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Immigration Legislation and Issues in the 109th Congress

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Abstract. The 109th Congress has enacted some border security-related provisions. P.L. 109-295, the FY2007 Department of Homeland Security Appropriations Act, includes border tunnel provisions like those in S. 2611, as well as other enforcement-related provisions. P.L. 109-367 includes border fencing provisions similar to those in H.R. 4437. In addition, the House has passed other bills with border security and enforcement-related provisions (H.R. 4830, H.R. 6094, H.R. 6095, H.R. 6160, H.R. 6162). The 109th Congress also has enacted limited provisions on temporary and permanent employment-based immigration as part of P.L. 109-13 and P.L. 109-364. Among the other immigration bills that have received action are measures on alien victims of domestic violence (P.L. 109-162, P.L. 109-271, 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).

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CRS Report for Congress

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**Prepared for Members and
Committees of Congress**

Immigration Legislation and Issues in the 109th Congress

Summary

Security concerns have figured 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. In addition to these 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. S. 2611, as passed by the Senate, combines provisions on enforcement and on unlawful presence, voluntary departure and removal, expedited removal, and denying U.S. entry to nationals from uncooperative countries with provisions on legal temporary admissions, including guest workers, and legal permanent admissions. S. 2611 also would establish legalization programs to enable certain groups of unauthorized aliens in the United States to obtain legal permanent resident (LPR) status.

The 109th Congress has enacted some border security-related provisions. P.L. 109-295, the FY2007 Department of Homeland Security Appropriations Act, includes border tunnel provisions like those in S. 2611, as well as other enforcement-related provisions. P.L. 109-367 includes border fencing provisions similar to those in H.R. 4437. In addition, the House has passed other bills with border security and enforcement-related provisions (H.R. 4830, H.R. 6094, H.R. 6095, H.R. 6160, H.R. 6162).

The 109th Congress also has enacted limited provisions on temporary and permanent employment-based immigration as part of P.L. 109-13 and P.L. 109-364. Among the other immigration bills that have received action are measures on alien victims of domestic violence (P.L. 109-162, P.L. 109-271, 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).

This report will not be updated.

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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 have figured 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 are the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437),¹ which was passed by the House on December 16, 2005, and the Comprehensive Immigration Reform Act of 2006 (S. 2611), which was passed by the Senate on May 25, 2006. Fencing provisions similar to those in H.R. 4437 have been enacted in P.L. 109-367. The FY2007 Department of Homeland Security Appropriations Act (P.L. 109-295) contains several security-related provisions, including border tunnel provisions like those in S. 2611. In addition, the House has passed a number of other enforcement-related measures, among them H.R. 6094, H.R. 6095, H.R. 6160, and H.R. 6162.

In addition to its enforcement provisions, S. 2611 contains provisions on temporary and permanent immigration, unauthorized aliens in the United States, and other issues. In March 2006, the Senate Judiciary Committee amended and approved an S. 2611 predecessor proposal drafted by Committee Chairman Specter, known as the Chairman's mark. This bill contained 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

¹ 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.

issues. Prior to the completion of the mark-up, Senator Frist introduced a separate bill, Securing America's Borders Act (S. 2454), containing selected titles of the Chairman's mark, 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. During Senate floor debate on S. 2454 in late March, Senator Specter proposed a substitute amendment based on the Judiciary Committee-approved bill (S.Amdt. 3192). On April 6, 2006, the Senate rejected a motion, by a vote of 39 to 60, to invoke cloture (and thereby initiate post-cloture procedures to eventually move to a vote) on the Specter substitute. The following day, the Senate rejected two other cloture motions: It rejected, on a 38 to 60 vote, a motion to invoke cloture on a motion to recommit S. 2454 to the Senate Judiciary Committee with instructions that it be reported back with the Hagel amendment (Hagel-Martinez compromise); and it rejected, on a 36 to 62 vote, a motion to invoke cloture on S. 2454. The Hagel-Martinez compromise, with some modifications, was subsequently introduced in the Senate as the Comprehensive Immigration Reform Act of 2006 (S. 2611/S. 2612).²

While major immigration reform proposals remain pending, Congress has enacted limited provisions on temporary and permanent employment-based immigration as part of P.L. 109-13 and P.L. 109-364. 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 addressed in other products and are not covered here.³ 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

² S. 2611 and S. 2612 are identical. S. 2611, introduced by Senator Specter with Senators Hagel and Martinez among its cosponsors on April 7, 2006, was placed on the Senate legislative calendar. S. 2612, introduced by Senator Hagel with the same cosponsors as S. 2611 on April 7, 2006, was referred to the Senate Judiciary Committee.

