



# Immigration Legislation and Issues in the 112<sup>th</sup> Congress

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## Summary

Immigration has not been a front-burner issue for the 112<sup>th</sup> Congress. During the past two years, however, Congress has taken legislative action on some measures containing provisions on a range of immigration-related topics. The Consolidated Appropriations Act, 2012 (P.L. 112-74) contains provisions on border security, visa security, tourist visas, and refugees. It also includes limited language on other issues, such as employment eligibility verification and the H-2B temporary worker visa. P.L. 112-176 extends the authorization for four immigration programs (EB-5 visa program, E-Verify, Conrad State program, and special immigrant religious worker program) for three years, until September 30, 2015. P.L. 112-205 provides statutory authority for the Border Enforcement Security Task Force (BEST) initiative. P.L. 112-58 concerns military service-based immigration benefits; P.L. 112-127 concerns border tunnels. P.L. 112-130 makes Israeli nationals eligible for E-2 treaty investor visas.

Both the House and the Senate have passed different bills (H.R. 4970, S. 1925) to reauthorize the Violence Against Women Act (VAWA). In addition, the House has passed bills that would make changes to permanent employment-based and family-based admissions (H.R. 3012); create new visa categories for prospective LPRs with graduate degrees in science, technology, engineering, or mathematics (STEM) fields (H.R. 6429); and reauthorize a temporary worker category for foreign nurses (H.R. 1933). It has also passed legislation with provisions on border security at and between ports of entry (H.R. 1299) and student visa reform (H.R. 3120).

In other action on immigration-related legislation, the House Judiciary Committee has reported or ordered reported bills on electronic employment eligibility verification (H.R. 2885), immigrant detention (H.R. 1932), visa security (H.R. 1741), and the diversity visa (H.R. 704). House and Senate Committees have considered different DHS authorization bills. The Senate Homeland Security and Governmental Affairs Committee has reported S. 1546, and the House Homeland Security Committee has ordered reported H.R. 3116. Bills on victims of trafficking have been reported by the Senate Judiciary Committee (S. 1301) and ordered reported by the House Foreign Affairs Committee (H.R. 2830). The House Natural Resources Committee has reported bills addressing border enforcement activities on federal lands (H.R. 1505, which also was included as an amendment to H.R. 3116) and foreign residents of the Commonwealth of the Northern Mariana Islands (CNMI), a U.S. territory in the Pacific (H.R. 1466). In addition, House and Senate committees and subcommittees have held hearings on a number of immigration-related issues.

This report discusses immigration-related issues that have received legislative action or are of significant congressional interest in the 112<sup>th</sup> Congress. Department of Homeland Security (DHS) appropriations are addressed in CRS Report R41982, *Homeland Security Department: FY2012 Appropriations*, and, for the most part, are not covered here.

# Contents

Introduction.....	1
Border Security.....	1
At Ports of Entry.....	2
Entry-Exit Screening.....	2
Between Ports of Entry.....	3
Border Patrol Staffing.....	4
Border Surveillance and Technology.....	4
Tactical Infrastructure and Border Fencing.....	5
Border Enforcement Security Task Force (BEST) Initiative.....	5
Activities on Federal Lands and Waivers of Environmental Laws.....	6
Border Enforcement Metrics.....	7
Electronic Employment Eligibility Verification.....	7
Preemption of State and Local Employment-Verification Measures.....	9
Immigrant Detention.....	10
Visa Security.....	11
Per-Country Limits on Permanent Admissions.....	12
Science, Technology, Engineering, and Mathematics (STEM) Visas.....	14
Diversity Visas.....	14
Foreign Temporary Nurses.....	15
U.S. Refugee Program.....	16
Other Issues and Legislation.....	17
Secure Communities and the 287(g) Program.....	17
State and Local Immigration Measures.....	18
Limits on Executive Branch Discretion.....	19
Immigration Provisions of the Violence Against Women Act.....	20
Victims of Trafficking.....	21
Immigrant Investors.....	22
Special Immigrant Program for Religious Workers.....	23
Tourist Visas.....	23
Foreign Temporary Agricultural Workers.....	24
Unauthorized Students.....	25
Birthright Citizenship.....	26
Commonwealth of the Northern Mariana Islands.....	27
Professional Foreign Temporary Employees.....	28
Other Legislation Receiving Action.....	29
Military Service-Based Immigration Benefits.....	29
E-2 Visas for Israeli Nationals.....	29
Student Visas.....	30
Visa Waiver Program.....	30
Waivers for Foreign Medical Graduates.....	31
Wage Requirements for H-2B Temporary Employment.....	31

## **Contacts**

Author Contact Information..... 32

## **Introduction**

Immigration has not been a front-burner issue for the 112<sup>th</sup> Congress. Unlike in some past years, there has been little discussion in this Congress of comprehensive immigration reform legislation, which typically has encompassed border security, employment eligibility verification, temporary worker programs, permanent admissions, and unauthorized aliens, among other issues.

The 112<sup>th</sup> Congress has, however, taken legislative action on some immigration-related measures. The Consolidated Appropriations Act, 2012 (P.L. 112-74) contains provisions on border security, visa security, tourist visas, refugees, and other immigration issues. P.L. 112-176 extends the authorization for four immigration programs (EB-5 visa program, E-Verify, Conrad State program, and special immigrant religious worker program) for three years, until September 30, 2015. Legislation has also been enacted on military service-based immigration benefits (P.L. 112-58), border tunnels (P.L. 112-127), the Border Enforcement Security Task Force (BEST) initiative (P.L. 112-205), and E-2 treaty investor visas (P.L. 112-130).

In addition, the House and Senate have each passed other immigration-related legislation. Both houses have passed different bills (H.R. 4970, S. 1925) to reauthorize the Violence Against Women Act (VAWA). The House has passed bills that would reform permanent employment-based and family-based admissions (H.R. 3012); create new visa categories for prospective LPRs with graduate degrees in science, technology, engineering, or mathematics (STEM) fields (H.R. 6429); and reauthorize the H-1C temporary worker category for nurses (H.R. 1933). It also has passed legislation on border security at and between ports of entry (H.R. 1299) and student visa reform (H.R. 3120). Among the other subjects of immigration-related legislation before the 112<sup>th</sup> Congress are victims of trafficking (S. 1301, H.R. 2830), immigrant detention (H.R. 1932), and diversity visas (H.R. 704).

This report discusses these and other immigration-related issues that have received legislative action or are of significant congressional interest in the 112<sup>th</sup> Congress. Department of Homeland Security (DHS) appropriations are addressed in a separate report<sup>1</sup> and, for the most part, are not covered here.

## **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 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.

At ports of entry, the U.S. Customs and Border Protection (CBP) Office of Field Operations is responsible for conducting immigration, customs, and agricultural inspections of travelers seeking admission to the United States. Between POEs, CBP's border patrol is responsible for enforcing

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<sup>1</sup> CRS Report R41982, *Homeland Security Department: FY2012 Appropriations*, coordinated by (name redacted) and (name redacted).

U.S. immigration law and other federal laws along the border and for preventing unlawful entries into the United States. In the course of discharging its duties, the border patrol patrols 8,500 miles of U.S. international borders with Mexico and Canada and the coastal waters around Florida and Puerto Rico.

Border security has been an important issue for the last several Congresses, with much of the debate focused on whether DHS has sufficient resources to fulfill its border security mission. Some Members of Congress have argued that Congress should not consider other reforms to the immigration system, including any proposed legalization provisions or changes to the family- or employment-based visas systems, until DHS is better able to secure the border. With apprehensions of unauthorized immigrants at a 42-year low, administration officials have argued that significant progress has been made at the border, though continued investments are needed.<sup>2</sup> The following discussion focuses on key border-related provisions that have been considered by the 112<sup>th</sup> Congress and may be considered in the future concerning staffing and enforcement at and between POEs, including on federal lands.

## **At Ports of Entry**

The overarching immigration challenge at POEs is to prevent terrorists and unauthorized migrants from being admitted to the United States, while also facilitating legal migration flows. This challenge translates into policy questions about funding for various CBP screening and enforcement programs, including the number of CBP officers at POEs, which has grown from 17,881 in FY2005 to 21,186 in FY2012. Three hundred additional CBP officers were funded during the FY2012 appropriations process, and several other bills that would address additional POE staffing increases have been considered in the 112<sup>th</sup> Congress. For example, the Secure Border Act of 2012 (H.R. 1299), passed by the House in May 2012, would direct DHS to develop metrics to measure security at ports of entry and to estimate the required number of CBP officers at POEs. The Department of Homeland Security Authorization (DHSA) Act of 2011 (S. 1546), as reported by the Senate Homeland Security and Governmental Affairs Committee, would direct DHS to develop a workforce staffing model and to ensure that CBP has instituted an outbound inspections program at land, air, and maritime ports of entry.

## **Entry-Exit Screening**

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208, Div. C), as amended, requires DHS to maintain an automated, biometric entry-exit system that collects a record of arrival and departure for every alien arriving to and departing from the United States. The U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program is responsible for collecting and storing biometric and biographic data about foreign visitors to the United States, and for providing biometric and biographic information about U.S. visitors to other components within DHS and other federal agencies.<sup>3</sup>

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<sup>2</sup> See, for example, Testimony of Department of Homeland Security Secretary Janet Napolitano, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Securing the Border: Progress at the Federal Level*, hearing, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 4, 2011.

<sup>3</sup> Biometric data include fingerprints and digital photographs, and may be used to confirm an individual's identity against previously recorded biometric data (i.e., by matching fingerprints); biographic data include names, birthdates, and other identifying information and can be connected to an individual's case history and immigration records, but (continued...)

US-VISIT, which is active at all POEs, has been a subject of debate because it does not collect biometric data from all visitors entering the United States and does not collect any biometric data from visitors leaving the United States, potentially weakening its effectiveness as an enforcement tool.<sup>4</sup> (CBP collects biographic data from all visitors lawfully admitted to the United States; from certain people exiting through land ports; and, based on carrier information, from all passengers departing through air and sea ports.) Department of Homeland Security Authorization bills, as ordered to be reported by the House Homeland Security Committee (H.R. 3116) and as reported by the Senate Homeland Security and Governmental Affairs Committee (S. 1546), would require DHS to develop a plan for implementing a biometric exit system.<sup>5</sup>

## **Between Ports of Entry**

Between ports of entry, congressional attention in recent years has focused on border patrol staffing, surveillance technology, and fencing and other physical barriers.<sup>6</sup> One effect of increased border enforcement has been that smugglers increasingly have turned to cross-border tunnels, particularly for moving illegal drugs into the United States. To combat this trend, Congress passed the Border Tunnel Prevention Act of 2012 (P.L. 112-127), which creates a new federal crime relating to the unlawful construction or use of an underground tunnel between the United States and another country, and requires DHS to submit annual reports to Congress on the investigations of unlawful tunnels between Mexico and the United States.

A new border patrol national strategy published in May 2012 continues to emphasize staffing, surveillance, and infrastructure, with an increased focus on intelligence and risk management to allocate enforcement resources efficiently.<sup>7</sup> House and Senate FY2012 DHS authorization<sup>8</sup> and appropriations<sup>9</sup> bills include related provisions, as discussed below.

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cannot confirm the identity of arriving and departing passengers. For background information on US-VISIT see archived CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and (name redacted).

<sup>4</sup> See, for example, U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *From the 9/11 Hijackers to Amine el-Khalifi: Terrorists and the Visa Overstay Problem*, hearing, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., March 6, 2012. With some exceptions, all non-U.S. citizens arriving at U.S. air, land, and sea ports of entry are required to submit biometric data through the US-VISIT program. Among the exceptions are Canadians applying for admission to the United States as B-1/B-2 visitors for business or pleasure and LPRs arriving at land ports of entry who are not referred to secondary inspection.

