

# CRS Report for Congress

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## **Visa Issuances: Policy, Issues, and Legislation**

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Ruth Ellen Wasem  
Specialist in Social Legislation  
Domestic Social Policy Division

# Visa Issuances: Policy, Issues, and Legislation

## Summary

Since the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States legally despite provisions in immigration laws that bar the admission of terrorists. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to further terrorist attacks have led many to call for revisions in the policy as well as changes in who administers immigration law.

Foreign nationals not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted, with certain exceptions noted in law. Prior to establishment of the Department of Homeland Security (DHS), two departments — the Department of State (DOS) Bureau of Consular Affairs and the Department of Justice (DOJ) Immigration and Naturalization Service (INS) — each played key roles in administering the law and policies on the admission of aliens. Although DOS Consular Affairs remains the agency responsible for issuing visas, DHS' Bureau of Citizenship and Immigrant Services approves immigrant petitions, and DHS's Bureau of Customs and Border Protection inspects all people who enter the United States. In FY2002, DOS issued approximately 6.2 million visas and rejected over 2.2 million aliens seeking visas.

The President's proposal for DHS, H.R. 5005 as introduced, would have bifurcated visa issuances so that DHS would set the policies, giving the DHS Secretary exclusive authority through the Secretary of State to issue or refuse to issue visas and retaining responsibility for implementation in DOS. When the House Select Committee on Homeland Security marked up H.R. 5005 on July 19, it approved compromise language on visa issuances that retained DOS's administrative role in issuing visas, but added specific language to address many of the policy and national security concerns raised during hearings. An amendment to move the consular affairs visa function to DHS failed when the House passed H.R. 5005 on July 26.

The Homeland Security Act of 2002 (P.L. 107-296) retained the compromise language stating that DHS through a new Directorate of Border and Transportation Security issues regulations regarding visa issuances and assigns staff to consular posts abroad to advise, review, and conduct investigations, and that DOS's Consular Affairs will continue to issue visas. The memorandum of understanding that will implement the working relationship between DOS and DHS's three immigration-related bureaus has not yet been signed.

The 108<sup>th</sup> Congress is overseeing the implementation of these new policies and may consider further options, such as tightening up interview requirements for visa applicants and expanding the grounds for excluding aliens to possibly include, among other things, visa revocation.

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# Visa Issuances: Policy, Issues, and Legislation

## Introduction

In the months following the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens (i.e., noncitizens or foreign nationals) who apparently entered the United States legally on temporary visas. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to further terrorist attacks have led many to call for revisions in the visa policy and possibly changes in who administers immigration law.<sup>1</sup>

Foreign nationals not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted.<sup>2</sup> Under current law, three departments — the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ) — each play key roles in administering the law and policies on the admission of aliens.<sup>3</sup> DOS's Bureau of Consular Affairs (Consular Affairs) is the agency responsible for issuing visas, DHS's Bureau of Citizenship and Immigration Services (BCIS) is charged with approving immigrant petitions, and DHS's Bureau of Customs and Border Protection (CBP) is tasked with inspecting all people who enter the United States. DOJ's Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.

This report addresses policies on immigration visa issuances, options to reassign this function to the Department of Homeland Security (DHS) that were considered prior to passage of the Homeland Security Act of 2002 (P.L. 107-296), and other

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<sup>1</sup> For an analysis of the possible transfer of immigration functions and activities to a new Department of Homeland Security, see CRS Report RL31560, *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*; and CRS Report RL31584, *A Comparative Analysis of the Immigration Functions in the Major Homeland Security Bills*, both by Lisa M. Seghetti and Ruth Ellen Wasem.

<sup>2</sup> Authorities to except or to waive visa requirements are specified in law, such as the broad parole authority of the Attorney General under §212(d)(5) of INA and the specific authority of the Visa Waiver Program in §217 of INA.

<sup>3</sup> Other departments, notably the Department of Labor (DOL), and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (DHHS) sets policy on the health-related grounds for inadmissibility discussed below.

policies options that may arise in the 108<sup>th</sup> Congress.<sup>4</sup> It opens with an overview of visa issuances, with sections on procedures for aliens coming to live in the United States permanently and on procedures for aliens admitted for temporary stays.<sup>5</sup> An analysis of the grounds for excluding aliens follows. The report summarizes the debate on transferring visa issuance policy functions to homeland security and concludes with a discussion of the legislative proposals to reassign the visa issuance activities and to revise visa issuance policies.

## Overview on Visa Issuances

There are two broad classes of aliens that are issued visas: immigrants and nonimmigrants. Humanitarian admissions, such as asylees, refugees, parolees and other aliens granted relief from deportation, are handled separately under the Immigration and Nationality Act (INA). Those aliens granted asylum or refugee status ultimately are eligible to become legal permanent residents (LPRs).<sup>6</sup> Illegal aliens or unauthorized aliens include those noncitizens who either entered the United States surreptitiously, i.e., entered without inspection, or who violated the terms of their visas.

