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Immigration Legislation and Issues in the 109th Congress

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Andorra Bruno, Coordinator,
Ruth Ellen Wasem, Alison Siskin, and Blas Nuñez-Neto
Domestic Social Policy Division

Michael John Garcia, Stephen R. Viña, and Margaret Mikyung Lee
American Law Division

Karma Ester
Knowledge Services Group

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Summary

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

The security-related issue of immigration enforcement remains on Congress's agenda. H.R. 4437, as passed by the House, contains provisions on border security, the role of state and local law enforcement, employment eligibility verification and worksite enforcement, smuggling, detention, and other enforcement-related issues. Many of these provisions were included in H.R. 4312, a predecessor bill of H.R. 4437 reported by the House Homeland Security Committee. The enforcement-related issues in H.R. 4437 are also the subject of other bills.

In addition to its enforcement provisions, H.R. 4437 contains significant and, in some cases, highly controversial provisions on unlawful presence, voluntary departure and removal, expedited removal, and denying U.S. entry to nationals from uncooperative countries. Despite efforts by some House Members to amend H.R. 4437 to establish new guest worker programs, the bill does not contain any such provisions. Some other bills, however, do combine enforcement provisions with provisions on legal temporary admissions, including guest workers, and/or legal permanent admissions. Among these measures are S. 1033/H.R. 2330, S. 1438, S. 2454, H.R. 3333, and the draft mark by Senate Judiciary Committee Chairman Specter. The Senate Judiciary Committee is in the process of marking up the Chairman's mark. The 109th Congress also has held hearings on immigration reform issues and has enacted limited provisions on temporary and permanent employment-based immigration as part of P.L. 109-13.

Among the other immigration bills receiving action thus far in the 109th Congress are measures on alien victims of domestic violence (P.L. 109-162 and S. 1197), trafficking in persons (P.L. 109-162, P.L. 109-164, and S. 1197), and refugees (P.L. 109-102 and P.L. 109-149).

Department of Homeland Security (DHS) appropriations and immigration legislation related to Hurricane Katrina are covered in other products and are not discussed here. This report will be updated as legislative developments occur.

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Immigration Legislation and Issues in the 109th Congress

Introduction

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

The security-related issue of immigration enforcement continues to be on the congressional agenda. Various bills have been introduced that address enforcement-related issues, including border security; the roles of the U.S. military, civilian patrols, and state and local law enforcement agencies in immigration enforcement; smuggling; detention; and the enforcement of prohibitions on employing unauthorized workers. Among these bills is the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), which was passed by the House on December 16, 2005. A number of provisions in H.R. 4437 were included in a predecessor bill (H.R. 4312), as reported by the House Homeland Security Committee.

Immigration reform proposals that combine enforcement provisions with provisions on temporary and permanent immigration and other issues are also before the 109th Congress. A number of immigration reform-related hearings have been held this Congress, including a July 2005 Senate Judiciary Committee hearing on reform proposals. The Senate Judiciary Committee is in the process of marking up a draft immigration reform proposal by Committee Chairman Specter, known as the Chairman's mark.¹ It contains provisions on border enforcement, interior enforcement, and unlawful employment of aliens, as well as on guest workers, legal permanent immigration reform, unauthorized aliens in the United States, and other issues. No official document listing the amendments to the Chairman's mark that the Senate Judiciary Committee has considered or approved is currently available. S. 2454, introduced on March 16, 2006, contains selected titles of the Chairman's mark,

¹ The version of the Chairman's mark discussed in this report is as of March 7, 2006.

with some modifications. These titles address border enforcement, interior enforcement, unlawful employment, permanent legal immigration reform, and other topics. S. 2454 does not contain provisions on guest workers or on the future status of unauthorized aliens in the United States. Other related immigration reform bills include the Secure America and Orderly Immigration Act (S. 1033/H.R. 2330) and the Comprehensive Enforcement and Immigration Reform Act of 2005 (S. 1438), both of which address immigration enforcement, guest workers, and legal permanent immigration reform, among other issues.

While immigration reform proposals remain pending, Congress has enacted limited provisions on temporary and permanent employment-based immigration as part of P.L. 109-13. It also has enacted legislation concerning alien victims of domestic violence, trafficking in persons, and refugees. This report discusses these and other immigration-related issues that have seen legislative action or are of significant congressional interest. DHS appropriations and immigration legislation related to Hurricane Katrina are covered in other products and are not discussed here.² The final section of the report lists enacted legislation and selected bills receiving action.

REAL ID Act

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

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

The REAL ID Act makes a number of changes to Immigration and Nationality Act (INA)⁴ provisions concerning asylum and other forms of relief from removal. It provides express statutory guidelines regarding burden of proof, eligibility, and

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

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

⁴ Act of June 27, 1952, ch. 477; 66 Stat. 163; 8 U.S.C. 1101 *et seq.* The INA is the basis of current immigration law.

credibility standards in relief from removal cases. In most cases, no statutory standards existed prior to the REAL ID Act; instead, standards were established by regulation and (sometimes conflicting) case law. In some areas, the guidelines established by the REAL ID Act are arguably more stringent than under preexisting law (e.g., pursuant to the act an asylum applicant must now show that one of the five grounds for asylum eligibility was or will be *at least one central reason* for his persecution, a higher standard than previously employed in some federal circuits); in other cases, the REAL ID Act simply codifies existing regulation or case law. The act also eliminates the annual caps on the number of persons granted asylum who may have their status adjusted to legal permanent residents (LPRs), and on the number of persons who may enter the United States as refugees/asylees on account of persecution for resistance to coercive population control methods (a special asylum category).⁵

Judicial Review

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

Terrorism-Related Grounds for Exclusion and Removal

The REAL ID Act expands the terrorism-related grounds for alien inadmissibility and deportation, as well as the meaning of certain terms used in the INA to describe terrorist activities or entities, to cast a wider net over groups and persons who provide more discrete forms of assistance to terrorist organizations, particularly with respect to fund-raising and soliciting membership in those organizations. The REAL ID Act makes activities such as espousal of terrorist activity and receipt of military-type training from or on behalf of a terrorist organization grounds for exclusion. It also significantly expands the terrorism-related grounds for deportation so that they are identical to the terrorism-related grounds for inadmissibility. At the same time, the REAL ID Act provides the Secretary of State and the Secretary of Homeland Security with authority to waive certain terrorism-related INA provisions that would otherwise make a particular alien inadmissible or cause a group to be designated as a terrorist organization.⁶

⁵ For further information on asylum, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

⁶ For additional information, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

Expediting the Construction of Barriers at the Border

The REAL ID Act provides the Secretary of Homeland Security with authority to waive the application of any legal requirements when he believes such a waiver is necessary to ensure the expeditious construction of certain barriers and roads along U.S. land borders, including a 14-mile wide fence near San Diego. The act provides that federal judicial review of waiver decisions or actions by the Secretary is limited to those claims alleging a violation of the U.S. Constitution.⁷

Improving Border Infrastructure and Technology Integration

The REAL ID Act includes measures to improve border infrastructure and technology integration between state and federal entities. DHS is required to conduct a study on border security vulnerabilities, establish a pilot program to test ground surveillance technologies on the northern and southern borders, and implement a plan to improve communications systems and information-sharing between federal, state, local, and tribal agencies on matters relating to border security. DHS is also required to submit reports to Congress concerning the implementation of these requirements.

Requirements Concerning State-Issued Drivers' Licenses and ID Cards

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

⁷ For additional information, see CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.

Border Security

DHS is charged with protecting our nation'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.