<sup>5</sup> S. 1546, Section 505, as reported; H.R. 3116 was amended during Committee mark up to direct DHS to provide Congress with a plan to implement a biometric exit system within two years, or to provide Congress with a plan to implement an alternative program within two years.

<sup>6</sup> For a fuller discussion of border enforcement between ports of entry, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by (name redacted).

<sup>7</sup> U.S. Border Patrol, *2012-2016 Border Patrol Strategic Plan*, Washington, DC, May 2012, [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/bp\\_strat\\_plan/bp\\_strat\\_plan.ctt/bp\\_strat\\_plan.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/bp_strat_plan/bp_strat_plan.ctt/bp_strat_plan.pdf); also see U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Measuring Border Security: Border Patrol's New Strategic Plan and the Path Forward*, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 8, 2012.

<sup>8</sup> H.R. 3116, as ordered reported by the House Homeland Security Committee; S. 1546, as reported by the Senate Homeland Security Committee.

<sup>9</sup> H.R. 5855, as passed by the House; S. 3216, as reported by the Senate Appropriations Committee.

In other related legislative action, Congress has passed the Jaime Zapata Border Enforcement Security Task Force Act (P.L. 112-205), which provides statutory authority for the Border Enforcement Security Task Force. Congress may also take additional action on proposals to broaden DHS authority to conduct enforcement activities on federal lands and waive environmental and other regulations and to address concerns about metrics for measuring border security.

## **Border Patrol Staffing**

With ongoing support from Congress, DHS has substantially increased border patrol staffing along the Southwest and northern borders over the last decade, with total border patrol staffing increasing from 9,821 in FY2001 to 21,370 for FY2012, including 1,000 border patrol agents added by the FY2010 Border Security Supplemental (P.L. 111-230) and funded again in P.L. 112-74.<sup>10</sup> A number of bills have been introduced in the 112<sup>th</sup> Congress to authorize further growth in the border patrol and/or to direct the Department of Defense (DOD) to deploy National Guard troops to the Southwest border.<sup>11</sup>

## **Border Surveillance and Technology**

For several years, Congress has supported a series of DHS programs aimed at achieving “border situational awareness.” Through these programs, CBP agents track movement in border areas, identify and classify (i.e., prioritize) illegal entries, correlate entries with the positions of nearby agents, and use this information to make tactical interdiction decisions. DHS’s primary effort to provide such an integrated surveillance system between 2006 and 2011 was known as SBInet. But cost overruns, technical problems, and scheduling delays led the agency to terminate the SBInet contract in January 2011 in favor of a new Arizona Border Technology Plan that relies on a broader mix of off-the-shelf surveillance technology and continued investment in SBInet-style integrated surveillance towers.<sup>12</sup>

The new plan has been a subject of some scrutiny. P.L. 112-74 provides \$400 million for border security fencing and technology for FY2012, \$128 million less than the President’s request,<sup>13</sup> and both chambers have recommended additional cuts in FY2013.<sup>14</sup> A pair of recent U.S. Government

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<sup>10</sup> U.S. Border Patrol, *Border Patrol Agent Staffing by Fiscal Year*, [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/staffing\\_92\\_10.ctt/staffing\\_92\\_10.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/staffing_92_10.ctt/staffing_92_10.pdf); U.S. Department of Homeland Security, Congressional Budget Justification FY2012, p. CBP S&E – 66.

<sup>11</sup> See, for example, National Guard Border Enforcement Act (H.R. 152), Secure America Through Verification and Enforcement (SAVE) Act of 2011 (H.R. 2000), and Border Security Enforcement Act of 2011 (BSEA, H.R. 1507/S. 803). Also see S. 1546, which would direct DHS to develop a bi-annual workforce staffing plan.

<sup>12</sup> Testimony of U.S. Customs and Border Protection Assistant Commissioner Mark S. Borkowski, U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Strengthening the Border: Finding the Right Mix of Personnel, Infrastructure and Technology*, hearing, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 15, 2011.

<sup>13</sup> See U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2012*, report to accompany H.R. 2017, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 26, 2011, H.Rept. 112-91, pp. 41-43; and U.S. Congress, Senate Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2012*, report to accompany H.R. 2017, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., September 7, 2011, S.Rept. 112-74, pp. 43-44.

<sup>14</sup> See U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2013*, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 23, 2012, H.Rept. 112-492, p. 45; U.S. Congress, Senate Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2013*, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 22, 2012, S.Rept. 112-169, p. 42.



Accountability Office (GAO) reviews of the Arizona Technology plan found that DHS has not documented the analysis justifying the specific technologies being proposed; has not defined metrics to assess the plan; and has not developed robust life-cycle cost estimates for the plan.<sup>15</sup>

Recent Congresses have also supported DHS's use of surveillance aircraft, including unmanned aerial systems (UAS). Several bills in the current Congress would authorize additional collaboration between DHS and DOD on aerial surveillance,<sup>16</sup> though questions have been raised about privacy and safety concerns with respect to increased domestic use of UAS.<sup>17</sup>

## **Tactical Infrastructure and Border Fencing**

Since Congress passed the Secure Fence Act of 2006, DHS has installed over 400 miles of pedestrian fencing and vehicle barriers along the Southwest border. As of August 2012, DHS reports a total of 352 miles of pedestrian fencing and 299 miles of vehicle fencing in place along the Southwest border, along with 36 miles of secondary fencing. This represents 99.8% of the 652 miles of total fencing and barriers that CBP plans to install,<sup>18</sup> and 93.1% of the 700 miles of fencing and barriers specified by Congress in the Consolidated Appropriations Act, 2008 (P.L. 110-161, Div. E).<sup>19</sup> Several pieces of legislation introduced in the 112<sup>th</sup> Congress would authorize or require additional fencing and barriers.<sup>20</sup>

## **Border Enforcement Security Task Force (BEST) Initiative**

Since 2006, DHS's U.S. Immigration and Customs Enforcement (ICE) has partnered with federal, state, local, and foreign law enforcement in a pilot program known as the Border Enforcement Security Task Force (BEST) initiative. The BEST initiative fosters coordination among law enforcement officials in border communities through a series of multi-agency teams developed to identify, disrupt, and dismantle criminal organizations posing significant threats to border security. The Jaime Zapata Border Enforcement Security Task Force Act (H.R. 915), as passed by the House in May 2012, would provide statutory authority for the BEST program and would authorize program funding for FY2012-FY2016. The act also would require annual reports on the program's effectiveness. In August 2012, the Senate Homeland Security and Governmental Affairs Committee reported H.R. 915 without the funding authorization (given that the initiative is already operational) and without authority to fund foreign law enforcement agencies. In

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<sup>15</sup> U.S. Government Accountability Office, *2012 Annual Report: Opportunities to Reduce Duplication, Overlap and Fragmentation, Achieve Savings, and Enhance Revenue*, GAO-12-342SP, February 2012, p. 299, <http://www.gao.gov/assets/590/588818.pdf>; U.S. Government Accountability Office, *Arizona Border Surveillance Technology: More Information on Plans and Costs Is Needed Before Proceeding*, GAO-12-22, November 4, 2011, <http://www.gao.gov/products/GAO-12-22>.

<sup>16</sup> See, for example, BSEA of 2011 (H.R. 1507/S. 803) and SAVE Act (H.R. 2000).

<sup>17</sup> See, for example, U.S. Congress, House Committee on Homeland Security, Subcommittee on Oversight, Investigations, and Management, *Using Unmanned Aerial Systems within the Homeland: Security Game Changer?*, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 19, 2012.

<sup>18</sup> CBP Office of Legislative Affairs communication with CRS, August 6, 2012.

<sup>19</sup> Section 564 of P.L. 110-161 requires DHS to install not less than 700 miles of border fencing, but also specifies that DHS is not required to install fencing in any location in which "the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location."

<sup>20</sup> See, for example, Unlawful Border Entry Prevention Act of 2011 (H.R. 1091) and BSEA (H.R. 1507/S. 803).

November, the House approved a motion to suspend the rules and agree to the Senate version of the bill; the President signed the bill into law (P.L. 112-205) on December 7, 2012.

## **Activities on Federal Lands and Waivers of Environmental Laws**

Over 800 miles of the Southwest border and over 1,000 miles of the northern border consist of national forests and parks and other federal lands.<sup>21</sup> The 112<sup>th</sup> Congress has held hearings on challenges associated with immigration enforcement on federal lands.<sup>22</sup> Historically, these challenges have included jurisdictional conflicts between the border patrol and agencies within the Departments of the Interior (DOI) and Agriculture (USDA) that are responsible for law enforcement on federal borderlands,<sup>23</sup> and lawsuits filed under environmental laws and regulations that have blocked or delayed fence construction.

Administration officials report that recent memoranda of agreement among DHS, DOI, and USDA have led to greater cooperation with respect to immigration enforcement on federal lands,<sup>24</sup> and legislation passed between 1996 and 2006 gave DHS broad authority to waive environmental statutes and other requirements that might otherwise delay construction.<sup>25</sup> Nonetheless, a recent GAO report recommended that additional steps be taken to improve information sharing and interagency communication.<sup>26</sup> Legislation has been introduced in the 112<sup>th</sup> Congress that would waive application of certain environmental laws to border enforcement activities on lands near the border and would allow DHS to conduct certain security activities on federal lands without permission from DOI or USDA, including routine motorized patrols and deployment of temporary tactical infrastructure.<sup>27</sup>

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<sup>21</sup> For a fuller discussion of immigration enforcement on federal lands and other issues related to federal lands, see CRS Report R42346, *Federal Land Ownership: Overview and Data*, by (name redacted), (name redacted), and (name redacted).

<sup>22</sup> See, for example, U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests and Public Lands and House Committee on Oversight and Government Reform, Subcommittee on National Security, Homeland Defense, and Foreign Operations, *The Border: Are Environmental Laws and Regulation Impeding Security and Harming the Environment?*, hearing, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., April 15, 2011.

<sup>23</sup> See, for example, U.S. Government Accountability Office (GAO), *Border Security: Additional Actions Needed to Better Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, GAO-11-177, November 2010, <http://www.gao.gov/new.items/d11177.pdf>.

<sup>24</sup> Testimony of U.S. Customs and Border Protection Deputy Chief Ronald Vitiello, U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *The Border: Are Environmental Laws and Regulations Impeding Security and Harming the Environment?*, hearing, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., April 15, 2011.

<sup>25</sup> §102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208, Div. C); §102 of the REAL ID Act of 2005 (P.L. 109-13, Div. B).

<sup>26</sup> U.S. Government Accountability Office (GAO), *Border Security: Additional Actions Needed to Better Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, GAO-11-177, November 2010, <http://www.gao.gov/new.items/d11177.pdf>.

<sup>27</sup> See, for example, National Security and Federal Lands Protection Act (H.R. 1505), BSEA (H.R. 1507/S. 803), and House version of the DHSA of 2011 (H.R. 3116).

## **Border Enforcement Metrics**

Obama Administration officials have described the Southwest border as being “more secure than ever,”<sup>28</sup> but some Members of Congress question the Administration’s metrics for measuring border security. For many years, DHS and its predecessor, the Immigration and Naturalization Service, have used apprehensions by the border patrol as a proxy measure of illegal entries (and thus, of border security), but analysts consider apprehensions an imperfect measure.<sup>29</sup> CBP plans to begin using a new “border conditions index” in 2013; the index reportedly will include apprehensions as one of several elements in an effort to more comprehensively describe security, trade and tourism conditions, and quality of life on the border.<sup>30</sup>

Some Members of Congress have expressed skepticism about the border conditions index.<sup>31</sup> Members also have expressed frustration that DHS in 2010 stopped publishing annual estimates of the number of miles of the border under “operational” or “effective” control.<sup>32</sup> The Border Security Act of 2012 (H.R. 1299), as passed by the House, would direct DHS to either (1) develop a strategy for achieving operational control of the border as defined in section two of the Secure Fence Act of 2006 (P.L. 109-367) as “the prevention of all unlawful entries into the United States,” or (2) work with a Department of Energy National Laboratory to develop a new metric for border security between ports of entry. H.R. 1299 also would direct DHS to develop metrics to measure the effectiveness of border security at ports of entry.