The documentary requirements for visas are stated in §222 of the INA, with some discretion for further specifications or exceptions by regulation. Generally, the application requirements are more extensive for aliens who wish to permanently live in the United States than those coming for visits. The amount of paperwork required and the length of adjudication process to obtain a visa to come to the United States is analogous to that of the Internal Revenue Service's (IRS) tax forms and review procedures. Just as persons with uncomplicated earnings and expenses may file an IRS "short form" while those whose financial circumstances are more complex may file a series of IRS forms, so too an alien whose situation is straightforward and whose reason for seeking a visa is easily documented generally has fewer forms and procedural hurdles than an alien whose circumstances are more complex. There are over 70 BCIS forms as well as DOS forms that pertain to the visa issuance process.<sup>7</sup>

The system of processing, adjudication, and issuances of visas is largely a fee-based, rather than a government service funded by direct appropriations. For example, the filing fee that a U.S. citizen would pay BCIS to process an immigrant petition for a relative is \$130 and for an alien worker is \$135. The immigrant

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<sup>4</sup> For a fuller account of INS restructuring proposals, see CRS Report RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107<sup>th</sup> Congress*, by Lisa M. Seghetti.

<sup>5</sup> For a broader discussion, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

<sup>6</sup> For background and further discussion of humanitarian cases, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno and Katherine Bush; and CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

<sup>7</sup> BCIS forms are available at [<http://www.immigration.gov/graphics/formsfee/index.htm>].

petition fees collected by BCIS are deposited in the examinations fee account along with fees filed with other BCIS petitions (e.g., naturalization, employment authorization).<sup>8</sup> In FY2001, the former INS deposited more than \$1 billion in the examinations fee account. Consular Affairs also collects fees for visas services. The Consular Affairs immigrant visa application processing fee is \$335, and the nonimmigrant processing fee is \$65.<sup>9</sup> DOS had authority to use up to \$316.7 million of these processing fees in FY2002 and requested authority to use \$642.7 million in FY2003.<sup>10</sup>

## Immigrant Visas

Aliens who wish to come to live permanently in the United States must meet a set of criteria specified in the INA. They must qualify as

- a spouse or minor child of a U.S. citizen;
- a parent, adult child or sibling of an adult U.S. citizen;
- a spouse or minor child of a legal permanent resident;
- an employee that a U.S. employer has gotten approval from the Department of Labor to hire;
- a person of extraordinary or exceptional ability in specified areas;
- a refugee or asylee determined to be fleeing persecution;
- winner of a visa in the diversity lottery; or
- qualify under other specialized provisions of law.

The largest number of immigrants is admitted because of family relationship to U.S. citizens. Of the 1,064,318 people who became LPRs in FY2001, 53.0% were relatives of U.S. citizens. Following a distant second are employment-based immigrants (16.8%), most of whom are sponsored by U.S. employers. Comparable numbers of immigrants were family of other LPRs (10.5%) and refugees and asylees (10.2%). The remainder were immigrants entering through the diversity lottery program (3.9%) and other miscellaneous categories (5.5%).

Petitions for immigrant, i.e., LPR, status, are first filed with BCIS by the sponsoring relative or employer in the United States. If the prospective immigrant is already residing in the United States, the BCIS handles the entire process, which is called “adjustment of status.” If the prospective LPR does not have legal residence in the United States, the petition is forwarded to Consular Affairs in their home country after BCIS has reviewed it. The Consular Affairs officer (when the alien is coming from abroad) and BCIS adjudicator (when the alien is adjusting status in the United States) must be satisfied that the alien is entitled to the immigrant status. As **Figure 1** depicts, many LPRs are adjusting status from within the United States rather than receiving visas issued abroad by Consular Affairs. The spikes in FY1990

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<sup>8</sup> §286(m) of INA.

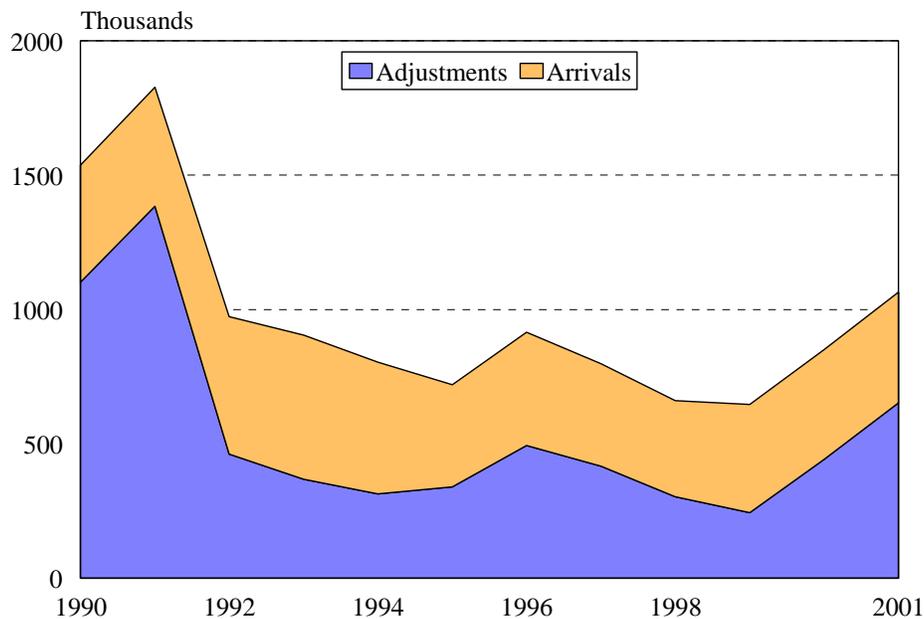
<sup>9</sup> DOS lists its fees at [<http://travel.state.gov/2002feechart.html>].