³ 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.

new proposals.⁴ 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)⁵ provisions concerning asylum and other forms of relief from removal. It provides express statutory guidelines regarding burden of proof, eligibility, and credibility standards in relief from removal cases. In most cases, no statutory standards existed prior to the REAL ID Act; instead, standards were established by regulation and (sometimes conflicting) case law. In some areas, the guidelines established by the REAL ID Act are arguably more stringent than under preexisting law (e.g., pursuant to the act, an asylum applicant must now show that one of the five grounds for asylum eligibility was or will be *at least one central reason* for his persecution, a higher standard than previously employed in some federal circuits); in other cases, the REAL ID Act simply codifies existing regulation or case law. The act also eliminates the annual caps on the number of persons granted asylum who may have their status adjusted to legal permanent residents (LPRs), and on the number of persons who may enter the United States as refugees/asylees on account of persecution for resistance to coercive population control methods (a special asylum category).⁶

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

⁴ 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.

⁵ 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.

⁶ For further information on asylum, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

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.⁷

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.⁸

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

⁷ For additional information, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

⁸ For additional information, see CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.

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.

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 has been a key immigration issue for the 109th Congress. Enactment of border security provisions as part of the REAL ID Act, as discussed above, has been followed by congressional consideration of a variety of other related measures. 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 or institute new programs within the Department. Other bills propose to expand various programs already being implemented by DHS at the border. H.R. 4437, as passed by the House,⁹ and S. 2611, as passed by the Senate, contain provisions of both types. Some border security provisions in H.R. 4437 and S. 2611 have been enacted in the FY2007 DHS Appropriations Act (P.L. 109-295) and in the Secure Fence Act of 2006 (P.L. 109-367). Other border security-related measures, including H.R. 4830, H.R. 6160, and H.R. 6162, also have been passed by the House.¹⁰

P.L. 109-295 makes the construction and financing of tunnels crossing the U.S. international border crimes subject to a fine and up to 20 years of imprisonment, and doubles the applicable criminal penalties for individuals who use tunnels to enter the country illegally or to smuggle people or goods into the country. These tunnel provisions also appear in S. 2611, as passed by the Senate, and H.R. 4830, as passed by the House. Another border-security related provision in P.L. 109-295 requires the DHS Inspector General to review all contracts relating to the Department's Secure

⁹ 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.

¹⁰ 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.

Border Initiative (SBI)¹¹ worth more than \$20 million. This provision was included in H.R. 4437, S. 2611, and House-passed H.R. 6162. P.L. 109-295 also includes \$1.2 billion in funding for border fencing, infrastructure, and technology, but does not specify what mix of resources should be implemented or to what locations on the border these resources should be allocated, instead leaving these decisions to DHS's discretion.¹²

P.L. 109-367 directs DHS to construct border fencing along five different stretches of the southern border that total roughly 850 miles.¹³ This language is identical to that in H.R. 4437, but includes later construction deadlines. P.L. 109-367 also calls for a study on the feasibility of constructing border security infrastructure along the northern border. S. 2611, as amended, would direct DHS to replace current border fencing in the Border Patrol's Tucson and Yuma sectors and to construct additional border fencing totaling 370 miles and additional vehicle barriers totaling 700 miles.

H.R. 4437, as passed by the House, and S. 2611, as passed by the Senate, contain a number of other border-security related provisions. Both bills 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. Both would add personnel, technology, and infrastructure resources at and between POE and would direct DHS to work with the Department of Defense (DOD) to formulate a plan for increasing the availability and use of military equipment to assist with the surveillance of the border. Both bills would require DHS to expand the U.S. Visitor and Immigrant Status Technology (US-VISIT) Program¹⁴ to collect 10 fingerprints from aliens currently required to register with the program as they enter the country, and would require DHS to submit a time line for deploying and enabling the exit component of US-VISIT at land POE. Both bills would also require DHS to enhance the connectivity of its biometric fingerprint database with the Federal Bureau of Investigation's database and develop and implement a plan to ensure clear two-way communications for DHS agents working along the border.

While the border security provisions in S. 2611 and H.R. 4437 are largely similar, there are some substantive differences between the two bills. Among the

¹¹ 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.

¹² For more information about FY2007 DHS appropriations, see CRS Report RL33428, *Homeland Security Department: FY2007 Appropriations*, Jennifer Lake and Blas Nuñez-Neto, Coordinators.

¹³ From CBP Congressional Affairs, September 25, 2006.

¹⁴ For additional information on the US-VISIT program, see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa Seghetti and Stephen Viña.

major differences, House-passed 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, and would require DHS to design and carry out a border security exercise involving officials from federal, state, local, tribal, and international governments as well as representatives from the private sector within one year of the bill's enactment. 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.¹⁵ H.R. 4437 would also remove Air and Marine Operations (AMO) from DHS's Customs and Border Protection (CBP) and establish a stand-alone AMO Office within DHS. For its part, S. 2611 includes three separate provisions that would direct DHS to acquire and deploy various kinds of surveillance assets in order to establish a "virtual fence" along the southwest border. S. 2611 would also establish criminal penalties for attempting to evade inspection at POE or for disregarding orders given by CBP officers, Border Patrol agents, or Immigration and Customs Enforcement (ICE) investigators.