## **Electronic Employment Eligibility Verification**

Employment eligibility verification has received attention in the 112<sup>th</sup> Congress. Several related bills have been introduced, including the Legal Workforce Act (H.R. 2885), which was ordered reported by the House Judiciary Committee in September 2011. An earlier version of this bill (H.R. 2164) was the subject of a hearing by the House Judiciary Committee’s Subcommittee on Immigration Policy and Enforcement. Employment eligibility verification and the related issue of worksite enforcement are widely viewed as essential components of a strategy to reduce unauthorized immigration.

Under §274A of the Immigration and Nationality Act (INA),<sup>33</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

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<sup>28</sup> See, for example, U.S. Department of Homeland Security (DHS), “Secretary Napolitano’s Remarks on Smart Effective Border Security and Immigration Enforcement,” press release, October 5, 2011, <http://www.dhs.gov/ynews/speeches/20111005-napolitano-remarks-border-strategy-and-immigration-enforcement.shtm>.

<sup>29</sup> See CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*.

<sup>30</sup> CBP Office of Congressional Affairs, December 22, 2011

<sup>31</sup> See, for example, U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Measuring Border Security: Border Patrol’s New Strategic Plan and the Path Forward*, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 8, 2012.

<sup>32</sup> *Ibid.* CBP published such estimates in FY2005-FY2009 annual financial reports. DHS defined the border as being under effective control if the border patrol could detect, respond, and interdict cross-border illegal activity. See CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*.

<sup>33</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.

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” and is the responsibility of DHS’s ICE.

While all employers must meet the I-9 requirements, they may also elect to participate in the E-Verify electronic employment eligibility verification system.<sup>34</sup> 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>35</sup> E-Verify is a temporary program. P.L. 112-176 extends its authorization for three years, until September 30, 2015.

Several bills introduced in the 112<sup>th</sup> Congress would variously make E-Verify permanent, require its use for verification of new hires, and permit or require its use for verification of previously hired workers.<sup>36</sup> Other bills would authorize a new electronic employment eligibility verification system to replace E-Verify.<sup>37</sup> Discussion of proposals to expand electronic employment eligibility verification requirements—whether through E-Verify or another system—have raised some concerns about labor shortages in sectors of the economy that are known to employ large numbers of unauthorized aliens, such as agriculture. (Legislative proposals on foreign agricultural workers are discussed in a subsequent section.)

Among the bills that would authorize a new electronic verification system is H.R. 2885, which has been ordered reported by the House Judiciary Committee. The new system would be modeled on E-Verify and the authorizing language would be added to INA §274A. Under H.R. 2885, as ordered reported, the new verification system would be mandatory for all employers in cases of hiring, recruitment, and referral. The verification requirements with respect to hiring would be phased in by employer size, with the largest employers required to participate six months after the date of enactment and the smallest employers required to participate two years after the date of enactment. The requirements with respect to recruitment and referral would apply one year after the date of enactment. The bill would also provide for mandatory reverification of workers with limited work authorization. These reverification requirements would be phased in on the same schedule as the hiring requirements. Special provisions would apply to agriculture; the hiring, recruitment and referral, and reverification provisions would not apply to agricultural workers until three years after the date of enactment. As introduced, the bill also provided that seasonal agricultural workers returning to work for a previous employer would not be treated as new hires for verification purposes, but an amendment to strike this language was agreed to at the markup.

H.R. 2885, as ordered reported, would require or permit electronic verification in ways not currently allowed under E-Verify. Verification of previously hired individuals would be mandatory in some cases (such as, federal, state, and local government employees), while employers could verify current employees on a voluntary basis beginning 30 days after

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<sup>34</sup> While E-Verify is primarily a voluntary program, there are some mandatory participants. See CRS Report R40446, *Electronic Employment Eligibility Verification*, by (name redacted).

<sup>35</sup> For additional information on E-Verify, see *Ibid.*

<sup>36</sup> See, for example, Jobs Recovery by Ensuring a Legal American Workforce Act of 2011 (H.R. 800) and Accountability Through Electronic Verification Act (S. 1196).

<sup>37</sup> See, for example, Illegal Immigration Enforcement and Social Security Protection Act of 2011 (H.R. 98), Electronic Employment Eligibility Verification and Illegal Immigration Control Act (H.R. 483), and Legal Workforce Act (H.R. 2885).

enactment. Under H.R. 2885, employers could conduct electronic verification after making an offer of employment but before hiring, and could condition a job offer on final verification under the system.

H.R. 2885, as ordered reported by the House Judiciary Committee, would increase existing civil and criminal penalties for violations of INA §274A provisions on unauthorized employment. It would also establish new penalties, including for individuals who knowingly provide social security numbers or DHS identification numbers that belong to others and for employers who submit such numbers for verification knowing that they belong to someone other than the subject of the query. Lastly, the bill would direct the Secretary of Homeland Security, in consultation with the Social Security Commissioner and the Director of the National Institute of Standards and Technology, to establish a biometric employment eligibility verification pilot program that would be voluntary for employers.

P.L. 112-74 contains some E-Verify-related language. For example, a provision in Division D of the bill on DHS appropriations (§530) states that none of the funds made available to the DHS Office of the Secretary and Executive Management under the act may be used for any new hires not checked through E-Verify.

## **Preemption of State and Local Employment-Verification Measures**

Some states and localities have sought to deter unauthorized aliens from entering or remaining within their jurisdiction by requiring employers to use E-Verify and/or imposing sanctions on employers found to have hired unauthorized aliens.<sup>38</sup> In its May 26, 2011, decision in *Chamber of Commerce v. Whiting*, the Supreme Court held that one such measure, the Legal Arizona Workers Act, was not preempted by federal immigration law.<sup>39</sup> Some lower courts had previously found that similar measures were preempted, in part, because of the burdens that employers operating in multiple states would bear in complying with different state laws.<sup>40</sup> Some business groups have responded to the Supreme Court's decision in *Whiting* by lobbying for a single national electronic verification regime.<sup>41</sup> H.R. 2885, as ordered reported by the House Judiciary Committee, would establish such a regime, expressly preempting state and local E-Verify measures, along with other measures "relat[ing] to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens." However, H.R. 2885 would allow states and localities to revoke the business or other licenses of employers who fail to electronically verify the employment eligibility of their workers.

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<sup>38</sup> See CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by (name redacted).

<sup>39</sup> — U.S.—, 131 S. Ct. 1968 (2011). However, *Whiting* should not be construed to mean that all state and local E-Verify measures are permissible. See, for example, *Louisiana Assoc. Gen. Contractors, Inc. v. Jindal*, No. 605912, Judgment, 19<sup>th</sup> Judicial District Court, Parish of East Baton Rouge, December 20, 2011 (finding that a Louisiana law that required employers to use E-Verify to verify the work authorization of all employees was preempted by federal rules and regulations governing E-Verify); *Positronic Indus., Inc. v. City of Springfield*, No. 12-3243-CV-S-RED, Order Granting Preliminary Injunction (W.D. Mo., May 10, 2012) (preliminarily enjoining enforcement of a municipal ordinance that would have fined employers who did not use E-Verify).

<sup>40</sup> See, for example, *Lozano v. City of Hazleton*, 620 F.3d 170, 213 (3d Cir. 2010), *vacated and remanded by* 131 S. Ct. 2958 (2011).

<sup>41</sup> See, for example, "Uptick in State Immigration Laws May Force Congress to Act, Speakers Say," 5 *Workplace Immigration Report* 381 (July 25, 2011).

Other bills introduced in the 112<sup>th</sup> Congress would expressly preempt state and local measures prohibiting employers from verifying new hires or current employees through E-Verify.<sup>42</sup> Illinois had enacted such a prohibition, but a reviewing court found it to be preempted by federal immigration law.<sup>43</sup>

## **Immigrant Detention**

Certain removable aliens cannot be removed from the United States because they do not have travel documents permitting them to return to their country of origin or because the aliens are more likely than not to be subject to torture if returned to the country of origin.<sup>44</sup> The U.S. Supreme Court ruled in *Zadvydas v. Davis* (2001)<sup>45</sup> that such aliens could only be detained following an order of removal for so long as is “reasonably necessary to bring about that alien’s removal from the United States,” but that the INA “does not permit indefinite detention.” The Court found that the presumptively reasonable limit for the post-removal-period detention is six months, but indicated that continued detention may be warranted when the policy is limited to specially dangerous individuals, such as terrorists or those in other special circumstances, and strong procedural protections are in place.

Following the Court’s ruling in *Zadvydas*, new regulations were issued to comply with the Court’s holding.<sup>46</sup> ICE generally can only detain an alien beyond the initial 90-day removal period if ICE determines that the alien is likely to abscond if released or that the alien poses a danger to the public, or if ICE is likely to obtain travel documents for the alien in the near future.<sup>47</sup> Under regulation, ICE may not detain an alien for more than six months unless the alien’s removal is likely in the reasonably foreseeable future, except in special circumstances, including aliens who are detained on account of (1) having a highly contagious disease that is a threat to public safety, (2) serious adverse foreign policy consequences of release, (3) security or terrorism concerns, or (4) being considered specially dangerous due to having committed one or more crimes of violence and having a mental condition making it likely that the alien will commit acts of violence in the future.<sup>48</sup>

The House Judiciary Committee has reported the Keep Our Communities Safe Act of 2011 (H.R. 1932). Among other provisions, the bill would allow DHS to detain indefinitely, subject to six-month reviews, an alien under orders of removal who cannot be removed if (1) there is a significant likelihood that the alien will be removed in the reasonably foreseeable future; (2) the alien would have been removed but for the alien’s refusal to cooperate with the DHS Secretary’s identification and removal efforts; (3) the alien has a highly contagious disease that poses a public safety threat; (4) release would have serious adverse foreign policy consequences; (5) release

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<sup>42</sup> See, for example, Accountability Through Electronic Verification Act (S. 1196).

<sup>43</sup> *United States v. Illinois*, No. 07-3261, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill., March 12, 2009).

<sup>44</sup> For a discussion of the Convention Against Torture, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by (name redacted).

<sup>45</sup> 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

<sup>46</sup> See 8 C.F.R. §§241.13-14 and discussion at 66 *Federal Register* 56967 (November 14, 2001) of procedures for determining whether there is no significant likelihood of removal in the reasonably foreseeable future and for determining whether an alien is subject to special circumstances justifying continued detention.

<sup>47</sup> 8 C.F.R. §241.4.

<sup>48</sup> *Ibid.*

would threaten national security; (6) release would threaten the safety of the community, and the alien has either been convicted of one or more aggravated felonies or other designated crimes or been convicted of one or more crimes of violence and due to a mental condition or personality disorder is likely to engage in future acts of violence; or (7) release would threaten the safety of the community, and the alien has been convicted of at least one aggravated felony. The bill would limit habeas corpus reviews<sup>49</sup> of such detention and related actions or decisions to the U.S. District Court for the District of Columbia. Also, the bill would permit unlimited detention of certain aliens during pending removal proceedings.