<sup>10</sup> §231 of P.L. 106-113, the Foreign Relations Authorization Act of 2001. CRS Report RL31370, *State Department and Related Agencies: FY2003 Appropriations*, by Susan Epstein.

and FY1991 are due to the legalization programs of the Immigration Reform and Control Act of 1986.

A personal interview is required for all prospective LPRs.<sup>11</sup> The burden of proof is on the applicant to establish eligibility for the type of visa for which the application is made. Consular Affairs officers (when the alien is coming from abroad) and BCIS adjudicators (when the alien is adjusting status in the United States) must confirm that the alien is not ineligible for a visa under the so-called “grounds for inadmissibility” of the INA, which include criminal, terrorist, and public health grounds for exclusion discussed below.<sup>12</sup>

**Figure 1. Immigrant Arriving or Adjusting Status, FY1990-FY2001**



Source: CRS presentation of published BCIS data.

## Nonimmigrant Visas

Aliens seeking to come to the United States temporarily rather than to live permanently are known as nonimmigrants.<sup>13</sup> These aliens are admitted to the United

<sup>11</sup> 22 CFR §42.62.

<sup>12</sup> For a recent review of Consular Affairs role in visa processing, see U.S. General Accounting Office Report GAO-03-132NI, *Border Security: Visa Process Should Be Strengthened as an Antiterrorism Tool*, Oct. 21, 2002.

<sup>13</sup> For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem. (Hereafter cited as (continued...))

States for a temporary period of time and an expressed reason. There are 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas are issued currently. Most of these nonimmigrant visa categories are defined in §101(a)(15) of the INA. These visa categories are commonly referred to by the letter and numeral that denotes their subsection in §101(a)(15), e.g., B-2 tourists, F-1 foreign students, H-1B temporary professional workers, or J-1 cultural exchange participants.

The burden of proof is on the applicant to establish eligibility for nonimmigrant status and the type of nonimmigrant visa for which the application is made. Nonimmigrants must demonstrate that they are coming for a limited period and for a specific purpose. The Consular Affairs officer, at the time of application for a visa, as well as the BCBP inspectors, at the time of application for admission, must be satisfied that the alien is entitled to a nonimmigrant status.<sup>14</sup> The law exempts only the H-1 workers, L intracompany transfers, and V family members from the requirement that they prove that they are not coming to live permanently.<sup>15</sup> BCIS and BCBP play a role determining eligibility for certain nonimmigrant visas, notably H workers and L intracompany transfers. Also, if a nonimmigrant in the United States wishes to change from one nonimmigrant category to another, such as from a tourist visa to a student visa, the alien files a change of status application with the BCIS. If the alien leaves the United States while the change of status is pending, the alien is presumed to have relinquished the application.

Personal interviews are generally required for foreign nationals seeking nonimmigrant visas. Interviews, however, may be waived in certain cases; prior to a recently promulgated rule change, personal interviews for applicants for most B visitor visas were waived.<sup>16</sup> This waiver formed the basis for the controversial and allegedly fraud-prone “Visa Express” in Saudi Arabia (now suspended) where travel agents pre-screened visa applicants and submitted petitions on behalf of the aliens. DOS issued interim regulations on July 7, 2003, that tighten up the requirements for personal interviews and substantially narrow the class of nonimmigrants eligible for the waiver of the personal interview.<sup>17</sup>

In FY2002, DOS issued 5,769,638 nonimmigrant visas. As **Figure 2** illustrates, the annual number grew over the past few years but has dipped slightly in 2002 to a level comparable to the early 1990s. The growth has been largely attributable to the issuances of border crossing cards to residents of Canada and Mexico and the issuances of temporary worker visas. Combined, visitors for tourism and business comprised the largest group of nonimmigrants in FY2002, about 4.3 million, down from 5.7 million in FY2000. Other notable categories were students (4.5%), exchange visitors (5.0%) and temporary workers (5.1%). Depending on the visa category and the country the alien is coming from, the nonimmigrant visa may be

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<sup>13</sup> (...continued)

RL31381, *Temporary Admissions*).

<sup>14</sup> 22 CFR §41.11(a).