Border security is a key immigration issue for the 109th Congress. As discussed above, border security provisions were enacted as part of the REAL ID Act. In addition, a variety of other bills addressing different aspects of the issue are pending. There has been much debate in the 109th Congress about whether DHS has sufficient resources to fulfill its border security mission, and some bills would add resources to the border, including personnel, infrastructure, and technology. Other bills propose to expand various programs already being implemented by DHS at the border. H.R. 4437, as passed by the House, S. 2454, and the Chairman's mark contain provisions of both types.⁸ Other pending bills would involve the military or civilians in patrolling the U.S. border.⁹

H.R. 4437

H.R. 4437, as passed by the House, contains a number of border-security related provisions; this section describes a selection of these provisions. The bill would require the Secretary of DHS to submit a National Strategy for Border Security outlining a comprehensive strategy for securing the border, including a surveillance plan and a time line for implementation. It would add personnel, technology, and infrastructure resources both at and between POE and would direct DHS to work with the Department of Defense to formulate a plan for increasing the availability and use of military equipment to assist with the surveillance of the border. Additionally, H.R. 4437 would direct DHS to improve coordination and communication among its component agencies by creating task forces and other mechanisms to enhance information and intelligence sharing. It would allow homeland security grant funding to be used for reimbursing state and local governments for costs associated with detecting and responding to the unlawful entry of aliens.¹⁰ It would remove Air and Marine Operations (AMO) from DHS's Customs and Border Protection (CBP) and establish a stand-alone AMO Office within the department. It would require DHS to expand the U.S. Visitor and Immigrant Status Technology (US-VISIT) Program¹¹

⁸ Almost all of the border security provisions in H.R. 4437 were included in a related bill (H.R. 4312), as reported by the House Homeland Security Committee.

⁹ For an expanded discussion of immigration-related border security issues, see CRS Report RL33181, *Immigration Related Border Security Legislation in the 109th Congress*, by Blas Nuñez-Neto.

¹⁰ For a discussion of the role of state and local law enforcement in the enforcement of immigration law, see the next main section of the report.

¹¹ For additional information on the US-VISIT program, see CRS Report RL32234, *U.S.* (continued...)

to collect ten fingerprints from aliens currently required to register with the program as they enter the country. Lastly, as amended on the House floor, H.R. 4437 would direct DHS to construct border fencing along five different stretches of the southern border that total roughly 730 miles, and it would require DHS to submit a time line for deploying, and enabling the exit component of US-VISIT at land POE.

S. 2454 and Chairman's Mark

In the Senate, S. 2454 and the Chairman's mark contain a number of border security-related provisions that are similar. Many of these provisions are also similar to provisions in H.R. 4437, including those calling for developing a national border security plan, for using military surveillance assets at the border, and for additional resources. This section outlines a selection of the border security-related provisions in S. 2454 and the Chairman's mark. Both bills would require DHS to develop a National Strategy for Border Security that sets forth actions that must be carried out to achieve operational control of the border and establishes a schedule for implementing these actions. The bills would require DHS to develop a comprehensive plan for the systematic surveillance of the border, and would direct DHS and the Department of Defense (DOD) to develop a plan to increase the use of DOD equipment to surveil the border. The bills would add resources for border security by authorizing increases for personnel, technology, and infrastructure. Both bills include provisions authorizing the Border Patrol to maintain temporary or permanent checkpoints on roadways, and CBP to construct additional POEs as necessary. Both bills would require DHS to enhance the connectivity of their biometric fingerprint database with the Federal Bureau of Investigation's database, and to develop and implement a plan to ensure clear two-way communications for its agents working along the border. The bills would require DHS to submit a schedule for deploying US-VISIT at all land POE, for developing and deploying the system's exit control component, and for making all immigration screening systems interoperable. The bills would also authorize DHS to require entering and departing aliens to provide information including biometric data, and to collect biometric data from alien crewmen. Additionally, both bills would add withholding biometric data as a ground for inadmissibility. Lastly, both bills would direct DHS, in conjunction with other federal agencies, to submit a study on the construction of a system of barriers along the southern and northern borders.

Although the two bills feature many sections that are virtually identical, S. 2454 includes some provisions that are either slightly different from or not present in the Chairman's mark. The Chairman's mark, as reportedly amended by the Judiciary Committee during the ongoing markup, would replace the current border fencing in the Border Patrol's Tucson Sector with a reinforced double layer fence and would direct DHS to construct 150 miles of vehicle barriers in the Sector. S. 2454 includes a similar provision, but would also expand the fencing in the Yuma Sector and add 50 miles of vehicle barriers there. S. 2454 would also require the DHS Inspector General (IG) to review all contracts relating to the Department's Secure Border

¹¹ (...continued)

Visitor and Immigrant Status Indicator Technology (US-VISIT) Program, by Lisa Seghetti and Stephen Viña.

Initiative¹² (SBI) worth more than \$20 million dollars, and would require the Secretary to report the IG's findings to Congress. Additionally, S. 2454 would require DHS to report within 60 days any contracts awarded under the SBI to companies with headquarters outside the United States.

U.S. Military at the Border

The National Defense Authorization Act for Fiscal Year 2006 (P.L. 109-163) includes a provision (§1035) that requires a report from the Secretary of Defense concerning the potential use of military air assets to support DHS by surveilling the border. This language was inserted during conference, and replaced prior language in the House-passed version of the bill (H.R. 1815) that would have authorized the U.S. military to be deployed to the border to assist DHS in preventing the entry of terrorists, drug smugglers, and unauthorized aliens at and between official ports of entry. Under the House-passed provision, U.S. military personnel would have been deployed to the border only at the request of the Secretary of Homeland Security and only after completing a training course on border law enforcement. Military personnel would have to have been accompanied by DHS law enforcement personnel once deployed, and would not have been authorized to conduct searches, seizures, or other similar law enforcement activities, or to make arrests. This provision would not have superseded the Posse Comitatus Act, which prohibits the use of the U.S. military to perform civilian governmental tasks unless explicitly authorized to do so.¹³ As previously noted, H.R. 4437, S. 2454, and the Chairman's mark include a provision that would direct DHS to work with DOD to create a plan that would enhance the use of military surveillance assets at the border.

Civilian Patrols

Several bills in the 109th Congress would create civilian border patrolling organizations. In the Senate, S. 1823 would establish a pilot Volunteer Border Marshal Program. This program would use volunteer state peace officers who would be assigned to the Border Patrol and charged with assisting in "identifying and controlling illegal immigration and human and drug trafficking." In the House, H.R. 3704 would create a Border Patrol Auxiliary that would be deployed to the border and charged with notifying the Border Patrol about unauthorized aliens attempting to cross into the United States. These auxiliaries would be vested with the same powers as Border Patrol agents. DHS would be charged with recompensing members

¹² The Secure Border Initiative is a three pillared plan for securing the border that, according to DHS, "will focus on controlling the border, building a robust interior enforcement program, and establishing a Temporary Worker Program." SBI includes all the DHS resources that are deployed at the border, including personnel, technology, and infrastructure such as vehicle barriers or fencing. United States Department of Homeland Security, *FY2007 Congressional Budget Justifications*, p. CBP-S&E-6.

¹³ For a detailed explanation of the Posse Comitatus Act (18 U.S.C. 1385), please see CRS Report RS20590, *The Posse Comitatus Act and Related Matters: A Sketch*, by Jennifer Elsea; and CRS Report RS21012, *Terrorism: Some Legal Restrictions on Military Assistance to Domestic Authorities Following a Terrorist Attack*, by Charles Doyle and Jennifer Elsea.

of the auxiliaries for their travel, subsistence, and vehicle operation expenses. H.R. 3622 would authorize state governments to create a militia called the Border Protection Corps (BPC) in order to prevent the illegal entry of individuals and to take individuals who have entered illegally into custody. DHS would be responsible for recompensing the states for all the expenses incurred in the establishment and operation of their BPCs.