H.R. 6160, as passed by the House, would give recruitment and retention bonuses to Border Patrol agents.

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, which also appears in H.R. 5122, as amended and passed by the House, 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.¹⁶ The conference report on H.R. 5122, signed into law as P.L. 109-364, does not include this provision. H.R. 4437 and S. 2611 include language to direct DHS to work with DOD to create a plan that would enhance the use of military surveillance assets at the border. S. 2611, as amended, would also allow state governors to deploy

¹⁵ 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.

¹⁶ For a detailed explanation of the Posse Comitatus Act (18 U.S.C. 1385), 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.

the National Guard to the southwest border in a support capacity. The National Guard would be explicitly prohibited from participating in searches, seizures, arrests, or other similar activities.

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 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). Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be limited to the criminal provisions of the INA; by contrast, the enforcement of the civil provisions has been viewed strictly as a federal responsibility, with states playing an incidental supporting role. Some posit, nonetheless, that states and localities, as sovereign entities, retain certain police powers under the Constitution, and consequently, possess *inherent authority* to enforce civil as well as criminal violations of federal immigration law.¹⁷ Multiple bills in Congress would address these possible authority issues and enhance the role of state and local law enforcement agencies in the enforcement of immigration law.

H.R. 4437 (§220) and H.R. 6095 (§101), both of which have been passed by the House, would “reaffirm” the existing inherent authority of states, as sovereign entities (including their law enforcement personnel), to investigate, identify,

¹⁷ 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.

apprehend, arrest, detain, or transfer into federal custody aliens in the United States for the purpose of assisting in the enforcement of the immigration laws. Similar to H.R. 4437 and H.R. 6095, 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, H.R. 1817 would “reaffirm” the existing general authority for state and local law enforcement personnel to carry out the above mentioned activities. S. 2454 (§229) and Senate-passed S. 2611 (§229) 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.

Among its other provisions, H.R. 4437 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). It 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). H.R. 4437 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 government (§305). The bill 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).

In the Senate, S. 2611 would create a border relief grant program for eligible law enforcement agencies to address criminal activity that occurs near the border (§153). Under the program, the Secretary of DHS would be authorized to provide grants to law enforcement agencies located within 100 miles of the northern or southern border or to agencies outside 100 miles that are located in areas certified as “high impact areas” by the Secretary. Two-thirds of the funds would be allocated to the six states with the largest number of unauthorized alien apprehensions, and one-third would be set aside for High Impact Areas. Title IX of the Senate-passed version of H.R. 5441, the FY2007 Department of Homeland Security Appropriations Act, would have created the same program. The House-passed version of H.R. 5441 did not contain such a grant program, and it is not included in the enacted measure (P.L. 109-295). S. 2454 (§§220, 229) and S. 2611 (§§224, 229) would also authorize DHS to reimburse state and local authorities for certain training, transportation, and equipment costs related to immigration enforcement, and certain costs associated with processing criminal illegal aliens through the criminal justice system.

Employment Eligibility Verification and Worksite Enforcement

Under the INA, it is unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are 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.¹⁸ 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.¹⁹ 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 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 after hiring 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.

Like H.R. 4437, Title III of S. 2454 would direct DHS to establish an employment eligibility verification system (modeled on the Basic Pilot program),

¹⁸ 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.

¹⁹ 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>].

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 after hiring or recruiting or referring for a fee. These verification requirements would be phased in for different groups of employers over a period of up to five years. Under S. 2454, some, but not all, employers would be required to verify the identity and employment eligibility of previously hired workers. Employers 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. S. 2454 also would increase existing monetary penalties for employer violations, although to a lesser extent than H.R. 4437. In addition, the Senate bill would establish a new penalty for employees who falsely represent on the I-9 form that they are authorized to work.