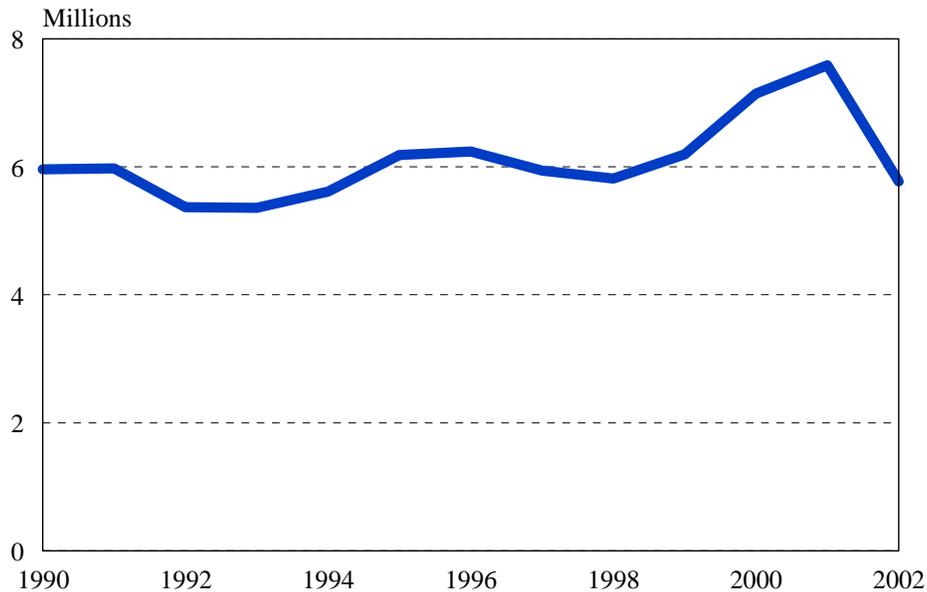
<sup>15</sup> §214(b) of INA.

<sup>16</sup> 22 CFR §41.102.

<sup>17</sup> *Federal Register*, vol. 68, no. 129, July 7, 2003, pp. 40127-40129.

valid for several years and may permit multiple entries. As a result, BCIS reports over 32.8 million nonimmigrant entries in FY2001.<sup>18</sup>

**Figure 2. Nonimmigrant Visas Issued, FY1990-FY2002**



**Source:** CRS presentation of DOS Bureau of Consular Affairs data.

Most visitors, however, enter the United States without nonimmigrant visas through the Visa Waiver Program (VWP). This provision of INA allows the Attorney General to waive the visa documentary requirements for aliens coming as visitors from 27 countries, e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland. The BCIS reports that 17 million nonimmigrants entered the United States through VWP in FY2001.<sup>19</sup> Since aliens entering through VWP do not have visas, BCBP inspectors at the port of entry perform the background checks and make the determination of whether the VWP alien is admissible.

## Grounds for Exclusion

All aliens must undergo reviews performed by DOS consular officers abroad and BCBP inspectors upon entry to the U.S. These reviews are intended to ensure that they are not ineligible for visas or admission under the grounds for inadmissibility spelled out in INA.<sup>20</sup> These criteria are

<sup>18</sup> For additional analysis, see RL31381, *Temporary Admissions*.

<sup>19</sup> See CRS Report RS21205, *Immigration: Visa Waiver Program*, by Alison Siskin.

<sup>20</sup> §212(a) of INA.

- health-related grounds;
- criminal history;
- security and terrorist concerns;
- public charge (e.g., indigence);
- seeking to work without proper labor certification;
- illegal entrants and immigration law violations;
- ineligible for citizenship; and,
- aliens previously removed.

Consular officers are required to check the background of all aliens in the “lookout” databases, specifically the Consular Lookout and Support System (CLASS) and TIPOFF databases.<sup>21</sup> Some other provisions may be waived or are not applicable in the case of nonimmigrants, refugees (e.g., public charge), and other aliens. All family-based immigrants and employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.

**Table 1. Aliens DOS Excluded in FY2000 by Grounds of Inadmissibility**

Grounds for exclusion	Aliens excluded by State Department			
	Immigrant		Nonimmigrant	
Health	1,288	3.8%	151	0.7%
Criminal	507	1.5%	3,207	15.2%
Terrorism & security	9	—	181	0.9%
Public charge	16,285	48.5%	763	3.6%
Labor certification	7,849	23.4%	2	—
Immigration violations	2,878	8.6%	13,969	66.1%
Ineligible for citizenship	3	—	3	—
Previously removed or illegal presence	4,781	14.2%	2,837	13.4%
Miscellaneous	5	—	6	—
<b>Total inadmissible</b>	<b>33,605</b>	<b>100%</b>	<b>21,119</b>	<b>100%</b>
Ineligible for visa applied for due to other reasons	40,241	—	2,489,327	—

**Source:** CRS analysis of DOS Bureau of Consular Affairs data.

<sup>21</sup> The State Department’s CLASS and TIPOFF terrorist databases interface with the Interagency Border Inspection System (IBIS) used by the DHS immigration inspectors. IBIS also interfaces with the FBI’s National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), and the Non-immigrant Information System (NIIS).