Role of State and Local Law Enforcement

Since the attacks of September 11, many have called on state and local law enforcement agencies to play a larger role in the enforcement of federal immigration laws. Some question, however, whether state and local law enforcement officers possess adequate authority to enforce all immigration laws — that is, both *civil* violations (e.g., lack of legal status, which may lead to removal through an administrative system) and *criminal* punishments (e.g., alien smuggling, which is prosecuted in the courts). Multiple bills in Congress would address these authority issues and enhance the role of state and local law enforcement agencies in the enforcement of immigration law.¹⁴

H.R. 4437, as passed by the House, would reaffirm the existing inherent authority of States, as sovereign entities (including their law enforcement personnel), to investigate, identify, apprehend, arrest, detain, or transfer into federal custody aliens in the United States in the course of carrying out routine duties (§220). Similar to H.R. 4437, the Department of Homeland Security Authorization Act for FY2006 (H.R. 1817), as passed by the House, would authorize state and local law enforcement personnel to apprehend, detain, or remove aliens in the United States in the course of carrying out routine duties (§520). Likewise, it would reaffirm the existing general authority for state and local law enforcement personnel to carry out the above mentioned activities. S. 2454 would also reaffirm a state's inherent authority to investigate, identify, apprehend, arrest, detain, or transfer into federal custody aliens in the United States, but would limit such practices to the enforcement of the *criminal* provisions of the INA. Similar language limiting enforcement to the *criminal* provisions of the INA appears to have been passed by voice vote as an amendment to the Chairman's mark.

Among its other provisions, H.R. 4437, as passed by the House, would require the Secretary of DHS to create a training manual to aid state and local law enforcement officers in carrying out immigration-related enforcement duties (§221). H.R. 4437 would authorize the Secretary to make grants to state and local police agencies for the procurement of equipment, technology, facilities, and other products that are directly related to the enforcement of immigration law (§222). The bill would allow a state to reimburse itself with certain DHS grants for activities related to the enforcement of federal laws aimed at preventing the unlawful entry of persons or things into the United States that are carried out under agreement with the federal

¹⁴ For further discussion of this issue, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen R. Viña, and Karma Ester.

government (§305). H.R. 4437 would further require designated sheriffs within 25 miles of the southern international border of the United States to be reimbursed or provided an advance for costs associated with the transfer of aliens detained or in the custody of the sheriff (§607). More specifically, sheriffs could be reimbursed for detaining, housing, and transporting aliens who are not lawfully present in the United States or who have unlawfully entered the United States, and sheriffs would be allowed to use 20% of the funds received for the construction, maintenance, and operation of detention facilities. Amendments to the Chairman's mark that would authorize funding for DHS to provide sufficient transportation for aliens apprehended by state and local authorities and that would reimburse states for training and equipment costs related to immigration enforcement appear to have been passed by voice vote.

Employment Eligibility Verification and Worksite Enforcement

Under the INA, it is unlawful for an employer to knowingly hire, or recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are required to participate in a paper-based employment eligibility verification system, commonly referred to as the I-9 system, in which they examine documents presented by new hires to verify identity and work eligibility, and complete and retain I-9 verification forms. In addition, employers may elect to participate in an electronic employment eligibility verification system, established under a 1996 law. Participants in the Basic Pilot program electronically verify new hires' employment authorization through Social Security Administration (SSA) and, if necessary, DHS databases. Employers violating prohibitions on unlawful employment may be subject to civil and/or criminal penalties.¹⁵ Enforcement of these provisions is termed worksite enforcement.

Employment eligibility verification and worksite enforcement are current areas of congressional interest. Chief among the reasons for this is the large and growing number of unauthorized aliens in the United States, the majority of whom are in the labor force. According to estimates by the Pew Hispanic Center, in 2005, the unauthorized alien population totaled about 11.1 million and the unauthorized alien working population totaled about 7.2 million.¹⁶ Particularly since the 2001 terrorist attacks, many have raised security concerns about having such a large unauthorized population. In addition, the issue of worksite enforcement has gained attention recently in connection with guest worker proposals. President Bush has expressed support for a new temporary worker program and has called for increased worksite

¹⁵ INA §274A, 8 U.S.C. §1324a. For further discussion of these legal provisions, see CRS Report RS22180, *Unauthorized Employment of Aliens: Basics of Employer Sanctions*, by Alison M. Smith.

¹⁶ Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.; Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center Research Report, March 7, 2006, at [<http://www.pewhispanic.org/reports/report.php?ReportID=61>].

enforcement as part of the program. Immigration reform bills containing guest worker and worksite enforcement-related provisions have been introduced in the 109th Congress.

A number of bills related to employment eligibility verification and worksite enforcement are before the 109th Congress. Title VII of H.R. 4437, as passed by the House, would direct DHS to establish an employment eligibility verification system (modeled on the Basic Pilot program), which would be mandatory for all employers. Employers would be required to query the system to verify the identity and employment eligibility of an individual within three days after the hiring date or, in a change from Basic Pilot program requirements, before commencing recruitment or referral. These verification requirements would take effect two years after enactment. The current I-9 system would remain in place with some modifications. H.R. 4437 also would require employers to verify the identity and employment eligibility of previously hired workers by six years after enactment. In addition, H.R. 4437 would increase existing monetary penalties for employer violations. At the same time, it would provide for the reduction of civil monetary penalties for employers with 250 or fewer employees.

The Chairman's mark and S. 2454 each include employment eligibility verification and worksite enforcement provisions in title III; the provisions in the two titles are nearly identical. Like H.R. 4437, both proposals would direct DHS to establish an employment eligibility verification system (modeled on the Basic Pilot program), which would be mandatory for all employers. Employers would be required to query the system to verify the identity and employment eligibility of an individual within three days after hiring or recruiting or referring for a fee. Under the Chairman's mark and S. 2454, these verification requirements would be phased in for different groups of employers over a period of up to five years. The current I-9 system would remain in place with some modifications. The Chairman's mark and S. 2454 would require some, but not all, employers to verify the identity and employment eligibility of previously hired workers. Employers to be subject to this requirement, which would be effective 180 days after enactment, would be those who are part of the critical infrastructure of the United States or who are directly related to U.S. national or homeland security. The Chairman's mark and S. 2454, like H.R. 4437, also would increase existing monetary penalties for employer violations. In addition, they would establish a new penalty for employees who falsely represent on the I-9 form that they are authorized to work.

Other pending bills, a selection of which are discussed below, would similarly require all employers to conduct employment eligibility verification through the Basic Pilot program or a similar system. As detailed in the following paragraphs, some would maintain the Basic Pilot program's separation of the DHS and SSA databases as part of the verification system; others call for the creation of a new unified database by DHS or SSA. Most of the measures would increase existing monetary penalties for employer violations. Among their other provisions, the bills variously would authorize appropriations at such sums as necessary to implement their provisions, and subject to the availability of appropriations, would authorize an increase in personnel to conduct worksite enforcement

H.R. 98, which was the subject of a May 2005 hearing by the House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims, would require Social Security cards to include an encrypted machine-readable electronic identification strip unique to the bearer and a digitized photograph. Under the bill, new hires would have to present a Social Security card of this type to their employers, who would use them to verify the worker's identity and work authorization. Employment eligibility verification would be conducted by accessing a database to be established by DHS that would contain DHS and SSA data. H.R. 98 would raise maximum penalties for employers who violate prohibitions on unlawful employment.

Section 402 of S. 1033/H.R. 2330 would direct SSA to establish a new employment eligibility confirmation system through which employers would verify new hires' identity and work authorization. The new system is to utilize machine-readable documents containing encrypted electronic information as a central feature. SSA also would be tasked with designing and maintaining an employment eligibility database, which would include specified information about work-authorized noncitizens. As described below in the section on guest workers, S. 1033/H.R. 2330 would establish a new H-5A temporary worker visa. Employers of these workers would be required to verify their identity and work authorization through the new database. S. 1033/H.R. 2330 would further direct SSA to develop a plan to phase out the current I-9 system and place all workers into the new database.