Title III of S. 2611, as passed by the Senate, like H.R. 4437 and S. 2454, would direct DHS to implement an employment eligibility verification system (modeled on the Basic Pilot program), which would be mandatory for all employers. Employers would be required to participate in the system with respect to all employees hired on or after the date that is 18 months after at least \$400 million is appropriated and made available for implementation. Under S. 2611, employers would be required to query the system to verify the identity and employment eligibility of an individual after hiring or recruiting or referring for a fee. In addition, DHS could require any employer or class of employers to participate in the system with respect to individuals employed as of the date of enactment or hired after the date of enactment, if DHS designates such employer or class as a critical employer based on homeland security or national security needs or if DHS has reasonable cause to believe that the employer has materially violated the prohibitions on unauthorized employment. Under S. 2611, individuals who are terminated from employment based on a determination by the verification system that they are not work eligible could obtain administrative and judicial review. If they are determined to, in fact, be work eligible and prevail, they would be entitled to compensation for lost wages. The current I-9 system would remain in place with some modifications. In addition, S. 2611 would increase monetary penalties for employer violations, and, like S. 2454, 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 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 existing 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, and S. 2611, as passed by the Senate, would rewrite INA §274. Although the bills are similar, they are not identical in language or in scope. Both 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 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. S. 2611 would also provide new exemptions from criminal liability for persons or organizations providing assistance to unauthorized aliens on humanitarian grounds (such exemptions are not contained in current law). H.R. 4437, in contrast, contains no such exemptions, and would also remove the current exemption contained in P.L. 109-97 for religious organizations that encourage certain unauthorized aliens to work for the organizations as volunteer ministers or missionaries.

In addition, H.R. 4437 and S. 2611 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 (GAO) report on alien smuggling, both proposals would amend the law to allow for the seizure and forfeiture of any property used to commit or facilitate alien smuggling.²⁰

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 visas²¹ 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.²²

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 House-passed H.R. 4437 and H.R. 6094 and Senate-passed S. 2611, contain provisions concerning the detention of aliens in the United States. H.R. 4437, H.R. 6094, and S. 2611 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

²⁰ See U.S. Government Accountability Office, *Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response*, GAO-05-305, May 27, 2005.

²¹ For more information on S visas see, CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*, by Karma Ester.

²² For more information on the detention of aliens see, CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

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; S. 2611 contains similar provisions. 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. (H.R. 6094, as passed by the House, would also require the mandatory detention of aliens who are street gang members.) S. 2611 would direct DHS to acquire or construct 20 additional detention facilities for aliens with a combined capacity of at least 10,000 aliens at any time, and would direct DHS to consider utilizing military installations approved for closure for this purpose. A detention-related provision added as a Senate floor amendment to S. 2611 would give the Border Patrol exclusive administrative and operational control over all assets utilized in carrying out its mission, which would include detention space.

Illegal Presence, Removal, and Exclusion

H.R. 4437, as passed by the House, and S. 2611, as passed by the Senate, would variously 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; alien exclusion from, or inadmissibility to, the United States; and judicial review. Some H.R. 4437- or S. 2611-like provisions in these areas have been passed by one or both houses in other bills.

Unlawful Presence

Section 203 of H.R. 4437 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 excluded, or had departed the United States 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). The bill would further heighten the criminal and civil penalties for unlawful entry, reentry, and presence when an alien had previously been convicted of certain crimes. Section 206 of S. 2611 would largely do the same, with the notable exception that it would not criminalize unlawful presence or impose heightened penalties on such presence if the alien had previously been convicted of certain crimes (unless the alien was unlawfully present in the United States after having been removed).

Under §209 of H.R. 4437 and §206 of S. 2611, unlawful reentry and presence after voluntary departure would be subject to increased criminal penalties. H.R. 4437 would also establish mandatory minimum sentence requirements for the crime of reentering the United States 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

In an effort to ensure that aliens granted voluntary departure leave the United States, H.R. 4437 and S. 2611 would amend the requirements for an alien to receive voluntary departure. 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 and S. 2611 would expand expedited removal. More specifically, these 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. Canadians, Cubans, and Mexicans would be notable exceptions to the expansion of this provision.

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 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 visas but are from uncooperative countries would be denied admission when they arrive at ports of entry if the Secretary of DHS so deemed. S. 2611 would authorize the Secretary of DHS to instruct the Secretary of State to deny a visa to any citizen, subject, national, or resident of a country that has denied or delayed accepting its citizens whom the United States ordered removed, until the country accepts its citizens.

Documentary Requirements for Western Hemisphere Travelers

The INA requires all U.S. citizens to bear a valid passport when entering and departing the United States, but gives the President the authority to waive this requirement. U.S. citizens are excepted from this requirement under several circumstances, including when the citizen is traveling between the United States and any country or territory in North, South, or Central America, excluding Cuba. P.L. 108-458 included language establishing what is now known as the Western Hemisphere Travel Initiative (WHTI). WHTI requires the Secretary of Homeland Security, in consultation with the Secretary of State, to develop and implement a plan as expeditiously as possible to require a passport or other document(s) “deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship,” for all travelers entering the United States. The law expressly states that citizens and categories of individuals for whom documentation requirements have previously been waived fall under this new requirement.²³ The deadline for fully implementing WHTI in P.L. 108-458 was January 1, 2008. This deadline has been eased by §546 of P.L. 109-295, which requires implementation not later than three months after the Secretaries of State and Homeland Security certify that specified requirements have been met, or June 1, 2009, whichever is earlier.