As **Table 1** presents, DOS excluded 33,605 applicants for immigrant visas and 21,119 applicants for nonimmigrant visas in FY2000 based upon inadmissibility. Almost half (48.5%) of the immigrant petitioners who were rejected on listed exclusionary grounds were rejected because the DOS determined that the aliens were inadmissible as likely public charges. On these grounds, about two-thirds of all rejected nonimmigrant applicants were inadmissible because of immigration law violations, most notably misrepresentation. Another 13.4% were inadmissible because of prior unlawful presence in the United States.

While the grounds of inadmissibility are an important basis for denying foreign nationals admission to the United States, it should be noted that most aliens who are rejected by DOS — over 2.5 million — are rejected because they are not eligible for the visa they are seeking. Comparable data from DHS on aliens deemed ineligible for immigrant status or inadmissible as a nonimmigrant are not available. As a result, the DOS data presented in **Table 1** understate the number and distribution of aliens denied admission to the United States.

**Visa Revocation.** After a visa has been issued, the consular officer as well as the Secretary of State has the discretionary authority to revoke a visa at any time.<sup>22</sup> A consular officer must revoke a visa if

- the alien is ineligible under INA §212(a) as described above to receive such a visa, or was issued a visa and overstayed the time limits of the visa;
- the alien is not entitled to the nonimmigrant visa classification under INA §101(a)(15) definitions specified in such visa;
- the visa has been physically removed from the passport in which it was issued; or
- the alien has been issued an immigrant visa.<sup>23</sup>

The Foreign Affairs Manual (FAM) instructs: “in making any new determination of ineligibility as a result of information which may come to light after issuance of a visa, the consular officer must seek and obtain any required advisory opinion.” This applies, for example, to findings of ineligibility under “misrepresentation,” “terrorist activity” or “foreign policy.” FAM further instructs: “pending receipt of the Department’s advisory opinion, the consular officer must enter the alien’s name in the CLASS under a quasi-refusal code, if warranted.”<sup>24</sup> According to DOS officials, they sometimes prudentially revoke visas, i.e., they revoke a visa as a safety precaution. A “prudential revocation” is undertaken with a relatively low threshold of national security information to ensure that all relevant or potentially relevant facts about an alien are thoroughly explored before admitting that alien to the United States.<sup>25</sup>

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<sup>22</sup> §221(i) of INA; 8 U.S.C. §1201(i).

<sup>23</sup> 22 CFR §41.122 Notes N1.

<sup>24</sup> 22 CFR §41.122 Notes PN3.

<sup>25</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border (continued...)

## Issues and Legislation

### 107<sup>th</sup> Congress: Reassigning Visa Issuance Functions

When the 107<sup>th</sup> Congress weighed the creation of the Department of Homeland Security, considerable debate surfaced about whether or not any or all visa issuance functions should be located in the new agency. Enactment of P.L. 107-293 resolved most of these issues, but similar concerns may arise as the 108<sup>th</sup> Congress oversees the implementation of the Act. Varied viewpoints are discussed below.

As announced on June 6, 2002, the Administration's proposal for a homeland security department would have included INS among the agencies transferred to a new homeland security department. The stated goal of the Administration's proposal is to consolidate into a single federal department many of the homeland security functions performed by units within various federal agencies and departments. The Administration would have placed all functions of INS under the border and transportation security division of the proposed department. The narrative of the June 6, 2002 plan did not go into details, however, it appeared that under the plan Consular Affairs in the Department of State would have retained its visa issuance responsibilities. This proposal precipitated considerable discussion on where the visa issuance should be located.

**Option: Locating all Functions in DHS.** Voices in support of moving Consular Affairs's visa issuance responsibilities to the proposed DHS asserted that consular officers emphasize the promotion of tourism, commerce, and cultural exchange and are lax in screening foreign nationals who want to come to the United States. Media reports of the "Visa Express" that DOS established in Saudi Arabia to allow travel agents to pre-screen nonimmigrants raised considerable concern, especially reports that several of the September 11 terrorists allegedly entered through "Visa Express." Critics argued that visa issuance was the real "front line" of homeland security against terrorists and that the responsibility for this function should be in a department that did not have competing priorities of diplomatic relations and reciprocity with foreign governments.

Some argued that keeping the INS adjudications and Consular Affairs visa issuances in different departments would perpetuate the types of mistakes and oversights that stem from inadequate coordination and competing chains of command. Most importantly, they emphasized the need for immigration adjudications and visa issuances — as well as immigration law enforcement and inspections activities — to be under one central authority that has border security as its primary mission.