Title III of S. 1438 would make various changes to current verification requirements. It would require SSA to issue machine-readable, tamper-resistant Social Security cards. These cards would become the only acceptable documents for evidencing employment authorization. To establish identity, an individual would have to provide either a U.S. government-issued identification document containing a biometric identifier or a state-issued driver's license or identification document that conforms with REAL ID Act guidelines. Under S. 1438, participation in the Basic Pilot program, which would be renamed, would be mandatory, and there would be sanctions for noncompliance. In addition, S. 1438 would increase monetary penalties for employer violations.

S. 1917 would rename the Basic Pilot program and make participation mandatory. Participants in the verification system would be deemed to be in compliance with the I-9 requirements. S. 1917 would direct DHS to fully integrate all databases and data systems used in the verification system. Under the bill, the only acceptable documents for evidencing employment authorization would be a social security card or a machine-readable, tamper resistant card issued by the U.S. government that explicitly authorizes employment. Among its other provisions, S. 1917 would increase monetary penalties for employer violations.

H.R. 3333 would rename the Basic Pilot program and make participation mandatory, and sanction employers for noncompliance. As under the House-passed H.R. 4437, employers would be required to verify that current employees, as well as new hires, are authorized to work. H.R. 3333 would increase monetary penalties for employer violations. In addition, it contains a number of provisions related to Social Security accounts and cards.

H.R. 3938 would rename the Basic Pilot program, make participation mandatory, and sanction employers for noncompliance. At the same time, it proposes to create a new employment eligibility verification system, essentially identical to that proposed in H.R. 98, to replace the renamed Basic Pilot program. The new verification system would be based on an employment eligibility database, to be established by DHS, containing DHS and SSA data. As explained in the above discussion of H.R. 98, individuals commencing new employment would be required to present a Social Security card with an encrypted machine-readable electronic identification strip and a digitized photograph, which the employer would use to verify identity and work authorization through the new database. H.R. 3938 also would increase monetary penalties for employer violations.

Alien Smuggling

Many contend that the smuggling of aliens into the United States constitutes a significant risk to national security and public safety. Since smugglers facilitate the illegal entry of persons into the United States, some maintain that terrorists may use smuggling routes and organizations to enter undetected. In addition to generating billions of dollars in revenues for criminal enterprises, alien smuggling can lead to collateral crimes including kidnaping, homicide, assault, rape, robbery, auto theft, high speed flight, vehicle accidents, identity theft, and the manufacturing and distribution of fraudulent documents. The main alien smuggling statute (INA §274) delineates the criminal penalties, asset seizure rules, and prima facie evidentiary requirements for smuggling offenses.

Several bills in the 109th Congress have provisions concerning alien smuggling. Among them is H.R. 2744, the FY2006 Agriculture Appropriations bill, which was signed into law as P.L. 109-97. Section 796 of this law specifies circumstances under which religious organizations are exempt from criminal penalties related to the smuggling and harboring of certain aliens, and states that it is not a violation of INA §274 for a bona fide, nonprofit, religious organization to encourage or allow an unauthorized alien to work for the religious organization as a volunteer minister or missionary. Under the provision, the alien must have been a member of the religious denomination for at least one year, and may not be compensated as an employee, but may be provided room, board, travel, medical assistance, and other basic living expenses.

H.R. 4437, as passed by the House, the Chairman's mark, and S. 2454 would rewrite INA §274. Although the bills are similar, they are not identical.¹⁷ All the bills would broaden the types of acts that are considered alien smuggling. For example, they would make it a smuggling offense to transport a person outside the

¹⁷ For example, H.R. 4437 would make a person guilty of a smuggling offense if the person “*assists*, encourages, directs or induces” an alien to come to the United States knowing or in reckless disregard that the alien will be illegally present. The Chairman's mark and S. 2454 would make a person guilty of a smuggling offense if the person “*facilitates*, encourages, directs or induces” an alien to come to the United States knowing or in reckless disregard that the alien will be illegally present.

United States knowing or in reckless disregard of the fact that the person is in unlawful transit from one country to another, or on the high-seas, and is seeking to illegally enter the United States. Nonetheless, only the Chairman's mark and S. 2454 would provide that it would not be a violation of the alien smuggling statute for an individual to provide an alien with emergency humanitarian assistance,¹⁸ or for a bona fide, nonprofit, religious organization to encourage, invite, call, or allow an unauthorized alien to work for the religious organization as a volunteer minister or missionary (i.e., the provision that was enacted in P.L. 109-97).

In addition, H.R. 4437, the Chairman's mark, and S. 2454 would establish mandatory minimum sentences for those convicted of alien smuggling, and would enhance penalties for persons carrying firearms during smuggling offenses. Furthermore, as recommended in a recent Government Accountability Office report on alien smuggling, all three proposals would amend the law to allow for the seizure and forfeiture of any property used to commit or facilitate alien smuggling.¹⁹

Other pending bills would variously increase penalties or establish minimum penalties for alien smuggling (H.R. 255, H.R. 688, H.R. 1320, H.R. 3938, S. 1916, S. 2061); increase the personnel devoted solely to combating alien smuggling (H.R. 688); and grant S visas²⁰ to aliens outside the United States who have information on alien smuggling operations (H.R. 255, H.R. 2092).

Detention

Under the INA, there is broad authority to detain aliens while awaiting a determination about whether the aliens should be removed from the United States. The law mandates that certain categories of aliens be subject to mandatory detention (i.e., the aliens must be detained). Aliens subject to mandatory detention include those arriving without documentation or with fraudulent documentation, those who are inadmissible or deportable on criminal or national security grounds, those certified as terrorist suspects, and those who have final orders of deportation. Aliens not subject to mandatory detention may be detained, paroled, or released on bond. The priorities for detention of these aliens are specified in statute and regulations.²¹

¹⁸ The assistance can include food or emergency medical care, and transportation to a location where the assistance is provided free of charge. Notably, there was much discussion during the Senate Judiciary mark-up about whether the assistance should include housing and counseling (e.g., for battered aliens) and whether the provision should be limited to individuals or also include organizations.

¹⁹ See GAO-05-305, "Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response," May 27, 2005.

²⁰ For more information on S visas see, CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*, by Karma Ester.

²¹ For more information on the detention of aliens see, CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

There are many policy issues surrounding the detention of aliens. Among them are concerns about the number of aliens subject to mandatory detention and the justness of mandatory detention, especially as it is applied to asylum seekers arriving without proper documentation. Some have raised concerns about the length of time spent in detention by aliens who have been ordered removed. Additionally, the amount of detention space available to house DHS detainees is a constant issue, especially since many nondetained aliens fail to appear for their removal hearings or to depart from the United States after receiving final orders of deportation.

Several bills in the 109th Congress, including H.R. 4437, the Chairman's mark, and S. 2454, contain provisions concerning the detention of aliens in the United States. H.R. 4437, the Chairman's mark, and S. 2454 would codify and modify the regulations governing the review of post-removal order detention cases for aliens who were lawfully admitted. In addition, H.R. 4437 would require that as of October 1, 2006, all aliens attempting to illegally enter the United States who do not withdraw their applications for admission and depart immediately or who are not granted parole, be subject to mandatory detention until the alien is either removed or granted admission; the Chairman's mark, as amended, contains a similar provision. H.R. 4437 also would authorize and establish the selection criteria for the Secretary of DHS to contract with private entities to provide transportation to detention facilities and other locations for aliens apprehended along the border by CBP, and would require mandatory detention for aliens of street gangs.