## Visa Security

The Department of State (DOS) and DHS both play key roles in administering the law and policies on the admission of aliens to the United States. Although DOS's Consular Affairs is responsible for issuing visas, USCIS in DHS approves immigrant petitions, ICE in DHS operates the Visa Security Program in selected U.S. embassies abroad, and CBP in DHS inspects all people who enter the United States.

All foreign nationals seeking visas must undergo admissibility reviews performed by DOS consular officers abroad. These reviews are intended to ensure that applicants are not ineligible for admission to the United States under the grounds for inadmissibility spelled out in INA §212. These criteria include health-related grounds, criminal history, security and terrorist concerns, public charge (e.g., indigence), and previous immigration offenses.<sup>50</sup>

Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. Records of all visa applications are now automated in the CCD, with some records dating back to the mid-1990s. Since February 2001, the CCD has stored photographs of all visa applicants in electronic form, and the CCD has stored 10-finger scans since 2007. In addition to indicating the outcome of any prior visa application and comments by consular officers, the system links to other security databases to flag problems that may have an impact on the issuance of the visa.

Congress is particularly interested in the Visa Security Program (VSP), which the ICE Office of International Affairs (OIA) operates in certain high-risk consular posts. As described by DHS, the VSP sends ICE special agents with expertise in immigration law and counterterrorism to foreign consulates, where they perform visa security activities that complement the DOS visa screening process. According to DHS, the VSP provides law enforcement resources not available to consular officers. One of the major tasks for VSP agents is to screen visa applicants to determine their risk profiles.

GAO released an evaluation of the VSP in 2011 that identified several shortcomings. In addition to noting that tensions exist between consular officials and VSP agents, GAO was especially concerned about the lack of standard operating procedures for VSP agents across the various posts. Most importantly, perhaps, GAO stated that ICE has not expanded VSP to key high-risk posts despite well-publicized plans to do so.<sup>51</sup>

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<sup>49</sup> Habeas corpus review is a legal action through which a person's detention is reviewed for legality.

<sup>50</sup> CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by (name redacted).

<sup>51</sup> U.S. Government Accountability Office (GAO), *Border Security: DHS's Visa Security Program Needs to Improve* (continued...)

Despite the VSP's implementation problems, some observers maintain that DHS should play a larger role in visa security. In their view, DOS retains too much power over visa issuances, and consular officers are too concerned about facilitating tourism and trade to thoroughly scrutinize visa applicants. From this perspective, greater responsibility should be given to the VSP, which does not have competing priorities of diplomatic relations and reciprocity with foreign governments, and may subject visa applications to greater scrutiny.<sup>52</sup>

Along these lines, the House Committee on the Judiciary has reported the Secure Visas Act (H.R. 1741) that would give the Secretary of Homeland Security "exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. §1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa."

In addition to these broader concerns about visa security, Congress has also addressed matters of exclusion and inadmissibility. More specifically, Division I, §4505(a)(3)(A), of P.L. 112-74 instructs the Secretary of State not to issue a visa to any alien who has willfully supported the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), the United Self-Defense Forces of Colombia (AUC), or other illegal armed group. The ban also includes aliens who have committed, ordered, incited, assisted, or otherwise participated in the commission of a violation of human rights in Colombia. The law states that the denial must be based upon credible evidence and allows the Secretary to grant waivers on a case-by-case basis if deemed necessary to support the peace process or for urgent humanitarian reasons.

## **Per-Country Limits on Permanent Admissions**

The INA specifies that each year, countries are held to a numerical limit of 7% of the total worldwide level of U.S. immigrant admissions,<sup>53</sup> known as the per-country limit.<sup>54</sup> This provision was intended to prevent any single country from dominating admissions to the United States. The per-country level is not a "quota" set aside for individual countries, as each country in the world could not receive 7% of the overall limit.

The per-country limit applies to legal permanent resident (LPR) admissions under the four family-sponsored admission classes and the five employment-based admissions classes.<sup>55</sup> The limit applies to total annual admissions under the preference system, as well as within the

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(...continued)

*Performance Evaluation and Better Address Visa Risk Worldwide*, GAO-11-315, March 31, 2011, <http://www.gao.gov/products/GAO-11-315>.

<sup>52</sup> For additional information, see CRS Report R41093, *Visa Security Policy: Roles of the Departments of State and Homeland Security*, by (name redacted).

<sup>53</sup> The INA provides for a permanent annual worldwide level of 675,000 LPRs, but this level is flexible and certain categories of LPRs are permitted to exceed the limits. INA §201; 8 U.S.C. §1151.

<sup>54</sup> INA §202; 8 U.S.C. §1152.

<sup>55</sup> The INA stipulates a floor of 226,000 for the four family-sponsored preference categories. The numerical limit for the five employment-based preference categories is 140,000. For more information on these limits and their exceptions, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, and CRS Report R42048, *Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings*, both by (name redacted).



employment-based and family-based preference categories.<sup>56</sup> In recent years, two countries that send large numbers of skilled immigrants to the United States, India and China, have been oversubscribed in the 2<sup>nd</sup> and 3<sup>rd</sup> employment-based preference categories for persons with advanced degrees and professional and skilled workers, respectively. To be “oversubscribed” means that more visa petitioners are eligible and approved for the preference category than the number allocated for that year, in that category, from that country. As a result, petitioners and their employers applying under these employment-sponsored categories could expect to wait several years to receive a visa.

Even as U.S. unemployment levels remain high, some employers assert that they continue to need the “best and the brightest” workers, regardless of their country of birth, to remain competitive in a worldwide market and to keep their firms in the United States. While support for increasing employment-based immigration may be dampened by current economic conditions, proponents argue it is essential for economic growth.<sup>57</sup> Those opposing increases in employment-based LPRs assert that there is no compelling evidence of labor shortages and cite the rate of unemployment across various occupations and labor markets.<sup>58</sup> They argue that recruiting foreign workers while unemployment levels remain high would have a deleterious effect on salaries, compensation, and working conditions of U.S. workers.<sup>59</sup>

The Fairness for High-Skilled Immigrants Act (H.R. 3012), as reported by the House Judiciary Committee and passed by the House, would amend the INA to eliminate per-country ceilings on permanent employment-based admissions and increase the per-country ceiling on permanent family-based admissions from 7% to 15%. The bill would not alter the total number of LPRs admitted under the family-based and employment-based preference systems. These changes in H.R. 3012 would be instituted over four years. On November 29, 2011, the House passed H.R. 3012 by a vote of 389-15.<sup>60</sup> In the Senate, a similar bill (S. 1983) was introduced in December 2011.<sup>61</sup>

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<sup>56</sup> However, there are circumstances when the employment based per-country limits may be exceeded. For example, the American Competitiveness in the Twenty-First Century Act of 2000 (P.L. 106-313) enabled the per-country ceilings for employment-based immigrants to be surpassed for individual countries that are oversubscribed as long as visas are available within the worldwide limit for employment-based preferences. As a result, employment-based preference allocations may exceed the 7% per-country limit within the overall level of 140,000 annually.

<sup>57</sup> Many of the comprehensive immigration reform bills since 2000 would have increased the total number of employment-based immigrants. Some would have revised the employment-based preference categories. A merit-based point system was also considered. For further background, see Appendix D in CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*.

<sup>58</sup> For further discussion, see U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *STEM the Tide: Should America Try to Prevent an Exodus of Foreign Graduates of U.S. Universities with Advanced Science Degrees?*, hearing, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 5, 2011; and CRS Report R40080, *Job Loss and Infrastructure Job Creation Spending During the Recession*, by (name redacted).

<sup>59</sup> For further discussion, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by (name redacted); and archived CRS Report 95-408, *Immigration: The Effects on Low-Skilled and High-Skilled Native-Born Workers*, by (name redacted).

<sup>60</sup> See CRS Report R42048, *Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings*, by (name redacted).

<sup>61</sup> Other related Senate bills include S. 1857 and S. 1866.

## Science, Technology, Engineering, and Mathematics (STEM) Visas

Rather than change the per-country limits on permanent admissions to address the issue of oversubscribed countries in the employment-based system, as discussed in the preceding section, some policymakers have proposed creating a separate visa category for prospective LPRs with graduate degrees in science, technology, engineering, or mathematics (STEM) fields. By pulling these individuals out of the numerically limited employment-based categories, this option would free up visas for the other prospective LPRs waiting in the employment-based queue.

The STEM Jobs Act of 2012 (H.R. 6429) would eliminate the Diversity Visa Lottery and re-allocate those 55,000 Diversity Visas to two new categories it would create for foreign STEM graduates who have job offers in related fields. In September 2012, H.R. 6429 failed to receive the necessary two-thirds vote to pass under suspension of the rules. The legislation garnered 257 yeas and 158 nays, with bipartisan support as well as bipartisan opposition.

The House passed a revised version of H.R. 6429 in November 2012. There are several differences between this version and the one the House considered in September. Perhaps the most significant addition to H.R. 6429 in the House-passed version is the expansion of the nonimmigrant visa for family members with approved or pending LPR petitions, commonly known as the “V” visa.<sup>62</sup> The House-passed bill would allow the spouses and minor children of LPRs to live in the United States on V visas (without employment authorization) while they wait for their LPR petitions or visa applications to be adjudicated or their visas to become available. Immediate relatives of LPRs would become eligible for V visas after a one-year wait.<sup>63</sup>

## Diversity Visas

The purpose of the diversity immigrant visa lottery is, as the name suggests, to encourage legal immigration from countries other than the major sending countries of current immigrants to the United States. Current law weights the allocation of immigrant visas heavily toward aliens with close family in the United States and, to a lesser extent, toward aliens who meet particular employment needs. The diversity immigrant category was added to the INA by the Immigration Act of 1990 (P.L. 101-649) to stimulate “new seed” immigration (i.e., to foster new, more varied migration from other parts of the world).

To be eligible for a diversity visa, the INA requires that the foreign national must have a high school education or the equivalent, or two years of experience in an occupation that requires at least two years of training or experience. The foreign national or the foreign national’s spouse must be a native of one of the countries listed as a foreign state qualified for the diversity visa lottery. Diversity lottery winners, like all other aliens wishing to come to the United States, must undergo reviews performed by DOS consular officers abroad and DHS immigration officers upon

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<sup>62</sup> For further background on the “V” visa, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by (name redacted), p.8.

<sup>63</sup> See CRS Report R42530, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, by (name redacted).

entry to the United States. These reviews are intended to ensure that the aliens are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the INA.

The diversity lottery currently makes 50,000 visas available annually to natives of countries that accounted for fewer than 50,000 immigrant admissions in total over the preceding five years. The formula for allocating visas is based upon the statutory specifications; visas are divided among six global geographic regions according to the relative populations of the regions.

Some argue that the diversity lottery should be eliminated and its visas used for backlog reduction in other visa categories. Supporters of the diversity visa, however, argue that the diversity visa provides “new seed” immigrants for an immigration system weighted disproportionately toward family-based immigrants from a handful of countries. Critics of the diversity lottery warn that it is vulnerable to fraud and misuse, and potentially an avenue for terrorists, citing the difficulties of performing background checks in many of the countries eligible for the diversity lottery. Supporters respond that background checks for criminal and national security matters are performed on all prospective immigrants seeking to come to the United States, including those winning diversity visas. The House Committee on the Judiciary has reported H.R. 704, the Security and Fairness Enhancement for America Act of 2011 (SAFE for America Act), which would amend the INA to eliminate the diversity visa lottery.<sup>64</sup> On November 30, 2012, the House passed H.R. 6429 (see preceding section), which includes the elimination of the Diversity Visa Lottery.