Consequences for Terrorist and Criminal Activity

Beyond the REAL ID Act, a number of bills have been introduced in the 109th Congress to expand the terrorism-related and criminal grounds for inadmissibility and deportation and to deny 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.²⁴ H.R. 4437 would also expand the criminal grounds for inadmissibility and deportation (including for alien gang members), prohibit the adjustment of status of refugees and asylees who have committed aggravated felonies, and expand the immigration-related and criminal

²³ Under §7209(c)(2) of P.L. 108-458, however, the President does retain some discretion, as specified, to waive documentary requirements for U.S. citizens.

²⁴ 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.

penalties for certain types of document and immigration fraud.²⁵ H.R. 6094, as passed by the House, contains largely the same gang-related provisions as H.R. 4437.

Title II of S. 2611 contains provisions generally covering the same matters as H.R. 4437. In addition, §764 of S. 2611 would expand the terrorism-related grounds for inadmissibility (and by reference, the terrorism-related grounds for removal) to cover *any* incitement or advocacy of terrorist activity (current law only expressly covers incitement in certain circumstances).

Reduction of Appellate Review

Title VIII of H.R. 4437, as passed by the House, and parts of Titles IV and VII of S. 2611, as passed by the Senate, would continue the trend of streamlining and limiting certain administrative and judicial review procedures.²⁶ These bills are not identical but share certain similar provisions. The proposed changes generally fall into a few categories: increasing resources; establishing administrative adjudication procedures statutorily, rather than merely in regulations; establishing major procedural changes in judicial review to handle the increased litigation; and procedural clarifications in response to procedural interpretations in various federal appellate court decisions.

Proposals in the latter two categories include provisions that would amend the judicial review statute (INA §242) in various ways. H.R. 4437 would provide 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 House-passed bill also includes provisions responding to certain federal appellate holdings regarding immigration procedures. S. 2454 would likewise establish a screening procedure with a certificate of reviewability, and would respond to some federal appellate holdings regarding immigration procedures. In addition, S. 2454 includes a controversial proposal to consolidate immigration appeals in one circuit of the federal appellate courts. None of these proposals have been included in S. 2611. Instead, the Senate-passed bill would provide for a related GAO study. It seems likely that, even if these consolidation and other proposals are not ultimately included in any immigration legislation enacted this Congress, they would be reintroduced in the future.

H.R. 4437 would amend INA §242 to clarify that the restrictions on judicial review of denials of discretionary relief would apply to individual determinations

²⁵ 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.

²⁶ For additional information, see CRS Report RL33410, *Immigration Litigation Reform*, by Margaret Mikyung Lee.

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. H.R. 4437 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. 2611 would 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 (BIA). It would also provide for the appointment, qualifications, terms, and removal of immigration judges and members of BIA and the continuation and expansion of a legal orientation program providing information about immigration court procedures to detainees on a nationwide basis. It would further provide for the participation of senior district court judges in the selection of magistrates.

S. 2611 includes the Fairness in Immigration Litigation Act (§§421-423), which would limit injunctive relief in immigration-related civil actions against the federal government. This proposal is reportedly in response to permanent injunctive relief concerning certain rights for El Salvadorans in deportation/removal proceedings under *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (1990), which the Departments of Justice and Homeland Security have filed a motion to terminate; the agencies assert that the circumstances giving rise to the injunction no longer exist. The injunction impedes the application to El Salvadorans of expedited removal procedures enacted since the issuance of the injunction, and some of the procedures mandated by the injunction have become part of the standard operating procedures for all aliens. These Fairness in Immigration Litigation provisions are also included in H.R. 6095, as passed by the House, under the new title, “Ending Catch and Release Act of 2006.” Another similar House bill on immigration litigation is H.R. 5541. Unlike S. 2611 and H.R. 6095, however, H.R. 5541 would prohibit a court from certifying a class action in any civil action that pertains to the administration and enforcement of immigration laws and is filed after the date of enactment.

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. These provisions cap at 33,000, the number of H-2B slots available during the first six months of a fiscal year. They also 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. In addition, for FY2005 and FY2006, these provisions exempt “returning workers” who have been counted toward the 66,000 annual H-2B cap in any of the past three years from being counted again. P.L. 109-364 contains a provision to extend the H-2B returning worker exemption through FY2007. In addition, S. 2611, as passed by the Senate, would extend the exemption through FY2009.

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. S. 2611, as passed by the Senate, includes H-2A reform provisions like those in Ag JOBS. (Provisions to legalize the status of certain agricultural workers are discussed below in the *LPR Status for Unauthorized Aliens* section.)