Illegal Presence, Removal, and Exclusion

H.R. 4437, as passed by the House, would build on past legislative efforts, most recently the REAL ID Act, to tighten current law in the areas of illegal presence and illegal entry; alien voluntary departure and removal from the United States; and alien exclusion from, or inadmissibility to, the United States. It also would expand limitations on judicial review enacted as part of the REAL ID Act.

Unlawful Presence

Section 203 of H.R. 4437 and §206 of both the Chairman's mark and S. 2454 would upgrade the consequences of illegal presence from a civil offense to a criminal offense. Presently, unlawful presence is a criminal offense only when an alien has previously been removed or had departed the U.S. while a removal order was outstanding. Under H.R. 4437, both *unlawful entry* and presence would be made into felonies (a first offense of the unlawful entry statute is currently a misdemeanor, while subsequent offenses are felonies), while the Chairman's mark and S. 2454 would make *unlawful presence* a misdemeanor for first-time offenses and a felony for subsequent offenses. The bills would further heighten the criminal and civil penalties for unlawful entry, reentry, and presence when an alien had previously been convicted of certain crimes. Under §209 of H.R. 4437 and §206 of both the Chairman's mark and S. 2454, unlawful reentry and presence after voluntary departure also would be subject to increased criminal penalties. H.R. 4437 would establish mandatory minimum sentences requirements for the crime of reentering the U.S. after either having been removed or having departed under a removal order.

(§204). In addition, it would enhance the penalties for certain violent crimes and drug trafficking offenses when committed by an unlawfully present alien (§618).

Voluntary Departure and Removal

Under H.R. 4437, the Chairman's mark, and S. 2454, the granting of voluntary departure as relief from being subject to removal would be reformed to reduce abuse. Among other things, voluntary departure would be granted only as part of an agreement by the alien. As part of the agreement, the alien would have to waive any rights to appeal, but could receive a discretionary reduction of the period of inadmissibility before the alien could apply to reenter the United States. A subsequent decision to file an appeal would nullify the agreement. The maximum validity period for permission to depart voluntarily prior to the conclusion of removal proceedings that have already been initiated would be reduced from 120 days to 60 days, and bond would be required in such cases unless waived as a serious financial hardship and unnecessary to guarantee departure. The maximum validity period for permission to depart voluntarily granted upon the conclusion of removal proceedings would be reduced from 60 days to 45 days. Any failure to depart voluntarily would result in increased civil penalties and ineligibility for immigration benefits and certain relief.

In addition, under the bills, aliens under a final order of removal who evade arrest and removal would be barred from seeking admission prior to removal, and aliens who fail to comply with or otherwise obstruct a removal order would be barred from discretionary relief.

Expedited Removal

H.R. 4437, as passed by the House, S. 2454, and the Chairman's mark, as amended, would expand expedited removal. More specifically, the bills would require the DHS Secretary to place any alien who has not been admitted or paroled, with minor exceptions, into expedited removal if the alien is apprehended within 100 miles of the land border and 14 days of unauthorized entry.

Denying Entry

Under current law (INA §243(d)), the Secretary of State is required to deny visas to nationals of countries, when informed by the Attorney General that the country has denied or delayed accepting its citizens, nationals, or residents whom the United States ordered removed. H.R. 4437, as passed by the House, would rewrite this provision to authorize the Secretary of DHS, after consultation with the Secretary of State, to deny the admission of nationals of countries that deny or delay accepting their citizens, nationals, or residents whom the United States ordered removed. In other words, it would shift implementation from visa issuances at consulates abroad — where reportedly the Attorney General has never invoked §243(d) — to alien admissions at U.S. ports of entry. If enacted, foreign nationals who have visa but are from uncooperative countries would be denied admission when they arrive at ports of entry if the Secretary of DHS so deemed.

The Senate Committee on the Judiciary reportedly approved an amendment to the Chairman's mark that would limit denial of admission to diplomats of countries that deny or delay accepting those persons whom the U.S. ordered removed.

Consequences for Terrorist and Criminal Activity

Beyond the REAL ID Act, a number of bills have been introduced in the 109th Congress aimed at expanding the terrorism-related and criminal grounds for inadmissibility and deportation and denying certain immigration benefits to aliens covered by such grounds. The House has passed one of these bills, H.R. 4437. Provisions in Titles II and VI of H.R. 4437 would modify immigration law relating to aliens involved in criminal or terrorism-related activity in a number of ways. Among other things, H.R. 4437 would prohibit persons described in the terrorism-related grounds for inadmissibility and deportation from being naturalized and restrict their eligibility for certain immigration benefits, including relief from removal.²² H.R. 4437 would also expand the criminal grounds for inadmissibility and deportation (including for alien gang members, among others), prohibit the adjustment of status of refugees and asylees who have committed aggravated felonies, and expand the immigration-related and criminal penalties for certain types of document and immigration fraud.²³ Title II of both S. 2454 and the Chairman's mark contain provisions generally covering the same matters.

Reduction of Appellate Review

Title VIII of H.R. 4437, Title V of S. 2454 and Title VII of the Chairman's mark would continue the trend of streamlining and limiting certain administrative and judicial review procedures. These bills share certain similar provisions. In response to case law in the U.S. Court of Appeals for the Ninth Circuit, the definition of "order of removal" (or deportation) would be amended to clarify that the Board of Immigration Appeals (BIA) may directly enter an order upon reversal of an immigration judge's decision to the contrary.²⁴ Also with respect to removal, the removal statute (INA §241) would be amended to clarify that certain amendments

²² For background on the current terrorism-related grounds for inadmissibility and deportation, along with more detailed discussion of how H.R. 4437 would alter the terrorism-related provisions of the INA, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

²³ For background on the present immigration consequences of criminal activity, as well as the changes that H.R. 4437 would make to such consequences, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia. For more particular information on laws concerning immigration-related document fraud, and the effects that H.R. 4437 would have in this area, see CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Michael John Garcia.

²⁴ The court held that BIA must remand a case to the immigration judge for entry of an order of removal where it reversed the immigration judge's decision to not order removal. See *Molina-Camacho v. Ashcroft*, 393 F. 3d 937 (9th Cir. 2004); *Noriega-Lopez v. Ashcroft*, 335 F. 3d 874 (9th Cir. 2003).

made by the REAL ID Act with respect to evidentiary standards would apply to determinations of withholding of removal. In response to case law in the U.S. Court of Appeals for the Ninth Circuit, the INA would be amended to clarify that removal orders may be reinstated without a hearing before an immigration judge.²⁵ H.R. 4437 (but not S. 2454 or the Chairman's mark) would further provide for very limited judicial review of the constitutionality and statutory consistency of the reinstatement statute and of factual determinations in individual cases.

These three bills also would amend the judicial review statute (INA §242) in various ways. In response to the increasing backlog of appeals from BIA decisions in the federal appellate courts, INA §242 would be amended to provide for a screening process under which a single federal appellate judge or circuit justice would review a case within 60 days of assignment, and a petition for review would be denied absent the issuance of a certificate of reviewability by the federal appellate judge. The bills would clarify that motions to reopen/reconsider are discretionary decisions and provide for safeguards from the removal of an alien to an alternate country not previously considered in removal proceedings.²⁶ In addition, the statute providing for visa revocation (INA § 221(i)) would be amended to clarify that no judicial review of such revocation is available in any context, thereby facilitating efforts by DHS to remove aliens whose incorrectly granted visas were revoked after they entered the United States. The bills would also ban award of fees/expenses to an alien who prevails in judicial review of removal orders unless the order was not substantially justified.

H.R. 4437 alone would amend INA §242 to clarify that the restrictions on judicial review of denials of discretionary relief would apply to individual determinations made by the Attorney General or Secretary of Homeland Security under the immigration laws regardless of whether such determinations were made in removal proceedings and regardless of whether such decisions or actions were guided by regulatory or other standards. It would also make issuance of a nonimmigrant visa subject to a waiver of any right to review of an inadmissibility determination at a port of entry or to contest removal except for asylum.