## **Foreign Temporary Nurses**

The H-1C nonimmigrant (temporary admission) category for nurses was established by a 1999 law (P.L. 106-95) and reauthorized in 2006 (P.L. 109-423) as a short-term solution for nursing shortages in a limited number of medically underserved areas. Facilities have to be approved to employ H-1C nurses.<sup>65</sup> The authority to issue H-1C visas expired on December 20, 2009. Previously, the law allowed for the issuance of 500 nonimmigrant visas to nurses each year, with the proviso that the number of visas issued annually for employment in smaller states could not exceed 25 and the number issued for employment in larger states could not exceed 50. The law limited an H-1C nurse’s stay to three years.

H.R. 1933, as passed by the House, would reauthorize the H-1C category for three years. It also would amend the law to allow for the issuance of 300 nonimmigrant visas to nurses each year, and to limit an H-1C nurse’s initial stay to three years with the opportunity to renew the visa for another three years (i.e., a total stay of six years). The bill would provide H-1C nurses with portability by allowing an H-1C nurse to begin employment at another hospital approved to employ aliens in this visa category while the petition filed by the new employer is being adjudicated. Employment at the new facility would end if the petition is denied.

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<sup>64</sup> For additional information, see CRS Report R41747, *Diversity Immigrant Visa Lottery Issues*, by (name redacted).

<sup>65</sup> There are 14 hospitals approved to hire H-1C nurses.

## **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>66</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 handles overseas processing of refugees, and DHS/USCIS makes final determinations about eligibility for admission.<sup>67</sup> After one year in refugee status in the United States, refugees are required to apply to adjust to LPR status.

Several bills have been introduced in the 112<sup>th</sup> Congress that would make various changes to the U.S. refugee program. Some of these measures propose to reform the refugee admissions process, such as by authorizing the President to designate groups of aliens of humanitarian concern that, absent countervailing factors, would be considered refugees for purposes of admission and by changing existing INA provisions regarding the admission of refugee spouses and children.<sup>68</sup> Other proposals focus more directly on the resettlement assistance program for refugees and other designated groups administered by the Department of Health and Human Services' Office of Refugee Resettlement (HHS/ORR).<sup>69</sup>

Special legislative provisions facilitate relief for certain refugee groups. The "Lautenberg amendment," first enacted in 1989, required 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 provided 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," to direct the Attorney General to establish categories of Iranian religious minorities who may qualify for refugee status under the Lautenberg amendment's reduced evidentiary standard. The Lautenberg amendment was regularly extended through FY2010. For FY2011, Congress extended the amendment only until June 1, 2011, in P.L. 112-10 (Div. B, §2121(m)), and it temporarily terminated on that date. It was re-enacted for FY2012 by P.L. 112-74 (Div. I, §7034(r)). FY2013 extension language is included in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2013 (S. 3241), as reported by the Senate Appropriations Committee.

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<sup>66</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>67</sup> For additional information on the U.S. refugee program, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by (name redacted).

<sup>68</sup> See, for example, Refugee Protection Act of 2011 (H.R. 2185/S. 1202).

<sup>69</sup> See, for example, Domestic Refugee Resettlement Reform and Modernization Act of 2011 (H.R. 1475).

## Other Issues and Legislation

### Secure Communities and the 287(g) Program

Two of ICE's main programs designed to identify and remove certain aliens from within the United States are Secure Communities and the 287(g) program.<sup>70</sup> Under Secure Communities, when participating law enforcement agencies submit the fingerprints of arrestees to the Federal Bureau of Investigation (FBI) for criminal background checks, the fingerprints are also checked against DHS databases. When an arrestee appears to be subject to removal, local ICE officials may issue an immigration detainer to request that the arresting jurisdiction hold the person for up to 48 hours and transfer them to ICE custody so that ICE may initiate removal proceedings.

ICE views Secure Communities as an efficient way to carry out the agency's mandate to identify aliens who have been convicted of crimes and to make the removal of these criminal aliens an enforcement priority. Secure Communities was active in 3,074 of 3,181 (97%) law enforcement jurisdictions as of August 1, 2012, and the Obama Administration plans to expand the program to every law enforcement jurisdiction in the country by the end of 2013.<sup>71</sup> Congress has consistently met DHS funding requests for Secure Communities and some Members support the program. The program has generated controversy, however, because some aliens identified and removed through Secure Communities have not been convicted of "serious" crimes or any criminal offense and because of concerns that state and local involvement in enforcing federal immigration law could lead to racial profiling or strain police-community relations.<sup>72</sup> Partly for these reasons, some states and localities have sought to limit their participation in Secure Communities in various ways; but after initially describing the program as optional, DHS has taken the position since 2010 that communities may not "opt out" of the program.<sup>73</sup>

Under the 287(g) program, state and local law enforcement agencies may enter into agreements with ICE to allow state and local law enforcement officials to receive ICE training and to perform certain immigration enforcement activities under ICE supervision. Some 287(g) programs ("jail screening" programs) allow local law enforcement officials to conduct migration screening as persons are being booked into prisons or jails. Other 287(g) programs ("task force" programs) allow them to conduct migration screening during the course of their regular police work outside of the booking process.

As with Secure Communities, some people have raised concerns that the 287(g) program may promote racial profiling and/or strain police-community relations. And a 2009 GAO report found several problems with DHS' oversight of the program.<sup>74</sup> The program expanded from 3 to 55

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<sup>70</sup> For a fuller discussion of these and other interior enforcement programs see CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

<sup>71</sup> U.S. Immigration and Customs Enforcement, *Secure Communities: Activated Jurisdictions*, August 1, 2012, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

<sup>72</sup> See U.S. Department of Homeland Security Advisory Council, "Task Force on Secure Communities Findings and Recommendations," September 2011.

<sup>73</sup> See, for example, Tara Bahrapour, "Immigration Authority Terminates Secure Communities Agreements," *The Washington Post*, August 7, 2011, [http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx80I\\_story.html](http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx80I_story.html); Letter from John Morton, Director, U.S. Immigration and Customs Enforcement, to Gerald Brown, Governor of California, August 5, 2011.

<sup>74</sup> U.S. Government Accountability Office, *Better Controls Needed over Program Authorizing State and Local* (continued...)

jurisdictions between 2006 and 2008, but only 8 jurisdictions were added in 2009-2011, according to ICE data.<sup>75</sup> The Administration's FY2013 budget proposes to reduce 287(g) funding by 25% (\$17 million) by discontinuing certain 287(g) programs in jurisdictions in which Secure Communities has been activated and by not supporting new 287(g) task force programs.

Legislation related to Secure Communities and the 287(g) program has been introduced in the 112<sup>th</sup> Congress. In line with efforts to expand Secure Communities, several bills would deny funding for various Department of Justice programs, including the State Criminal Alien Assistance Program (discussed below), to jurisdictions that do not participate fully in Secure Communities.<sup>76</sup> Other proposed legislation would respond to concerns about whether state and local participation in Secure Communities leads to racial profiling or interferes with police-community relations.<sup>77</sup>

Congress also may address proposed changes to Secure Communities and 287(g) funding through the appropriations process. For example, the Senate-reported S. 3216 would provide the same reduced level of FY2013 funding for the 287(g) program as the FY2013 budget request, while the House-passed H.R. 5855 would fund the program for FY2013 at the higher FY2012 level and would prohibit any funds made available under the act from being used to terminate a 287(g) agreement that is in existence on the date of enactment of the act.

## **State and Local Immigration Measures**

In recent years, several states and localities have sought to deter the presence of unauthorized aliens within their jurisdictions through a variety of enforcement measures, with Arizona's S.B. 1070 being perhaps the most notable example.<sup>78</sup> Many of these measures have been challenged in federal court, with litigation generally focusing on whether these enactments are consistent with federal immigration law. The Supreme Court recently held in *Arizona v. United States* that some aspects of S.B. 1070 that were intended to deter unlawfully present aliens from remaining in the state were preempted by federal law, but the Court also held that federal law did not facially preempt S.B. 1070's requirement that Arizona police run immigration status checks on persons stopped for state or local offenses.<sup>79</sup> Several other state and local measures intended to deter the presence of unlawfully present aliens (e.g., requiring schools to determine whether enrolling students were born outside the United States or are the children of unauthorized aliens;

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*Enforcement of Federal Immigration Laws*, GAO-09-109, January 30, 2009, <http://www.gao.gov/products/GAO-09-109>.

<sup>75</sup> U.S. Immigration and Customs Enforcement, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, Washington, DC, September 2, 2011, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa>.

<sup>76</sup> See, for example, Enforce the Law for Sanctuary Cities Act (H.R. 1134), Strengthening Our Commitment to Legal Immigration and America's Security Act (S. 332), and H.R. 1764/S. 169.

<sup>77</sup> See, for example, Traffic Stops Along the Border Statistics Study Act of 2011 (H.R. 228).

<sup>78</sup> See, generally, CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by (name redacted) and (name redacted).

<sup>79</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012). Specifically, the Court struck down those provisions of S.B. 1070 that imposed criminal sanctions for alien registration violations and upon unauthorized aliens who seek employment in the state, as well as a provision authorizing the warrantless arrest of aliens who have criminal offenses that constitute grounds for removal under federal immigration law.

prohibiting unlawfully present aliens from entering into certain “public records transactions”) are the subject of ongoing litigation.<sup>80</sup>

Given the unsettled state of the law in this area, particularly prior to the Court’s recent decision in *Arizona*, some legislation introduced in the 112<sup>th</sup> Congress would purport to recognize that state and local officers have “inherent authority” to enforce federal immigration law,<sup>81</sup> or conversely, would establish that state and local officers may only enforce federal immigration law pursuant to a written agreement authorized under Section 287(g) of the INA.<sup>82</sup>

## **Limits on Executive Branch Discretion**

The Obama Administration has observed that ICE does not have the funding or capacity to deport every potentially removable alien identified by DHS, especially with the increased number of such aliens identified through Secure Communities. In March and June 2011, ICE published a pair of updated agency guidance memoranda governing the use of prosecutorial discretion during immigration enforcement to ensure that removal resources go to high-priority cases.<sup>83</sup> (These memoranda are often referred to as the “Morton Memos.”) On August 18, 2011, DHS Secretary Janet Napolitano announced in a letter to Senator Richard Durbin and others that the March and June guidance would apply to all DHS immigration agencies.<sup>84</sup> DHS and the Department of Justice (DOJ) also created an interagency working group to review about 300,000 pending removal cases on a case-by-case basis to consider administratively closing certain cases, and to conduct expedited reviews of those cases that are not administratively closed. As of May 29, 2012, about 7% of the cases reviewed by the DHS-DOJ working group reportedly had been identified as candidates for administrative closure.<sup>85</sup>

Some Members of Congress object to the Administration’s prosecutorial discretion policies and have argued that for the Administration explicitly to identify certain types of cases that may be closed amounts to an “administrative amnesty”; others describe prosecutorial discretion as a critical tool to prevent misallocation of agency resources.<sup>86</sup> The Department of Homeland

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<sup>80</sup> See, for example, *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236 (11<sup>th</sup> Cir. 2012); *United States v. Alabama*, 691 F.3d 1269 (11<sup>th</sup> Cir. 2012); *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11<sup>th</sup> Cir. 2012); *United States v. South Carolina*, No. 2:11-cv-2958, 2012 U.S. Dist. LEXIS 170752 (D.S.C., November 15, 2012); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011).

<sup>81</sup> See, for example, CLEAR Act (H.R. 100).

<sup>82</sup> See, for example, Comprehensive Immigration Reform Act (S. 1258).

<sup>83</sup> John Morton, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Department of Homeland Security, Immigration and Customs Enforcement, March 2, 2011, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Department of Homeland Security, Immigration and Customs Enforcement, June 17, 2011, <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>84</sup> Letter from Janet Napolitano, Secretary of Homeland Security, to Senator Richard Durbin, August 18, 2011. Also see Robert Pear, “Few Youths to be Deported in New Policy,” *New York Times*, August 18, 2011, p. A1; Testimony of DHS Secretary Janet Napolitano, at U.S. Congress, Senate Committee on the Judiciary, *Oversight of the Department of Homeland Security*, hearing, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 19, 2011.

