, as specified. During the temporary absence, the LPR would be considered to be physically present and residing in the United States for naturalization purposes. This program would be capped at 1,000 aliens annually.

## **Immigration Relief for Immediate Family of Victims of September 11, 2001**

The September 11 Family Humanitarian Relief and Patriotism Act of 2009 (H.R. 3290), as ordered reported by the House Judiciary Committee, would enable certain spouses and children of aliens who died as a direct result of the September 11 terrorist attacks to adjust to LPR status. These adjustments of status would not count against the numerical limits in the INA.

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