S. 2454 and the Chairman's mark would consolidate immigration appeals in the U.S. Court of Appeals for the Federal Circuit; increase the number of litigation and adjudication personnel in DHS, the Department of Justice, and the Administrative Office of the U.S. Courts; and establish procedural guidelines for the Board of Immigration Appeals (CBIA). The Chairman's mark would generally establish by statute the position of Director of Executive Office of Immigration Review (EOIR); the appointment, qualifications, terms, and removal of immigration judges and members of BIA; and the continuation and expansion of a legal orientation program

²⁵ The court held that reinstatement of a previous order of removal against an alien who illegally reenters the United States necessitates a hearing before an immigration judge. *Morales-Izquierdo v. Ashcroft*, 388 F. 3d 1299 (9th Cir. 2004); this decision was subsequently vacated pending a rehearing en banc, *Morales-Izquierdo v. Gonzales*, 423 F. 3d 1118 (9th Cir. 2005).

²⁶ In H.R. 4437, this section is in title II, separate from the other litigation reform proposals.

providing information about immigration court procedures to detainees on a nationwide basis.

Temporary Immigration

The INA provides for the temporary admission of various categories of foreign nationals, who are known as nonimmigrants. Nonimmigrants are admitted for a temporary period of time and a specific purpose. They include a wide range of visitors, including tourists, foreign students, diplomats, and temporary workers. The latter group is the subject of major legislation and considerable interest in the 109th Congress. The main nonimmigrant category for temporary workers is the H visa. Among the visa classifications in the H visa category are the H-1B visa for professional specialty workers, the H-2A visa for agricultural workers, and the H-2B visa for nonagricultural workers. Foreign nationals also may be temporarily admitted to the United States for work- or business-related purposes under other nonimmigrant categories, including the B-1 visa for business visitors, the E visa for treaty traders and investors, and the L-1 visa for intracompany transfers.²⁷

Guest Workers

The H-2A and the H-2B visa programs mentioned above are the two main programs for temporarily importing low-skilled workers, sometimes referred to as guest workers. The 109th Congress revised the H-2B program for nonagricultural workers as part of P.L. 109-13. The H-2B language, added as a Senate floor amendment and retained, as modified, in the final conference agreement as Title IV of Division B, was based on S. 352/H.R. 793. For FY2005 and FY2006, these provisions exempt aliens who have been counted toward the 66,000 annual H-2B cap in any of the past three years from being counted again. They also cap at 33,000, the number of H-2B slots available during the first six months of a fiscal year. In addition, they require DHS to submit specified information to Congress on the H-2B program on a regular basis; impose a new fraud-prevention and detection fee on H-2B employers; and authorize DHS to impose additional penalties on H-2B employers in certain circumstances.

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

Title I of H.R. 3333 would eliminate all the current “H” visa subcategories, including the H-2A and H-2B visas, and replace them with a single H visa covering aliens coming temporarily to the United States to perform skilled or unskilled work. H visa holders could not change to another nonimmigrant status or adjust to LPR

²⁷ For an overview of nonimmigrant admissions, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

status in the United States. Under H.R. 3333, the new H visa program could not be implemented until the Secretary of Homeland Security makes certain certifications to Congress, including that a congressionally mandated automated entry-exit system is fully operational.²⁸

Other proposals to create new temporary worker visas have also been introduced in the 109th Congress. Among them are S. 1033/H.R. 2330 and S. 1438. Titles III and VII of S. 1033/H.R. 2330, respectively, would establish new H-5A and H-5B visas. The H-5A visa would cover aliens coming temporarily to the United States *initially* to perform labor or services “other than those occupational classifications” covered under the H-2A or specified high-skilled visa categories. The H-5B visa would cover certain aliens present and employed in the United States since before May 12, 2005. S. 1033/H.R. 2330 includes special provisions for H-5A and H-5B workers to apply to adjust to LPR status.

Title V of S. 1438 would establish a new “W” temporary worker visa under the INA. The W visa would cover aliens coming temporarily to the United States to perform temporary labor or service other than that covered under the H-2A or specified high-skilled visa categories. (S. 1438 would repeal the H-2B category.) In addition, Title VI of S. 1438 would authorize DHS to grant a new status — Deferred Mandatory Departure (DMD) status — to certain aliens present in the United States since July 20, 2004, and employed since before July 20, 2005. Aliens could be granted DMD status for up to five years. S. 1438 would not provide aliens in W status or DMD status with any special pathway to LPR status.²⁹

The Chairman’s mark proposes to establish a new temporary worker visa but these provisions, as well as those addressing unauthorized aliens in the United States, remain in flux. S. 2454 does not contain any such guest worker or unauthorized alien provisions.

Professional and Managerial Workers

Much of the recent legislative action on foreign temporary workers in professional and managerial jobs has focused on fees.³⁰ Title IV of P.L. 108-447, the Consolidated Appropriations Act for FY2005, requires the Secretary of Homeland Security to impose a fraud prevention and detection fee of \$500 on H-1B (professional specialty workers) and L (intracompany business personnel) petitioners. Section 426(b) of the act requires that the H-1B and L fraud prevention and detection fee be divided equally among DHS, the Department of State (DOS), and the Department of Labor (DOL) for use in combating fraud in H-1B and L visa

²⁸ For information on the entry-exit system issue, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Viña.

²⁹ For further information and analysis, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

³⁰ See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*; and CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, both by Ruth Ellen Wasem.

applications filed with DOS, investigating H-1B and L petitions filed with USCIS, and carrying out DOL labor attestation activities.

L Intracompany Visas. H.R. 3648, as ordered reported by the House Judiciary Committee, would place new requirements on the L nonimmigrant visa category, which permits multinational firms to transfer top-level personnel to their locations in the United States for five to seven years. The bill would require the Secretaries of State and Homeland Security to each charge fees of \$1,500 to employers filing certain visa applications and nonimmigrant petitions for L visas. These provisions were included in Title V of H.R. 4241, the Deficit Reduction Act of 2005, as passed by the House. The conference report (H.Rept. 109-362) on S. 1932 (P.L. 109-171), which was renamed the Deficit Reduction Act of 2005, did not include these L visa provisions.

Recaptured H-1B Visas and New Fees. On October 20, 2005, the Senate Judiciary Committee approved compromise language to recapture up to 30,000 H-1B visas that had not been issued in prior years. An additional fee of \$500 would be charged to obtain these recaptured visas. Also under this compromise, an additional fee of \$750 would be charged for L-1 visas. This language was forwarded to the Senate Budget Committee for inclusion in the budget reconciliation legislation. S. 1932, as passed by the Senate, included these provisions in Title VIII. Neither the House-passed budget reconciliation bill (H.R. 4241) nor the conference report on S. 1932 (P.L. 109-171), however, contained these H-1B or fee provisions.

The Chairman's mark, S. 1918, and S. 2454 would add a new exemption from the 65,000 H-1B annual numerical limit for H-1Bs who have earned an advanced degree in science, technology, engineering, or math from an accredited university in the United States. On a related issue, the Chairman's mark and S. 2454 would extend foreign students' practical training (and F-1 status) from 12 to 24 months, which could become an attractive alternative to the H-1B visa for some employers.