<sup>85</sup> Immigration Policy Center, *Prosecutorial Discretion: A Statistical Assessment*, Washington, DC, June 11, 2012, [http://www.immigrationpolicy.org/sites/default/files/docs/pd\\_-\\_a\\_statistical\\_assessment\\_061112.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/pd_-_a_statistical_assessment_061112.pdf).

<sup>86</sup> See, for example, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., (continued...)

Security Appropriations Act, FY2013 (H.R. 5855), as passed by the House, would prohibit any funding made available in the act from being used to “finalize, implement, administer, or enforce the ‘Morton Memos’.” Partly in response to the June 2011 agency guidance, some bills introduced in the 112<sup>th</sup> Congress would tighten the standards for certain forms of executive branch discretion.<sup>87</sup> Other proposed legislation, by contrast, could expand judicial relief from removal by allowing immigration judges to consider factors not currently considered when determining whether to grant cancellation of removal.<sup>88</sup>

## **Immigration Provisions of the Violence Against Women Act**

The INA includes provisions to assist foreign national victims of domestic abuse.<sup>89</sup> These provisions were enacted by Congress with the Immigration Act of 1990 (P.L. 101-649) and the Violence Against Women Act (VAWA) of 1994 (P.L. 103-322, Title IV). They afford benefits to abused foreign nationals and allow them to self-petition for LPR status independently of their U.S. citizen or LPR relatives. Congress reauthorized VAWA in 2000 (VAWA 2000), as part of the larger Victims of Trafficking and Violence Protection Act (TVPA, P.L. 106-386). VAWA 2000 included the Battered Immigrant Women Protection Act of 2000 (Title V). This title created the nonimmigrant U visa for foreign national victims of certain crimes—including domestic abuse—who assist law enforcement. A second VAWA reauthorization in 2005 added protections and expanded eligibility for abused aliens. Program authorizations in VAWA expired in 2011.

The Senate Judiciary Committee has reported S. 1925 to reauthorize VAWA. Title VIII of the reported bill expands some protections under VAWA and the U visa provisions of the INA. The bill would require DHS to conduct additional background checks of U.S. citizen and LPR spouse petitioners who are sponsoring foreign national fiancées or fiancés. It would prohibit international marriage brokers from marketing information about foreign nationals under age 18 and would clearly define penalties for doing so. It also would extend VAWA coverage to derivative children whose self-petitioning parent died during the petition process. In addition, the bill would include “stalking” in the definition of criminal activity covered under the U visa. It would exempt VAWA self-petitioners, U visa petitioners, and battered foreign nationals from being classified as inadmissible for LPR status if their financial circumstances raised concerns about their potentially becoming public charges.<sup>90</sup> It would also temporarily increase the annual numerical cap on the U visa from 10,000 to 15,000.

The House passed a different VAWA reauthorization bill (H.R. 4970) in May 2012. H.R. 4970 contains similar provisions to S. 1925 regarding additional background information requirements, restrictions on marketing by international marriage brokers, and inadmissibility protections for

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(...continued)

October 12, 2011.

<sup>87</sup> See, for example, the Hinder the Administration’s Legalization Temptation (HALT) Act (H.R. 2497) and the Deferred Action Reform Act of 2011 (H.R. 1853). Press releases announcing the introduction of the Hinder the Administration’s Legalization Temptation (HALT) Act explicitly mentioned the June 17, 2011, ICE memorandum on prosecutorial discretion.

<sup>88</sup> See, for example, H.R. 250.

<sup>89</sup> For more information, see CRS Report R42477, *Immigration Provisions of the Violence Against Women Act (VAWA)*, by (name redacted).

<sup>90</sup> “Public charge” refers to an inability to take care of oneself without public assistance. See CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by (name redacted), p. 6.



abused aliens. However, H.R. 4970 also differs from S. 1925 in certain key respects. It would permit DHS to admit credible evidence from alleged abusers for purposes of adjudicating VAWA petitions; require local USCIS District Officers to interview VAWA petitioners in person; and require USCIS to consider law enforcement investigations or prosecutions of alleged abusers, or the lack thereof, as evidence when adjudicating petitions. Petition adjudication would be stayed until pending investigations or prosecutions of abusive conduct alleged by the petitioning alien were concluded. Likewise, the bill would require USCIS to consider previous applications for immigration benefits and their outcomes. H.R. 4970 would limit LPR status eligibility for U visa recipients to victims whose criminal perpetrators were aliens convicted of related crimes and deported to the same country of origin as the victim. The bill would maintain the current annual allocation of U visas at 10,000 and restrict circumstances under which U visa petitions could be certified by law enforcement.

Two sets of concerns for Congress may arise regarding the immigration provisions of the VAWA reauthorization legislation. The first is whether the proposed legislation provides sufficient relief to foreign nationals who are abused by their U.S. citizen or LPR sponsoring relatives. Advocates for battered immigrants suggest that additional provisions are needed to assist this population obtain legal and economic footing. Others have expressed concern over the extent to which these provisions may expand eligibility and incur costs to U.S. taxpayers. The second concern centers on alleged immigration fraud perpetrated through VAWA and the extent to which the reported legislation should address this issue. While some suggest that VAWA provides opportunities for dishonest and enterprising immigrants to circumvent U.S. immigration laws, reliable empirical support for these assertions is limited.

## **Victims of Trafficking**

It is an international and a domestic crime to engage in trafficking in persons (TIP) for the purposes of exploitation. TIP involves violations of labor, public health, and human rights standards. Congress passed the Victims of Trafficking and Violence Protection Act in 2000 and has reauthorized TVPA several times since, most recently in the 110<sup>th</sup> Congress (P.L. 110-457). The current program authorizations expired at the end of FY2011. Domestically, TVPA and its subsequent reauthorizations<sup>91</sup> created two nonimmigrant visa categories: the T visa for victims of severe forms of trafficking and, as discussed above, the U visa for victims of certain specified crimes.<sup>92</sup> The 2000 act and the reauthorizations also created several grant programs to aid trafficking victims and to train law enforcement to combat TIP.

A House reauthorization bill, the Trafficking Victims Protection Reauthorization Act of 2011 (H.R. 2830), has been ordered reported by the House Foreign Affairs Committee.<sup>93</sup> A Senate reauthorization bill, the Trafficking Victims Protection Reauthorization Act of 2011 (S. 1301), has been reported by the Senate Judiciary Committee. H.R. 2830 would extend current authorizations in TVPA and its reauthorizations for FY2012 and FY2013, and would maintain most programs at current authorization levels. S. 1301 would extend current authorizations in TVPA and its

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<sup>91</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457), Trafficking Victims Protection Reauthorization Act of 2005 (P.L. 109-164), and Trafficking Victims Protection Reauthorization Act of 2003 (P.L. 108-193).

<sup>92</sup> For additional information on these visa categories, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by (name redacted) and Liana Sun Wylar

<sup>93</sup> A related bill of the same name with same sponsor was introduced in the House (H.R. 3589) in December 2011.

reauthorizations through FY2015 and would increase authorization levels by \$2 million each for the two main victim service grant programs.

Both H.R. 2830 and S. 1301 would make it a criminal offense to knowingly destroy—or, for a period of more than 48 hours, to conceal, remove, confiscate, or possess—another person’s passport or immigration or personal identification documents in the course of attempting to commit fraud in foreign labor contracting or alien smuggling, or in order to unlawfully maintain, prevent, or restrict the labor or services of the individual. In addition, both bills would make several changes to the INA related to the custody and care of unaccompanied alien children. The Senate bill would further specify that children who receive U status and are in the custody of HHS are eligible for programs and services to the same extent as refugees. S. 1301 would also create a new grant program to provide services to child victims of sex trafficking.

## **Immigrant Investors**

There is currently one immigrant visa category specifically for foreign investors (LPR investors) coming to the United States. LPR investors comprise the fifth preference category under the employment-based immigration system in the INA, and this immigrant visa is commonly referred to as the EB-5 visa.<sup>94</sup> The basic purpose of the LPR investor visa is to benefit the U.S. economy, primarily through employment creation and an influx of foreign capital into the United States. Employment-based LPR investor visas are designated for individuals wishing to develop a new commercial enterprise in the United States. The INA stipulates that for the investor to qualify for the EB-5 visa, the enterprise must employ at least 10 people, the investor must invest \$1 million into the enterprise, and the business and jobs created must be maintained for a minimum of two years.<sup>95</sup>

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>96</sup> The Regional Center Pilot Program is intended to provide a coordinated focus for foreign investment toward specific geographic regions. The majority of EB-5 immigrant investors come through the pilot program. The Regional Center Pilot Program was set to expire on September 30, 2012,<sup>97</sup> but Congress passed P.L. 112-176, reauthorizing the program through September 30, 2015. In addition, there are bills in the 112<sup>th</sup> Congress that would amend the requirements for EB-5 visas<sup>98</sup> or create a new, sixth employment-based preference (EB-6) for sponsored alien entrepreneurs.<sup>99</sup>

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<sup>94</sup> For a discussion of employment-based immigration and the preference categories, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*.

<sup>95</sup> INA §203(b)(5), §216A.

<sup>96</sup> P.L. 102-395, Title VI, §610, October 6, 1992. 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.

<sup>97</sup> P.L. 108-156 extended the program through FY2008, and §548 of P.L. 111-83 extended the authorization through September 30, 2012.

<sup>98</sup> See, for example, Immigration Driving Entrepreneurship in America Act of 2011 (H.R. 2161).

<sup>99</sup> See, for example, StartUp Visa Act of 2011 (H.R. 1114/S. 565).

## Special Immigrant Program for Religious Workers

Special immigrants comprise the fourth preference category under the employment-based immigration system in the INA.<sup>100</sup> Over the years, the special immigrant category has been used to confer immigration benefits on particular groups and there are various subcategories of special immigrants under current law. 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. P.L. 112-176 extends the authorization for the special immigrant religious worker program for three years, until September 30, 2015.

## Tourist Visas

There is interest in Congress in promoting international tourism to the United States.<sup>101</sup> P.L. 112-74 contains provisions intended to help increase tourism. Section 7076 of the act requires the Secretary of State to “implement the necessary steps” (e.g., hiring more consular officers) to reduce the wait time to interview visa applicants in China, Brazil, and India.<sup>102</sup> The provision also gives the Secretary of State the authority to develop and conduct a pilot program for processing B visas (i.e., short-term visas for business or leisure) using videoconferencing technology to conduct interviews of the applicants.<sup>103</sup> The act further requires the Secretary of State to conduct a risk and benefit analysis regarding the extension of the expiration period for a B visa, before requiring an interview. Under current law, an in-person interview by a consular officer is required for visa applicants age 14 through 79 years, with few exceptions. An interview may be waived if the alien is applying for a new visa within 12 months of the old visa’s expiration and certain other conditions are met.<sup>104</sup>

In addition, there have been two hearings related to promoting tourism to the United States. In March 2012, the Senate Judiciary Committee’s Subcommittee on Immigration, Refugees and Border Security held a hearing on promoting international travel to the United States. During the hearing, there were discussions of S. 2233, the Jobs Originated through Launching Travel (JOLT) Act. Among other provisions, the Jolt Act would allow premium processing<sup>105</sup> for B visas and

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<sup>100</sup> For a discussion of employment-based immigration and the preference categories, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*.

<sup>101</sup> See, for example, H.R. 3341.