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 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

Proposals to create new temporary worker visas have also been introduced in the 109th Congress. Title IV of S. 2611, as passed by the Senate, would establish a new H-2C guest worker visa for aliens coming temporarily to the United States to perform temporary labor or services other than the labor or services covered under

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

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.

the H-2A visa or other specified visa categories. As introduced, S. 2611 would have capped the proposed H-2C visa at 325,000 the first fiscal year and would have established a process for adjusting the cap in subsequent fiscal years based on demand for the visas. A Senate floor amendment (S.Amdt. 3981) that was agreed to by voice vote replaced these provisions with a provision placing an annual cap of 200,000 on the H-2C visa. Under Title IV of S. 2611, an H-2C worker's initial authorized period of stay would be three years, and could be extended for an additional three years. H-2C nonimmigrants in the United States could adjust to LPR status. Petitions for employment-based *immigrant* visas could be filed by an H-2C worker's employer or, if the H-2C worker had maintained H-2C status for a total of four years, by the worker.

Among the other pending bills to establish new temporary workers visas 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

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

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 DHS, 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. S. 2611 would revise the INA provisions on the L visa to address certain perceived abuses.

H-1B Visas. 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.

S. 2611 would raise the numerical limit on H-1B visas from 65,000 to 115,000 and would establish a formula by which to calculate future admissions. Like S. 1918, and S. 2454, S. 2611 would add a new exemption from the 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, S. 2454 and S. 2611 would extend foreign students' practical training from 12 to 24 months and would expand the F student and J exchange visas for aliens who have earned an advanced degree in science, technology, engineering, or math, options that could become attractive alternatives to the H-1B visa for some employers.

H-1C Visas. P.L. 106-95 established a new H-1C nonimmigrant classification for nurses coming to the United States to work in health professional shortage areas. That law provided that H-1C petitions could be filed only during a specified four-year period, which has since expired. H.R. 1285, as passed by the House and the Senate, would amend P.L. 106-95 to allow for the filing of H-1C petitions for an additional three years. It would not otherwise change the H-1C program.

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. 2611, S. 1033/H.R. 2330, S. 1438, S. 2454, and H.R. 3700 would broadly change permanent admissions.³¹

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 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 S. 1438 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

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

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

annual cap on family-based visas for LPR status, thereby providing additional visas to the family preference categories. It also would lower the income requirements for sponsoring a family member for LPR status from 125% of the federal poverty guidelines to 100%, and recapture for future allocations those LPR visas that were unused due to processing delays from FY2001 through FY2005. In addition, it would increase the annual limit on employment-based LPR visa categories from 140,000 to 290,000 visas, and raise the current per-country limit on LPR visas from an allocation of 7% of the total preference allocation to 10% of the total preference allocation (which would be 480,000 for family-based and 290,000 for employment-based under this bill).

S. 1438

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

H.R. 3700

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

S. 2454

Title IV of S. 2454 would substantially increase the number of visas issued to LPRs. Foremost, this bill would no longer deduct immediate relatives of U.S. citizens from the overall family-sponsored numerical limit of 480,000. It also would no longer count the derivative family members of employment-based LPRs as part of the numerical ceiling. S. 2454 would further 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 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.

S. 2454 also would reallocate family-sponsored and employment-based immigrant visas. With respect to employment-based visas, it 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.

S. 2611

Title V of S. 2611 would substantially increase legal immigration and would restructure the allocation of these visas. The Senate-passed bill would no longer deduct immediate relatives of U.S. citizens from the overall family-sponsored numerical limit of 480,000. It would increase the annual number of employment-based LPRs from 140,000 to 450,000 for FY2007 through FY2016, and set the limit at 290,000 thereafter. Although derivative family members of employment-based LPRs would no longer count under the 450,000/290,000 numerical ceiling, S. 2611 would establish a total cap of 650,000 employment-based LPRs and their accompanying families.

Similar to other Senate bills, S. 2611 would further increase overall levels of immigration by reclaiming family and employment-based LPR visas when the annual ceilings were not met, FY2001-FY2005. Title V of S. 2611 would 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 450,000/290,000 for employment-based under this bill).³³ The bill also would eliminate the exceptions to the per-country ceilings for certain family-based and employment-based LPRs.³⁴

LPR Status for Unauthorized Aliens

Some immigration reform bills before the 109th Congress contain highly controversial provisions to enable certain unauthorized aliens in the United States to adjust to LPR status. In the case of S. 1033/H.R. 2330, as discussed in the section on guest workers above, a separate guest worker visa would be established for unauthorized aliens, who would then be able to adjust to LPR status through the permanent employment-based immigration system. Other bills, such as Senate-passed S. 2611, would establish legalization mechanisms separate from guest worker

³³ The per-country ceiling for dependent states is raised from 2% to 7%.