Permanent Immigration

In addition to the admission of temporary workers and other temporary visitors, the INA provides for the admission of foreign nationals to the United States as LPRs. Four elements underlie U.S. policy on permanent immigration: the reunification of families, the admission of immigrants with needed skills, the protection of refugees, and the diversity of admissions by country of origin. Various measures to revise permanent admissions have been introduced, but only one has been enacted thus far in the 109th Congress. Some, such as the enacted measure on visas for nurses, are narrowly targeted at particular aspects of the permanent immigration system. Others, including S. 1033/H.R. 2330, S. 1438, S. 2454, H.R. 3700, and the Chairman's mark would broadly change permanent admissions.³¹

³¹ For additional background and analysis, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

Recaptured Visa Numbers for Nurses

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

Recaptured Employment-Based Visa Numbers

On October 20, 2005, the Senate Judiciary Committee approved compromise language that would, among other things, “recapture” up to 90,000 employment-based visas that had not been issued to employment-based immigrants in prior years (when the statutory ceiling of 140,000 visas was not met). An additional fee of \$500 would be charged to obtain these recaptured visas. Like the H-1B and fee provisions discussed above, this language was forwarded to the Senate Budget Committee; it was included in Title VIII of S. 1932, as passed by the Senate. These provisions were not included in the House-passed H.R. 4241 or in the conference report on S. 1932 (P.L. 109-171).

Elimination of Diversity Visas

The Security and Fairness Enhancement for America Act of 2005 (H.R. 1219) would amend the INA to eliminate the diversity visa lottery. The purpose of the diversity visa lottery is, as the name suggests, to encourage legal immigration from countries other than the major sending countries of current immigration to the United States. H.R. 1219 has been marked up by the House Immigration subcommittee. The provisions of H.R. 1219 have been incorporated into H.R. 4437, as passed by the House.³² Various Senate bills, notably S1438 and S. 2377, would also eliminate the diversity visa.

S. 1033/H.R. 2330

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

³² For more information, see CRS Report RS21342, *Immigration: Diversity Visa Lottery*, by Ruth Ellen Wasem and Karma Ester.

allocation (which would be 480,000 for family-based and 290,000 for employment-based under this bill).

S. 1438

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

H.R. 3700

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

S. 2454 and Chairman’s Mark

Title IV of S. 2454 and Title V of the Chairman’s mark would substantially increase the number of visas issued to LPRs. Foremost, these bills would no longer deduct immediate relatives of U.S. citizens from the overall family-sponsored numerical limit of 480,000. They also would no longer count the derivative family members of employment-based LPRs as part of the numerical ceiling. The bills would “recapture” visa numbers from FY2001 through FY2005 in those cases when the family-based and employment-based ceilings were not reached.

Similar to S. 1033/H.R. 2330, Title IV of S. 2454 and Title V of the Chairman’s mark would increase the annual limit on employment-based LPR visa categories from 140,000 to 290,000 visas, and raise the current per-country limit on LPR visas from an allocation of 7% of the total preference allocation to 10% of the total preference allocation (which would be 480,000 for family-based and 290,000 for employment-based under these bills). These proposed increases to the worldwide ceilings and to the per-country limits would ease the visa wait times that oversubscribed countries (i.e., China, India, Mexico, and the Philippines) currently face by substantially increasing their share of the overall ceiling.

The Chairman’s mark and S. 2454 would reallocate family-sponsored and employment-based immigrant visas. With respect to employment-based visas, they would shift the allocation of visas from persons of “extraordinary” and “exceptional” abilities and persons having advanced professional degrees (i.e., first and second

preferences) toward unskilled workers, whose visa allocation would increase from 10,000 to 87,000, plus any unused visas that would roll down from the other employment-based preference categories. Employment-based visas for certain special immigrants would no longer be numerically limited.

Immigrant Victims

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

Battered Aliens

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

P.L. 109-162 amends and broadens existing protections for battered immigrants. It represents a compromise between provisions included in the House-passed H.R. 3402 and the Senate-passed S. 1197. Under current law, battered spouses and children of citizens or LPRs who meet specified criteria are treated differently than most other prospective family-based immigrants, who must be the beneficiaries of immigrant visa petitions filed by their family members. Battered aliens are allowed to file immigrant visa petitions on their own behalf, which is known as VAWA self-petitioning. P.L. 109-162 makes self-petitioning available to the battered parents of citizens. It also makes VAWA self-petitioners whose petitions are approved eligible for employment authorization, and more generally, allows the Secretary of DHS to grant work authorization to battered spouses of certain nonimmigrants. Among its other provisions, P.L. 109-162 places new requirements on the K visa, and establishes rules and associated penalties for international marriage brokers.

Trafficking Victims

The 109th Congress has enacted two bills with provisions on victims of trafficking. P.L. 109-164, the Trafficking Victims Protection Reauthorization Act of 2005 (H.R. 972), authorizes appropriations for existing grant programs under VTVPA. It also creates several new grant programs, including grants to develop, expand, or strengthen trafficking victims assistance programs for U.S. citizens and LPRs, and grants to strengthen law enforcement programs to investigate and prosecute domestic trafficking involving U.S. citizens and LPRs. In addition, P.L. 109-164 creates a pilot program to establish three residential treatment facilities for trafficking victims who are minors.

The INA includes a nonimmigrant category, known as T status or the T visa, for aliens who are victims of severe forms of trafficking in persons. P.L. 109-162 makes various changes to the T visa to expand existing protections. Although under current law there is no time limit on the duration of T status, under regulation it is limited to three years. P.L. 109-162 authorizes T status for four years, and allows for additional year-by-year extensions upon certification from selected officials, including state and local law enforcement, that the alien's continued presence in the United States is required to assist in a criminal investigation or prosecution. P.L. 109-162 removes the requirement that there must be a finding of hardship for family members of the trafficking victim (T visa recipient) to be given T visas, and allows aliens with T status to adjust to LPR status, after the shorter of three years or the conclusion of the investigation or prosecution of the trafficking crime. The act also allows an alien to change from another nonimmigrant classification to T status, and removes illegal presence as a reason to deny the change in status.

Other Legislation and Issues

Refugees

The worldwide refugee ceiling for FY2006 is 70,000, with 60,000 of these numbers allocated among the regions of the world and the remaining 10,000 comprising an "unallocated reserve" to be used if, and where, additional refugee slots are needed. As of December 30, 2005, actual FY2006 refugee admissions totaled 9,503. Refugee admissions for FY2005 totaled 53,813. Refugee numbers that are unused in a fiscal year are lost; they do not carry over into the following year.

The "Lautenberg amendment," first enacted in 1989, requires the Attorney General (now the Secretary of DHS) to designate categories of former Soviet and Indochinese nationals for whom less evidence is needed to prove refugee status, and provides for adjustment to LPR status for certain former Soviet and Indochinese nationals denied refugee status. P.L. 108-199 amended the Lautenberg amendment to add a new provision, known as the "Specter amendment," that directs the Attorney General to establish categories of Iranian religious minorities who may qualify for refugee status under the Lautenberg amendment's reduced evidentiary standard. P.L. 109-102 extends the Lautenberg amendment through FY2006.

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

Resettlement Funding. For FY2005, Congress appropriated \$484.4 million for the Department of Health and Human Service's (HHS) Office of Refugee Resettlement (ORR). For FY2006, P.L. 109-149 includes an appropriation of \$575.6 million for ORR programs. This funding, however, like most other FY2006

discretionary appropriations, is subject to a 1% rescission enacted as part of the FY2006 Defense appropriations bill (P.L. 109-148).

Citizenship and Naturalization

Legislative proposals are in the 109th Congress concerning restrictions on U.S. citizenship at birth, naturalization reform, and naturalization based on military service. A desire to eliminate incentives for illegal immigration and concern about divided national loyalties have led to proposals to restrict birthright citizenship either by constitutional amendment or by statutory interpretation of constitutional language, so that persons born in the United States would only become citizens at birth if their parents were U.S. citizens, lawful permanent residents, or at least lawfully present in the United States. Measures containing such provisions include S. 2117, H.J.Res. 41, H.J.Res. 46, H.R. 698, H.R. 3700, H.R. 3938, and H.R. 4313. These proposals vary as to where the line would be drawn concerning the parents' status.