<sup>102</sup> In FY2010, these three countries accounted for 27% of all visas issued worldwide. CRS analysis of data from, Office of Immigration Statistics, *Yearbook of Immigration Statistics: FY2010*, Department of Homeland Security, Washington, DC, August 2011, [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf).

<sup>103</sup> In P.L. 108-458 (§5301), Congress established detailed requirements for interviews for nonimmigrant visas. (These are codified in INA §222(h)). On January 19, 2012, President Obama signed an Executive Order and announced new initiatives aimed to increase tourism to the United States. See The White House, “We Can’t Wait: President Obama Takes Actions to Increase Travel and Tourism in the United States,” press release, January 19, 2012, <http://www.whitehouse.gov/the-press-office/2012/01/19/we-can-t-wait-president-obama-takes-actions-increase-travel-and-tourism->.

<sup>104</sup> INA §222(h).

<sup>105</sup> Premium processing, which is legislatively mandated, allows aliens to pay an additional fee to have their visa application processed more quickly. Currently, premium processing is offered by USCIS for employment-based visa petitions.

lower the fees charged in select countries during periods of low demand for B visas. As with other bills introduced in this Congress,<sup>106</sup> S. 2233 would also make changes to admissions criteria for the Visa Waiver Program.<sup>107</sup>

In May 2012, the House Judiciary Committee, Subcommittee on Immigration Policy and Enforcement held a hearing on H.R. 3039, the Welcoming Business Travelers and Tourist to America Act of 2011. H.R. 3039 would direct the Secretary of State to: (1) set a visa processing standard of 12 or fewer calendar days at U.S. missions in China, Brazil, and India; and (2) use machine-readable nonimmigrant visa fees to hire a sufficient number of Foreign Service officers and non-career appointment consular officers to maintain such standard. The bill would also require that the Secretary of State conduct a pilot program for processing B visas using videoconferencing technology to conduct interviews of the applicants, and work with other federal agencies to ensure the security of the videoconferencing transmissions. H.R. 3039 would also authorize the Secretary of State to allow for longer visa validity periods for certain countries on a non-reciprocal basis.

## **Foreign Temporary Agricultural Workers**

Under current law, there is one program that provides for the admission of foreign temporary agricultural workers to the United States: the H-2A nonimmigrant visa program. This program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature, provided that U.S. workers are not available. An approved H-2A visa petition is generally valid for an initial period of up to one year. An employer can apply to extend an H-2A worker's stay in increments of up to one year, but an alien's total period of stay as an H-2A worker may not exceed three consecutive years. The H-2A program, which is not subject to a numerical cap, is administered by the Employment and Training Administration (ETA) of the Department of Labor (DOL) and USCIS of DHS. The Obama Administration issued new final rules on the H-2A program in 2010.<sup>108</sup>

An employer who wants to import H-2A workers must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. Prospective H-2A employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state workforce agencies (SWAs) in local, intrastate, and interstate recruitment efforts. In addition, under the "50 percent rule," H-2A employers are required to hire any qualified U.S. worker who applies for a position until 50% of the work contract under which the H-2A workers are employed has elapsed. H-2A employers must pay their H-2A workers and similarly employed U.S. workers the highest of several wage rates (including the adverse effect wage rate) and must provide workers with housing, transportation, and other benefits.<sup>109</sup>

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<sup>106</sup> See, for example, H.R. 3855 and S. 2046.

<sup>107</sup> The Visa Waiver Program (VWP) allows nationals from certain countries to enter the United States for short-term business or leisure without first obtaining a B visa. To be eligible for the VWP a country must meet certain requirements including having a low nonimmigrant refusal rate. For more on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by (name redacted).

<sup>108</sup> For a discussion of these DOL and DHS rules, see CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by (name redacted).

<sup>109</sup> See *Ibid.*

The American Specialty Agriculture Act (H.R. 2847), which was the subject of a hearing by the House Judiciary Committee's Subcommittee on Immigration Policy and Enforcement in September 2011, would establish a new H-2C visa for temporary agricultural workers as an alternative to the H-2A visa. Unlike the H-2A visa, the H-2C visa would not be limited to agricultural labor of a temporary or seasonal nature and could be used to bring in workers to perform non-seasonal agricultural work. An H-2C worker's continuous period of stay would be limited to 10 months, and the program would be capped at 500,000 annually. The new program would be administered by USDA and would not be subject to the same labor certification process as the H-2A visa. Instead, prospective H-2C employers would attest in their applications that they had satisfied applicable recruitment, wage, and benefit requirements, which would differ from those under the H-2A visa. With respect to wages, the H-2C visa would not be subject to the adverse effect wage rate; H-2C employers would be required to pay the higher of the prevailing wage rate or the applicable minimum wage rate. Among other differences between the H-2A program and the proposed H-2C program, the H-2C program would be subject to more limited U.S. worker recruitment requirements; the H-2C program would not have a "50 percent rule;" and H-2C employers could provide housing vouchers instead of housing. Other bills would establish different new foreign agriculture worker programs or would amend the existing H-2A program.<sup>110</sup>

## **Unauthorized Students**

Unauthorized alien students are a subpopulation of the larger unauthorized alien population in the United States.<sup>111</sup> They are able to receive free public education through high school despite their illegal status, but face various obstacles in the pursuit of higher education. More broadly, as unauthorized aliens they are typically unable to work legally and are subject to removal from 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 unauthorized alien students with access to both educational opportunities and immigration status.<sup>112</sup> Typically, DREAM Act bills propose to enable eligible individuals to obtain LPR status in the United States through a two-stage process. In the first stage, aliens meeting specified criteria could go through an immigration procedure known as "cancellation of removal" to obtain a conditional legal status. In the second stage, aliens, after meeting additional requirements, could apply to become full-fledged LPRs. DREAM Act bills also often contain a repeal of a provision of current law (§505 of the Illegal Immigration Reform and Immigrant Responsibility Act) that restricts the ability of states to provide postsecondary educational benefits to unauthorized aliens. Attempts to enact a DREAM Act bill in the 110<sup>th</sup> and 111<sup>th</sup> Congresses were unsuccessful.

DREAM Act bills have once again been introduced in the 112<sup>th</sup> Congress, both as stand-alone measures and as parts of larger bills.<sup>113</sup> In a related development, DHS issued a memorandum in June 2012<sup>114</sup> stating that certain individuals who were brought to the United States as children

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<sup>110</sup> See, for example, Legal Agricultural Workforce Act (H.R. 2895) and HARVEST Act of 2011 (S. 1384).

<sup>111</sup> For information and analysis of the unauthorized alien population generally, see CRS Report R41207, *Unauthorized Aliens in the United States*, by (name redacted).

<sup>112</sup> See CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by (name redacted).

<sup>113</sup> See, for example, H.R. 1842, S. 952, and S. 1258 (Title I, Subtitle A, Part IV). For a discussion of these and other bills introduced in the 112<sup>th</sup> Congress, also see *Ibid.*

<sup>114</sup> U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs (continued...)

and meet other criteria would be considered for relief from removal in the form of deferred action.<sup>115</sup> The eligibility criteria are similar to those included in DREAM Act bills. This deferred action process, however, would not grant eligible individuals a legal immigration status. USCIS began accepting requests for consideration of deferred action for childhood arrivals (DACA) in August 2012.

## **Birthright Citizenship**

Over the past decade or so, concern about illegal immigration has led some legislators to reexamine the long-established tenet of U.S. citizenship that a person, who is born in the United States, and subject to its jurisdiction, is a citizen of the United States regardless of the race, ethnicity, or alienage of the parents. This concept of birthright citizenship is codified in the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution and §301(a) of the INA. The war on terror and the case of Yaser Esam Hamdi, a U.S.-Saudi dual national captured in Afghanistan fighting with Taliban forces, further heightened attention to and interest in restricting automatic birthright citizenship. Although Hamdi's parents were Saudi nationals in the United States on nonimmigrant work visas, Hamdi was a U.S. citizen by right of his birth in Louisiana and arguably entitled to rights not available to foreign enemy combatants.

In the 112<sup>th</sup> Congress, some Members have supported introducing legislation that would revise or reinterpret the Citizenship Clause to address concerns that (1) children born to unauthorized aliens become an avenue to legal status for their parents and siblings when they turn 21 years old, and (2) affluent pregnant foreigners come to the United States on tourist visas to give birth to their children and thus provide them with U.S. citizenship.<sup>116</sup> Several bills have been introduced to amend the Constitution and/or the INA to exclude persons born in the United States from citizenship at birth if their parents were unlawfully present in the United States or were nonimmigrant aliens.<sup>117</sup> In order for a child to be a citizen at birth under these proposals, at least one parent would have to be a U.S. national, an LPR who resides in the United States, or an alien serving on active duty in the U.S. Armed Forces.

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and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. Also see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*.

<sup>115</sup> Deferred action is "a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion." U.S. Department of Homeland Security, "Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities," <http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-low-enforcement-priorities.shtm>. For additional information on prosecutorial discretion and deferred action, see Testimony of (name redacted), Congressional Research Service, at U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?*, hearing, 112<sup>th</sup> Congress, 1<sup>st</sup> sess., October 4, 2011, <http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Wasem.pdf>.

<sup>116</sup> See, for example, Daniel González, "Births by U.S. visitors: A real issue? Data indicate 'birth tourism' is not a widespread practice," *The Arizona Republic*, August 17, 2011, <http://www.azcentral.com/news/articles/2011/08/17/20110817births-by-us-visitors-smaller-issue.html>.

<sup>117</sup> See, for example, H.R. 140, §301 of H.R. 1196, S. 723, and S.J.Res. 2. For further information, see CRS Report RL33079, *Birthright Citizenship Under the 14<sup>th</sup> Amendment of Persons Born in the United States to Alien Parents*, by (name redacted).

Furthermore, some state legislators have voiced support for state legislation that would define state citizenship as excluding persons born to undocumented aliens and for a state compact under which states would issue a different type of birth certificate to such persons. State legislators from Arizona and 13 other states unveiled model legislation in January 2011, intending to set the stage for a U.S. Supreme Court review of the Citizenship Clause.<sup>118</sup> Such legislation has been introduced in some states but has not been enacted.<sup>119</sup>

## **Commonwealth of the Northern Mariana Islands**

Title VII of P.L. 110-229 made the INA applicable to the Commonwealth of the Northern Mariana Islands (CNMI), a U.S. territory in the Pacific. Previously, in accordance with an agreement known as the Covenant<sup>120</sup> that sets forth the relationship between the CNMI and the United States, the CNMI had not been subject to U.S. immigration law. Among other provisions, P.L. 110-229 established a transition period for implementing the INA in the CNMI that began on November 28, 2009. It aimed, in particular, to provide federal regulation and oversight of the admission of foreign workers to the CNMI, including by establishing a CNMI-only transitional worker visa. Aliens who were not eligible for the transitional foreign worker visas were able to remain in the CNMI on entry permits issued under the former territorial immigration laws until the earlier of the original permit expiration date or November 28, 2011.<sup>121</sup>

In the 112<sup>th</sup> Congress, H.R. 1466 would resolve the status of certain long-term foreign residents of the CNMI who otherwise may not be able to remain in the territory after November 28, 2011. The bill was reported by the House Natural Resources Committee, while the House Judiciary Committee discharged it without a report. Some long-term foreign residents of the CNMI have U.S. citizen spouses and children who, for various reasons, are unable to sponsor them for U.S. immigrant status. For example, some have U.S. citizen spouses and adult sons or daughters who are eligible to file a family-based immigrant petition on their behalf; however, due to the economic conditions in the CNMI, many citizens apparently are unable to satisfy the requisite household income level for sponsoring a relative as an immigrant under U.S. law. Other long-term foreign residents were granted permanent resident status in the CNMI under former territorial immigration laws, but this status will no longer be valid under federal immigration law after November 28, 2011. Still other persons who were born in the CNMI were not eligible for U.S. citizenship under the terms of the Covenant. As reported, H.R. 1466 would authorize admission of these various long-term foreign residents, subject to certain requirements, as

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<sup>118</sup> State Rep. Daryl Metcalfe, State Legislators for Legal Immigration, “State Lawmakers Convened in D.C. to Deliver Historic, Nationwide Correction of 14<sup>th</sup> Amendment Misapplication,” January 5, 2011, <http://www.statelegislatorsforlegalimmigration.com/NewsItem.aspx?NewsID=10195>; Associated Press, “Lawmakers in 14 States Craft Bill to Deny Citizenship to ‘Anchor Babies’,” October 19, 2010, listed the 13 other states as Alabama, Delaware, Idaho, Indiana, Michigan, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Texas, and Utah, <http://www.foxnews.com/politics/2010/10/19/lawmakers-states-craft-deny-citizenship-anchor-babies/?test=latestnews>. Some legal scholars think it is unlikely the Supreme Court will hear such a case. Valeria Fernández, “Birthright Citizenship’s Unlikely Road to Supreme Court,” *New America Media*, December 22, 2010, <http://newamericamedia.org/2010/12/birthright-citizenships-unlikely-road-to-supreme-court.php>.