**Option: Locating Functions in Different Agencies.** Proponents of retaining visa issuances in Consular Affairs asserted that only consular officers in the

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<sup>25</sup> (...continued)

Security and Citizenship, Hearing on *Visa Issuance, Information Sharing and Enforcement in a Post-9/11 Environment: Are We Ready Yet?*, Testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services, July 15, 2003.

field would have the country-specific knowledge to make decisions about whether an alien was admissible and that staffing 250 diplomatic and consular posts around the world would stretch the proposed homeland security department beyond its capacity. They also pointed out that under current law, consular decisions are not appealable and warned that transferring this adjudication to homeland security might make it subject to judicial appeals or other due process considerations. They maintained that the problems Consular Affairs evidenced in visa issuances have already been addressed by strengthening provisions in the USA PATRIOT Act (P.L. 107-56) and the Enhanced Border Security and Visa Reform Act (P.L. 107-173).

Those who supported retaining immigrant adjudications and services in DOJ and visa issuances in DOS point to the specializations that each department brings to the functions. They asserted that the “dual check” system in which both INS and Consular Affairs make their own determinations on whether an alien ultimately enters the United States provides greater security. Proponents of the current structures argued that failures in intelligence gathering and analysis, not lax enforcement of immigration law, were the principal factors that enabled terrorists to obtain visas. Others opposing the transfer of INS adjudications and Consular Affairs visa issuances to DHS maintained that DHS would be less likely to balance the more generous elements of immigration law (e.g., the reunification of families, the admission of immigrants with needed skills, the protection of refugees, opportunities for cultural exchange, the facilitation of trade, commerce, and diplomacy) with the more restrictive elements of the law (e.g., protection of public health and welfare, national security, public safety, and labor markets).

**Legislation.** Representative Dick Armey, Majority Leader and Chair of Select Committee on Homeland Security, introduced the President’s proposal as H.R. 5005, the Homeland Security Act of 2002. H.R. 5005 would have transferred all of the functions of INS to the newly created department under its Border Security and Transportation Division. As introduced, H.R. 5005 would have bifurcated visa issuances so that DHS would set the policies and DOS would retain responsibility for implementation.

During the week of July 8, 2002, the House Committees on Judiciary, International Relations, and Government all approved language on visa issuances that retained DOS’s administrative role in issuing visas, but added specific language to address many of the policy and national security concerns raised during their respective hearings. Breaking with the Administration, the House Judiciary Committee approved language that would have placed much of INS’s adjudication and service responsibilities — including its role in approving immigrant petitions — with a new Bureau of Citizenship and Immigration Services headed by an Assistant Attorney General at DOJ.

When the House Select Committee on Homeland Security marked up H.R. 5005 on July 19, 2002, it approved language on immigrant processing and visa issuances consistent with the House Judiciary Committee recommendations. As reported, H.R. 5005 clarified that the Secretary of DHS would have issued regulations regarding visas issuances and would have assigned staff to consular posts abroad to provide advice and review and to conduct investigations, and that Consular Affairs would have continued to issue visas. It would have further expanded the current exclusion

authority of the Secretary of State by permitting the Secretary to exclude an alien when necessary or advisable in the foreign policy or security interests of the U.S., giving the Secretary of State an authority even broader than that in law before the 1990 Immigration Amendments reformed the grounds for exclusion. It also would have clarified that decisions of the consular officers are not reviewable.

During the floor debate on H.R. 5005, only one immigration-related amendment was considered, and it would have moved the consular visa function to DHS. The amendment offered by Congressman David Weldon failed, and the House went on to pass H.R. 5005 on July 26, 2002. **Table 2** summarizes what department would be responsible for visa issuance activities under the various bills.<sup>26</sup>

The National Homeland Security and Combating Terrorism Act of 2002 reported by the Senate Governmental Affairs Committee (S. 2452) on June 24, 2002, included the immigration enforcement functions of INS and the Office of International Affairs but did not transfer any of the other immigration services and visa issuances functions. Representative Mac Thornberry sponsored H.R. 4660, a bill similar to S. 2452 as introduced, that would have created a homeland security department but also did not transfer any of the immigration adjudications and visa issuances functions.

The Senate Government Reform Committee acted on a substitute for S. 2452 on July 24, 2002, and that language became S.Amdt. 4471. S.Amdt. 4471 differed somewhat on the issues of immigration adjudications and visa issuances from the Administration's proposal and H.R. 5005 as passed. The Senate amendment would have transferred all of INS to a newly created DHS under two new bureaus (the Bureau of Immigration Services and the Bureau of Enforcement and Border Affairs) in a Directorate of Immigration Affairs. Similarly to H.R. 5005 as passed, the Senate amendment would have given the Secretary of DHS authority to issue regulations on visa policy; however, it would have permitted the Secretary of the new department to delegate the authority to the Secretary of State. In contrast to the House-passed bill and S. 2452 as introduced, S.Amdt. 4471 would have established an Under Secretary for Immigration Affairs in DHS who would have handled immigration and naturalization functions as well as immigration enforcement and border functions.