³⁴ For an analysis of per-country limits and actual admissions by country, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

programs. Under Title VI, Subtitle A of S. 2611, the Secretary of DHS would adjust the status of an alien and the alien's spouse and minor children to LPR status if the alien meets specified requirements. The alien would have to establish that he or she was physically present in the United States on or before April 5, 2001; did not depart during the April 5, 2001-April 5, 2006 period except for brief departures; and was not legally present as a nonimmigrant on April 5, 2006. Among the other requirements, the alien would have to establish employment for at least three years during the April 5, 2001-April 5, 2006 period and for at least six years after enactment, and would have to establish payment of income taxes during that required employment period. Such adjustments of status would not be subject to numerical limits.

Also under Title VI, Subtitle A of S. 2611, aliens who are unable to meet the presence and employment requirements for adjustment to LPR status but who have been present and employed in the United States since January 7, 2004, and meet other requirements, could apply to DHS for Deferred Mandatory Departure (DMD) status.³⁵ Eligible aliens would be granted DMD status for up to three years. An alien in DMD status could apply for immigrant or nonimmigrant status while in the United States, but would have to depart the country in order to be admitted under such status. The alien could exit the United States and immediately re-enter at certain land points of entry. Aliens granted DMD status who are subsequently admitted to the country as H-2C aliens could apply to adjust to LPR status, as described above in the *Guest Workers* section.

Title VI, Subtitles B and C of S. 2611 contain additional provisions that would enable certain unauthorized aliens in the United States to apply for LPR status. Subtitle B would establish a "blue card" program for certain agricultural workers in the United States. Under the program, aliens who had performed requisite agricultural employment and meet other requirements would be able to obtain "blue card" status. Not more than 1.5 million blue cards could be issued during the five years beginning on the date of enactment. After meeting additional requirements, blue card holders would be able to adjust to LPR status outside the INA's numerical limits.

Subtitle C, known as the DREAM Act, would enable aliens who first entered the United States before age 16, have a high school diploma or the equivalent or have been admitted to an institution of higher education, and meet other requirement to apply for LPR status. Individuals who qualify would be granted LPR status on a conditional basis. No numerical limitations would apply. The conditional LPR status would be valid for six years, after which the alien could apply to have the condition removed subject to specified requirements.

During Senate consideration of S. 2611, several amendments to eliminate or modify legalization provisions in the bill were debated. These included two unsuccessful amendments to delete the Subtitle A and Subtitle B legalization provisions for aliens who had been in the United States since April 5, 2001, and for agricultural workers (S.Amdt. 3963), and to expand the Subtitle A legalization

³⁵ The DMD provisions in S. 2611 differ from those in S. 1438; the S. 1438 provisions are discussed in the *Guest Workers* section above.

program for those in the United States since April 5, 2001, to cover aliens in the country since January 1, 2006 (S.Amdt. 4087).

House-passed H.R. 4437 does not contain provisions to legalize the status of unauthorized aliens in the United States.

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 House-passed H.R. 3402 and 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. P.L. 109-271 makes various technical changes to the INA's battered alien provisions.

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

President Bush has proposed a worldwide refugee ceiling for FY2007 of 70,000, with 50,000 of these numbers allocated among the regions of the world and the remaining 20,000 comprising an "unallocated reserve" to be used if, and where, additional refugee slots are needed. The worldwide refugee ceiling for FY2006 was 70,000, with 60,000 allocated numbers and 10,000 unallocated numbers. As of September 30, 2006, actual FY2006 refugee admissions totaled 41,277. 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. H.R. 5522, as reported by the Senate Appropriations Committee, would extend the amendment through FY2007.

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. P.L. 109-102 extends the amendments, as revised, through FY2007.

Resettlement Funding. For FY2006, P.L. 109-149 includes an appropriation of \$575.6 million for the refugee resettlement programs administered by the Department of Health and Human Service's (HHS) Office of Refugee Resettlement (ORR). This funding, however, like most other FY2006 discretionary appropriations, is subject to a 1% recision enacted as part of the FY2006 Defense appropriations bill (P.L. 109-148). For FY2007, the President has requested \$614.9 million for refugee assistance. The FY2007 Labor, HHS, Education appropriations bill reported by the House Appropriations Committee (H.R. 5647) would appropriate \$604.3 million for ORR programs, while the Senate Appropriations Committee-reported bill (S. 3708) includes an appropriation of \$599.9 million for ORR programs.

Citizenship and Naturalization

Legislative proposals have been introduced 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. Such proposals reportedly were submitted to the House Rules Committee for consideration as floor amendments to H.R. 4437 and to the Senate Judiciary Committee for consideration as an amendment to the Chairman's mark, but in the former case, no such amendments were included in the final rule and in the latter case, apparently no such amendment was considered.