<sup>119</sup> For example, Arizona S.B. 1308, 50<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess., failed to pass in the State Senate on March 17, 2011.

<sup>120</sup> The Covenant To Establish a Commonwealth of the Northern Mariana Islands In Political Union with the United States of America, codified at 48 U.S.C. §1801 note.

<sup>121</sup> The CNMI had issued so-called “umbrella permits,” valid through November 28, 2011, to most persons who had a valid permit expiring earlier.

immigrants to the CNMI only, and provide a path for most of these CNMI-only residents to adjust later to regular LPR status.

On November 23, 2011, USCIS announced that certain prospective beneficiaries of H.R. 1466, namely immediate relatives of U.S. citizens and certain persons born in the CNMI who did not receive U.S. citizenship (also their spouses and unmarried children under 21 years old), would be eligible for parole. Parole would be granted on a case-by-case, discretionary basis and would permit recipients to stay lawfully in the CNMI.<sup>122</sup> On December 9, 2011, USCIS issued guidelines clarifying that a grant of parole based on an application filed on or before January 31, 2012, would be backdated to November 27, 2011. If parole is denied, unlawful presence would accrue after the expiration of the CNMI permit on November 27, 2011. A grant of parole based on an application filed after January 31, 2012, would be valid from the date of grant, so unlawful presence would accrue after the expiration of the CNMI permit on November 27, 2011, until the date for the grant of parole. The maximum grant would be until December 31, 2012. In the meantime, discussions about H.R. 1466 continue, with some critics seeking to remove or limit the fourth group of beneficiaries in the current bill (foreign parents of minor U.S. citizen children) and some supporters pushing to extend the benefits of H.R. 1466 to other groups of long-term foreign workers.<sup>123</sup>

## **Professional Foreign Temporary Employees**

The 112<sup>th</sup> Congress is taking renewed interest in foreign temporary workers engaged in professional occupations. As discussed above, one issue focuses on whether Congress should revise the immigration law to expand temporary visas for professional specialty occupations, particularly for graduates with degrees in STEM fields. Another issue is whether other temporary visa categories, such as those designated for foreign study, cultural exchange, and intracompany transfers, are being misused by employers unable to obtain numerically limited professional workers visas. A corollary to these two issues is whether the wages and working conditions of U.S. workers are adversely affected by the recruitment of temporary foreign workers.<sup>124</sup>

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<sup>122</sup> Parole is a form of immigration relief that does not constitute formal admission into the United States but permits an alien to come to and/or stay in the United States temporarily for humanitarian or public interest reasons. See USCIS guidelines for parole benefitting immediate relatives of U.S. citizens in the CNMI and certain “stateless” persons born in the CNMI, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2ae38614e90d3310VgnVCM100000082ca60aRCRD&vgnnextchannel=4d3314dd2b635210VgnVCM100000082ca60aRCRD>.

<sup>123</sup> Haidee V. Eugenio, “Senate asks changes to Kilili’s HR 1466 for IRs of US citizens,” *Saipan Tribune*, August 2, 2012, <http://www.saipantribune.com/newsstory.aspx?newsID=120866>; Haidee V. Eugenio, “Besides removal of ‘fourth group’ HR 1466 may have other changes,” *Saipan Tribune*, June 8, 2012, <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=119505>; Haidee V. Eugenio, “‘4<sup>th</sup> group’ may be removed from HR 1466,” *Saipan Tribune*, June 7, 2012, <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=119491>.

<sup>124</sup> For related information, see CRS Report CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by (name redacted).



## Other Legislation Receiving Action

### Military Service-Based Immigration Benefits

Since 2003, Congress has enacted a range of measures to facilitate naturalization and maintenance of LPR status for military service members and their families, particularly when such persons are posted abroad. In the 112<sup>th</sup> Congress, several bills have been introduced to address additional issues that have resulted from military service. One of these bills (H.R. 398) has been enacted as P.L. 112-58. The new law extends the time to qualify for non-conditional LPR status to account for military service.

Under the INA, an alien who obtains LPR status through a marriage to a U.S. citizen or LPR that was entered into less than two years earlier is initially granted LPR status on a conditional basis. In order to have the condition removed, both spouses must jointly satisfy certain requirements during specified periods, including appearing together at a personal interview with DHS. P.L. 112-58 tolls the time for meeting such requirements during any period in which either spouse is a member of the U.S. Armed Forces and serving abroad in active-duty status. Although DHS had discretion to waive the requirements in certain circumstances before the new law, it obviates the need for discretionary waivers by tolling the time periods.

In addition, the enactment of P.L. 112-74 added a new statute, 10 U.S.C. §1790, providing for reimbursement to USCIS by the Department of Defense of fees for processing military-service-based naturalization applications (Div. A, §8070). Current law prohibits charging the applicants fees for such applications.<sup>125</sup>

### E-2 Visas for Israeli Nationals

While LPR investors enter the United States on EB-5 visas, as discussed above, the INA also provides for the admission of temporary investors. There are two classes of nonimmigrant visas for investors: the E-1 visa for treaty traders and the E-2 visa for treaty investors.<sup>126</sup> An E-1 treaty trader visa allows a foreign national to enter the United States for the purpose of conducting “substantial trade” between the United States and the individual’s country of citizenship.<sup>127</sup> An E-2 treaty investor can be any person who comes to the United States to develop and direct the

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<sup>125</sup> INA §329(b)(4), regarding military-service-based naturalization during periods of hostilities, codified as amended at 8 U.S.C. §1440(b)(4):

[N]otwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing a petition for naturalization or for the issuance of a certificate of naturalization upon citizenship being granted to the applicant, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

See also INA §328(b)(4), regarding military-service-based naturalization during peacetime, codified as amended at 8 U.S.C. §1439(b)(4), and 8 U.S.C. §1440e (not part of the INA), regarding prohibition on fees charged by a federal court for military-service-based naturalization during the Vietnam and subsequent hostilities.

<sup>126</sup> For more information on these visa categories, see CRS Report RL33844, *Foreign Investor Visas: Policies and Issues*, by (name redacted) and (name redacted).

<sup>127</sup> INA §101(a)(15)(E)(i).

operations of an enterprise in which he or she has invested, or is in the process of investing, a “substantial amount of capital.”<sup>128</sup>

P.L. 112-130 makes Israeli nationals eligible for E-2 status if Israel offers a similar status to U.S. citizens and nationals. Israelis have been eligible to enter under the E-1 visa category since 1954. The 1954 treaty allowed E-1 status but did not grant E-2 status.

## **Student Visas**

The most common nonimmigrant visa for foreign students is the F visa. This visa is for international students pursuing an education at an “established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program.”<sup>129</sup> H.R. 3120, as passed by the House, would require a college or university to be accredited by an accrediting agency recognized by the Secretary of Education in order to accept foreign students (i.e., students on F visas). Under certain circumstances, the Secretary of Homeland Security would be able to waive the accreditation requirement. In addition, H.R. 3120 would allow the Secretary of Homeland Security to require that other institutions (except seminaries and other religious institutions) be accredited if (1) there is an accrediting agency recognized by the Secretary of Education that can provide such accreditation; and (2) the institution has or will have 25 or more foreign students on F visas. Furthermore, the bill would prohibit persons convicted of certain offenses—such as alien smuggling, visa fraud, and human trafficking—from being involved in a position of ownership, authority, or management with an institution allowed to accept F students.

## **Visa Waiver Program**

The visa waiver program (VWP) allows nationals from certain countries to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad.<sup>130</sup> Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from DOS officers at a consular post abroad before coming to the United States. The INA specifies the criteria that a country must meet to be designated as a VWP country, including offering reciprocal privileges to U.S. citizens; having had a nonimmigrant refusal rate<sup>131</sup> of less than 3% for the previous year; and not compromising the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if an emergency occurs that threatens U.S. security interests

S. 3216, as reported by the Senate Appropriations Committee, would allow the Secretary of DHS to use visa overstay rates<sup>132</sup> instead of nonimmigrant visa refusal rates to determine which

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<sup>128</sup> INA §101(a)(15)(E)(ii).

<sup>129</sup> INA §101(a)(15)(F).

<sup>130</sup> As of August 2012, there were 36 countries participating in the VWP. In addition, another country, Taiwan, has been nominated to be part of the program. For more on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by (name redacted).

<sup>131</sup> A refusal rate is the number of citizens who applied for a B visa (tourist visa) from the country, were denied, and were unable or unwilling to provide sufficient evidence to have the denial reversed, divided by the total number of such citizens who applied for a B visa, in a specific year.

<sup>132</sup> An overstay rate is the number of citizens from a country who overstayed the terms of admittance of their visa, divided by the total number of citizens from the country who were admitted to the United States under a B visa, in a (continued...)

countries to admit to the VWP. Countries could be eligible for the VWP if their refusal rate or overstay rate was less than 3% in the previous fiscal year. S. 3216 would also allow the Secretary of DHS to waive the refusal or overstay rate requirement if certain conditions are met, such as meeting all the security requirements of the program and cooperating with the United States on counterterrorism initiatives and information sharing. The bill would also create a probationary period and procedures for terminating a country's participation in the VWP if that country failed to comply with any of the program's requirements.

### **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 or the Conrad 30 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. 112-176, which makes the program applicable to aliens who acquire J status before September 30, 2015.

### **Wage Requirements for H-2B Temporary Employment**

The H-2B visa allows for the temporary admission of foreign workers to the United States to perform temporary nonagricultural labor or service if unemployed U.S. workers cannot be found. H-2B employers are required to pay workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. In January 2011, DOL issued a final rule to change the methodology for determining prevailing wage rates for the H-2B program.<sup>133</sup> This rule has not yet gone into effect. Congress has blocked its implementation through a series of enactments. P.L. 112-55 (Div. B, §546) prohibited any funds made available by the act or another act for FY2012 to be used to implement or enforce the H-2B wage rule before January 1, 2012, and P.L. 112-74 prohibited any funds made available under the act to be used to implement the rule for the remainder of FY2012 (Div. F, §110). Currently, the Continuing Appropriations Resolution, 2013 (P.L. 112-175) prohibits DOL from using funds to implement the new wage methodology until March 27, 2013. In response, DOL announced that it was postponing the effective date of the new wage methodology until March 27, 2013.

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specific year.

<sup>133</sup> U.S. Department of Labor, Employment and Training Administration, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program," *76 Federal Register* 3452-3484, January 19, 2011.

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