On November 13, 2002, Majority Leader Arney introduced and the House passed H.R. 5710 as a compromise bill to establish a Department of Homeland Security. Among its many provisions, H.R. 5710 retains the language clarifying that — although DOS's Consular Affairs would continue to issue visas — the Secretary of DHS would issue regulations regarding visas issuances and would assign staff to consular posts abroad to advise, review, and conduct investigations. It also would permit the Secretary of the new department to delegate the authority to the Secretary of State. H.R. 5710 would transfer all of INS to two new bureaus in DHS: the

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<sup>26</sup> For discussion of the issues and options for transferring immigration functions and activities to DHS, see CRS Report RL31560, *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*; and CRS Report RL31584, *A Comparative Analysis of the Immigration Functions in the Major Homeland Security Bills*, both by Lisa M. Seghetti and Ruth Ellen Wasem.

Bureau of Citizenship and Immigration Services and the Bureau of Border Security. The former would report directly to the Deputy Secretary for Homeland Security, while the later would report to the Under Secretary for Border and Transportation Security. Language similar to H.R. 5710 passed the Senate on November 19, 2002 as S.Amdt. 4901 to H.R. 5005. The House agreed to the Senate amendment on November 22, and the President signed it as P.L. 107-296 on November 25, 2002.

**Table 2. Visa Issuance Policy Roles and Tasks:  
Comparison of Major Homeland Security Proposals**

Task/role	INA	S. 2452	S.Amdt. 4471	H.R. 5005 introduced	H.R. 5005 passed	P.L. 107-296
Issuing nonimmigrant visas abroad	State	State	Homeland regulates; state issues	Homeland sets policy; state administers	Homeland regulates; state issues	Homeland regulates; state issues
Changing nonimmigrant visas	Justice	Justice	Homeland	Homeland	Justice	Homeland
Approving immigrant (LPR) petitions	Justice	Justice	Homeland	Homeland	Justice	Homeland
Issuing immigrant visas	State	State	Homeland regulates; state issues	Homeland sets policy; state administers	Homeland regulates; state issues	Homeland regulates; state issues
Adjusting immigrant (LPR) status	Justice	Justice	Homeland	Homeland	Justice	Homeland

## 108<sup>th</sup> Congress: Revising Visa Issuance Policy

**Sharing Data and Screening Aliens.** Since the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States legally on temporary visas. Although the INA bars terrorists, consular officers issuing the visas were not able to bar them because information identifying them as such was not in the databases to which they had access. Many assert that the need for all agencies involved in admitting aliens to share intelligence and coordinate activities is essential for U.S. immigration policy to be effective in guarding homeland security. Some argue that the reforms Congress made in the mid-1990s requiring all visa applicants to be checked in the terrorist look out databases are inadequate because the databases across the relevant agencies are not inter-operable and do not respond to queries on a “real time” basis.

Those less enthusiastic about inter-operable databases point to the cost and time required to develop such databases. Instead, they argue the money and resources might be better spent on other tools to strengthen enforcement of immigration laws and improved intelligence gathering. They also warn that if intelligence data become

too accessible across agencies, national security may actually be breached because sensitive information could fall into the wrong hands.

The 107<sup>th</sup> Congress enacted provisions in the USA PATRIOT Act (P.L. 107-56) that seek to improve the visa issuance process by providing access to relevant electronic information. These provisions authorize the Attorney General to share data from domestic criminal record databases with the Secretary of State for the purpose of adjudicating visa applications. Title III of P.L. 107-173, the Enhanced Border Security and Visa Reform Act, likewise aims to increase access to electronic information in the context of visa issuances, while also requiring additional training for consular officers who issue visas. Whether these provisions have been successfully implemented remains an important policy question.<sup>27</sup>

On a related matter, critics point to the fact that consular officers have not personally interviewed many aliens to whom they issue nonimmigrant visas. Bypassing the personal interview, especially for visitors coming for purportedly short periods of time, was advocated by some as an efficiency of staffing and resources. They argue that time is better spent doing thorough background checks rather than face to face interviews. Others assert that this cost savings comes at too high a price in terms of national security. The critics argue that checking an alien's name in a database is no substitute for a face-to-face interview.

In the 107<sup>th</sup> Congress, H.R. 5013 would have required that consular officers conduct a personal interview of all aliens seeking visas to the United States, not just those who wish to become LPRs. DOS's recently promulgated interim regulations that increase the type and number of aliens required to have a personal interview has sparked concern that the waiting times to obtain a visa will increase dramatically.

**Visa Revocation and Removal.** Following September 11, 2001, the U.S. General Accounting Office reviewed 240 cases of visa revocations and identified several problems. It found that the appropriate units within the Federal Bureau of Investigation (FBI) and the former INS were not always notified, that "lookouts" were not consistently posted on the watch lists of suspected terrorists; that 30 foreign nationals whose visas had been revoked entered the United States and may still remain; and that the FBI and the former INS were not routinely taking action to investigate, locate the individuals, or resolve the cases.<sup>28</sup>

DOS responded to the GAO study by arguing that it was not fair or accurate to suggest that all persons whose visas were revoked were terrorists or suspected terrorists. In many such instances, DOS reports that it finds that the national security information does not pertain to the alien whose visa was revoked (a mistaken identity due to incomplete identifying data), or that the information can be explained in a way

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<sup>27</sup> For evaluations, see U.S. General Accounting Office, *Information Technology: Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, (GAO-03-322) Apr. 15, 2003; and U.S. General Accounting Office, *Border Security: Challenges in Implementing Border Technology*, (GAO-03-546T), Mar. 12, 2003.