Concern about divided national loyalties has also motivated legislation to reform naturalization by restricting dual nationality. Section 1201 of H.R. 4437 would codify the existing oath of allegiance in the INA (currently the exact wording is prescribed in regulations pursuant to substantive principles established in the INA). DHS, in cooperation with DOS, would be required to inform the country in which the new U.S. citizen has a pre-existing nationality that the citizen has renounced allegiance to that foreign country and has sworn allegiance to the United States. The codification of the oath would take effect six months after the date of enactment of this act. Bills containing similar provisions and/or others intended to restrict dual nationality include S. 1087, S. 1815/H.R. 4168, H.R. 688, H.R. 2513, and H.R. 3938.

In addition to barring terrorists from naturalization as noted in an earlier section, §609 of H.R. 4437 would reform the naturalization process by providing that no application shall be considered while there is any pending proceeding concerning an applicant's inadmissibility, deportability, or rescission of lawful permanent resident status; and no petition for immigrant status for another person shall be approved if there is any criminal or civil administrative or judicial proceeding pending that could result in the sponsor-petitioner's denaturalization or loss of lawful permanent resident status. Section 609 would also provide that an alien admitted under the statute for conditional lawful permanent residence shall only be considered lawfully admitted to permanent residence and to have the conditional period count for naturalization purposes if the conditionality has been removed; and would restrict judicial jurisdiction over naturalization delays and judicial review of naturalization denials. Section 612 of H.R. 4437 would bar an alien who had been determined at any time to have been an alien described in the national security/terrorism/genocide grounds for inadmissibility/removal from being considered a person of good moral character for naturalization purposes.

Finally, several legislative proposals, including S. 2097, S. 2165, H.R. 661, H.R. 901, H.R. 3018, H.R. 3911, and H.R. 4498, would build on the expansion of expedited naturalization and other citizenship-related benefits for aliens serving in the U.S. military that was enacted by Title XVII of P.L. 108-136.

Immigration Issues in Free Trade Agreements

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

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

The U.S.-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) was signed on August 5, 2004, and implementing legislation was sent to the U.S. Congress on June 23, 2005. Although DR-CAFTA does not contain any explicit immigration provisions, migration trends from these nations arise as an issue.³³

Document Fraud

H.R. 4437, S. 2454, and the Chairman’s mark would broaden and increase penalties for criminal offenses of document fraud and add such offenses to the criminal grounds for inadmissibility and deportation. Among other things, they would provide for the establishment of a new Fraudulent Documents Center or increased access to the existing one in order to collect and disseminate information assisting law enforcement officers in identifying fraudulent immigration and travel documents. Various provisions would amend the existing document fraud statutes generally or individually to establish that the distribution of fraudulent documents is a crime; increase the penalties for document fraud; provide for a uniform statute of limitations for document fraud and other immigration-related offenses; provide for the forfeiture of any property used to commit an immigration fraud offense or the proceeds of such an offense; criminalize attempt and conspiracy to commit immigration fraud; and criminalize schemes to defraud aliens, including misrepresenting oneself as an attorney in immigration matters. S. 2454 and the Chairman’s mark would include a criminal offense for marriage fraud and also would increase the number of fraud detection enforcement agents with regard to worksite enforcement.

³³ For complete discussion and legislative tracking of DR-CAFTA, see CRS Report RL31870, *The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA)*, by J. F. Hornbeck; and CRS Report RL32322, *Central America and the Dominican Republic in the Context of the Free Trade Agreement (DR-CAFTA) with the United States*, coordinated by K. Larry Storrs. For a more general discussion and analysis, see CRS Report RL32982, *Immigration Issues in Trade Agreements*, by Ruth Ellen Wasem.

Other Legislation Receiving Action

State Criminal Alien Assistance Program (SCAAP). SCAAP provides reimbursement to state and local governments for the direct costs associated with incarcerating undocumented criminal aliens. P.L. 109-162 authorizes appropriations for SCAAP of \$750 million for FY2006, \$850 million for FY2007, and \$950 million for each fiscal year from FY2008 through FY2011. It also would require that SCAAP reimbursement funds be used only for correctional purposes.³⁴

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

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

Legislation

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

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

P.L. 109-97 (H.R. 2744). Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006. Includes alien smuggling provision. Reported by Appropriations Committee (H.Rept. 109-102) on June 2, 2005. Passed House on June 8, 2005. Reported by Senate Appropriations Committee (S.Rept. 109-92) on June 27, 2005. Passed Senate, as amended, on

³⁴ See CRS Report RS21832, *Immigration: Frequently Asked Questions on the State Criminal Alien Assistance Program (SCAAP)*, by Karma Ester.

September 22, 2005. House agreed to conference report (H.Rept. 109-255) on October 26, 2005; Senate agreed on November 10, 2005. Signed on November 3, 2005. Signed on November 10, 2005.

P.L. 109-102 (H.R. 3057). Foreign Operations, Export Financial and Related Programs Appropriations Act, 2006. Includes refugee provisions. Reported by Appropriations Committee (H.Rept. 109-152) on June 24, 2005. Passed House on June 28, 2005. Reported by Senate Appropriations Committee (S.Rept. 109-96) on June 30, 2005. Passed Senate, as amended, on July 20, 2005. House agreed to conference report (H.Rept. 109-265) on November 4, 2005; Senate agreed on November 10, 2005. Signed on November 14, 2005.

P.L. 109-149 (H.R. 3010). Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006. Includes provisions on refugee resettlement funding. Reported by Appropriations Committee (H.Rept. 109-143) on June 21, 2005. Passed House on June 24, 2005. Reported by Senate Judiciary Committee (S.Rept. 109-103) on July 14, 2005. Passed Senate, as amended, on October 27, 2005. House *disagreed* to conference report (H.Rept. 109-300) on November 17, 2005. House agreed to conference report (H.Rept. 109-337) on December 14, 2005; Senate agreed on December 21, 2005. Signed on December 30, 2005.

P.L. 109-162 (H.R. 3402). Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009. Includes provisions on battered aliens, trafficking victims, and SCAAP. Reported by Judiciary Committee (H.Rept. 109-233) on September 22, 2005. Passed House on September 28, 2005. Passed Senate, as amended on December 16, 2005. House agrees to Senate amendment on December 17, 2005. Signed on January 1, 2006.

P.L. 109-163 (H.R. 1815). National Defense Authorization Act for FY2006. Includes provisions on U.S. Military patrols at the border. Reported by Armed Services Committee (H.Rept. 109-89) on May 20, 2005. Passed House on May 25, 2005. Passed Senate, as amended, on November 15, 2005. House agreed to conference report (H.Rept. 109-360) on December 19, 2005; Senate agreed on December 21, 2005. Signed on January 6, 2006.

P.L. 109-164 (H.R. 972). Trafficking Victims Protection Reauthorization Act of 2005. Reported by International Relations Committee (H.Rept. 109-317, Part I) on November 18, 2005, and by Judiciary Committee (H.Rept. 109-317, Part II) on December 8, 2005. Passed House on December 14, 2005. Passed Senate on December 22, 2005. Signed on January 10, 2006.

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

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

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

H.R. 4312 (King). Border Security and Terrorism Prevention Act of 2005. Reported by Homeland Security Committee (H.Rept. 109-329, Part I) on December 6, 2005.

H.R. 4437 (Sensenbrenner). Border Protection, Antiterrorism, and Illegal Immigration Control Act. Reported by Judiciary Committee (H.Rept. 109-345, Part I) on December 13, 2005. Passed House, as amended, on December 16, 2005.

S. 119 (Feinstein). Unaccompanied Alien Child Protection Act of 2005. Reported by Judiciary Committee (without written report) on April 14, 2005. Passed Senate, as amended, on December 22, 2005.

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