<sup>28</sup> U.S. General Accounting Office, *New Policies and Procedures Are Needed to Fill Gaps in the Visa Revocation Process*; GAO 03-798, June 18, 2003.

that clarifies the question at hand and eliminates the potential threat. In these cases the consular officers re-issue the visa and purge the alien's name from the lookout system. DOS maintains that the problem has been fixed in the creation last year of a revocation code that is shared with the relevant agencies via IBIS when a visa is prudentially revoked. It reportedly was put into place in December 2002, and DOS asserts that it has verified that each and every revocation for calendar year 2003 was properly coded and entered into CLASS and IBIS, and was available almost simultaneously to law enforcement and border inspection colleagues.<sup>29</sup>

A spokesperson for BICE recently disputed GAO's findings. He stated that its records indicate that the National Security Unit (NSU) in BICE received information on ten leads involving visa revocations and that the NSU conducted follow-up investigations in all 10 cases. He reported that NSU concluded that there was insufficient evidence under current civil and criminal immigration law to allow BICE to take action against the visa holders.<sup>30</sup>

An emerging issue is the legal process for removing aliens whose visas have been revoked. Under current law the alien must be inadmissible to be excluded or removed. Some maintain that a foreign national should be immediately removed if the visa that enabled his or her entry has been revoked. They argue that grounds for inadmissibility in the INA §212(a) should be amended to expressly include visa revocation as a basis for removal. Others assert that current law balances the broader discretion given to the consular officers abroad with the explicit standards of the grounds for inadmissibility and the legal process for removing aliens from the United States. They further maintain that consular officers often make "prudential revocations" of visas that they subsequently re-issue.

**Division of Responsibilities.** The Homeland Security Act of 2002 (P.L. 107-296) contains language stating that DHS through the Directorate of Border and Transportation Security issues regulations regarding visa issuances and may assign staff to consular posts abroad to advise, review, and conduct investigations, and that DOS's Consular Affairs continues to issue visas. The Act necessitates a memorandum of understanding (MOU) between DOS and DHS on how these provisions are to be implemented. At this time, the MOU has not been signed. The MOU potentially may resolve some of the concerns raised by earlier GAO studies and address some of the cross-cutting issues discussed above. It also may designate which of the three immigration-related bureaus in DHS will have staff assigned to consular posts abroad. Personnel from both BCIS and BICE (and possibly BCBP) had been posted abroad under the former INS.

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<sup>29</sup> U.S. Congress, Senate Committee on the Judiciary Subcommittee On Immigration, Border Security and Citizenship, Hearing on *Visa Issuance, Information Sharing and Enforcement in a Post-9/11 Environment: Are We Ready Yet?*, Testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services, July 15, 2003.

<sup>30</sup> U.S. Congress, Senate Committee on the Judiciary Subcommittee On Immigration, Border Security and Citizenship, Hearing on *Visa Issuance, Information Sharing and Enforcement in a Post-9/11 Environment: Are We Ready Yet?*, Testimony of Michael T. Dougherty, Director of Operations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security, July 15, 2003.

**Defining Terrorism.** In response to concerns that the definition of terrorism and the designation of terrorist organizations in the INA that is used to determine the inadmissibility and removal of aliens is too narrow, Congress amended the INA's inadmissibility provisions to broaden somewhat the terrorism grounds for excluding aliens. The INA already barred the admission of any alien who has engaged in or incited terrorist activity, is reasonably believed to be carrying out a terrorist activity, or is a representative or member of a designated foreign terrorist organization. To this list of inadmissible aliens, the USA PATRIOT Act adds representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and spouses and children of aliens who are deportable on terrorism grounds on the basis of activities occurring within the previous 5 years. Further changes or refinements to this definition may arise in the 108<sup>th</sup> Congress.

**Other Security Concerns.** In the 107<sup>th</sup> Congress, S. 864, which was reported by the Senate Judiciary Committee on April 25, 2002, would have further broadened the security and terrorism grounds of inadmissibility to exclude aliens who have participated in the commission of acts of torture or extrajudicial killings abroad. S. 864 also would have made aliens in the United States removable on these same grounds. H.R. 5013 would have expanded and recodified the grounds for inadmissibility in the INA as part of its significant revision of immigration policy. Legislation similar to S. 864 — the Anti-Atrocity Alien Deportation Act of 2003 (H.R. 1440 and S. 710) — has been introduced in the 108<sup>th</sup> Congress