Concern about divided national loyalties has also motivated legislation to reform naturalization by restricting dual nationality. Section 1201 of H.R. 4437, as passed by the House, 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). Section 643(h) of S. 2611, as passed by the Senate, would revise and codify language for the oath of allegiance. Both of these provisions would require DHS, in cooperation with DOS, 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. 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 and §204 of S. 2611 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 a 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. These provisions would also provide that

an alien admitted under the INA for conditional lawful permanent residence shall only be considered lawfully admitted to permanent residence and 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 and §204 of S. 2611 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.

Section 643 of S. 2611 would provide resources and establish programs for naturalization and naturalization education. Section 643(c)(2) of S. 2611 would reduce the period of required legal residency for naturalization from five years to four years for lawful permanent residents who demonstrate fluency in English in accordance with regulations to be prescribed by DHS in consultation with DOS. Section 768 of S. 2611 would, among other things, establish guidelines for a redesign of the citizenship test of English and civics knowledge.

Section 821 of S. 2611 would amend INA §320, which establishes the conditions for automatic citizenship of children born outside the United States (who do not otherwise qualify for citizenship under INA §301). The amendment would take effect retroactively to the original INA date of enactment. Section 821 would permit the automatic citizenship of a child born outside the United States to at least one U.S. citizen parent who satisfies certain physical presence requirements, where the child is under the age of 18 years. It would thereby eliminate the current requirement that a foreign-born child be residing in the United States as a lawful permanent resident in order to acquire automatic citizenship. (Changes that §821 of S. 2611 would make to the automatic citizenship requirements applicable to adopted children are covered below in the *International Adoption* section.)

Finally, sections in Title VII of S. 2611 would build on the expansion of expedited naturalization and other citizenship-related benefits for aliens serving in the U.S. military enacted by Title XVII of P.L. 108-136. Among other things, S. 2611 would waive the fingerprint requirement for members of the Armed Forces who were fingerprinted by DOD upon enlistment if they submit a naturalization application within 12 months of enlistment. It would provide that aliens shall not be denied the opportunity to serve in the U.S. Armed Forces, and that aliens may be granted U.S. citizenship after at least two years of honorable and satisfactory service on active duty and have other requirements waived, if they file an application, demonstrate English and civics knowledge and good moral character to their chain of command, and take the oath of allegiance. Similar legislative proposals include S. 2097, S. 2165, S. 3947, H.R. 661, H.R. 901, H.R. 3018, H.R. 3911, and H.R. 4533. Section 509 of S. 2611 would provide that numerical limits on immigrant visas shall not apply to the adult sons and daughters of U.S. citizens naturalized under a statute benefitting Filipino World War II veterans.

International Adoption

International adoption begins essentially as a legal matter between a private individual(s) and a foreign court or government, as the prospective parents must

comply with the adoption rules of that country.³⁶ No United States government agency is directly involved in the adoption process in another country or locates children to be adopted. Nonetheless, the prospective parents must meet the U.S. legal requirements as defined in the INA to bring a child adopted abroad into the United States. Under U.S. law, petitioning for an orphan requires two distinctive determinations: (1) whether the prospective adoptive parents are able to care for the child; and (2) whether the child meets the definition of orphan under the INA.

In 1993, the United States signed the Hague Convention on Intercountry Adoption. In 2000, Congress passed the International Adoption Act of 2000 (P.L. 106-279; IAA) to implement the Convention, and the Senate approved ratification.³⁷ As required by the Convention, among other things, the implementing legislation establishes the central adoption authority of the United States in DOS. The Secretary of DHS is responsible for filing applications of prospective adoptive parents with the central authority.

Title VIII of Senate-passed S. 2611, added to the bill by S.Amdt. 4025, would make changes to the international adoption process.³⁸ S. 2611 would mandate that DOS establish an Office of Intercountry Adoptions, to be headed by an Ambassador at Large for Intercountry Adoptions, who would be responsible for advocating for children, advising the President on intercountry adoptions, representing the U.S. government in diplomatic matters that arise as part of the intercountry adoption process, and developing and overseeing policies relating to intercountry adoptions. In addition, the bill would transfer all the responsibilities for administering intercountry adoption cases from DHS to DOS.

Currently under INA §320, citizenship is automatically acquired by all foreign-born children who are under the age of 18; who are residing in the United States as LPRs; and who are in the legal and physical custody of at least one parent who is a U.S. citizen. Adopted children can qualify for automatic citizenship upon entry to the United States provided that the adoption is finalized before the child enters the United States. S. 2611 would amend INA §320 so that a child adopted abroad would automatically become a U.S. citizen upon adoption by at least one U.S. citizen who has resided in the United States for at least five years, two of these years after the age of 14. The adoption must be full and final, and the child must be under the age of 16 on the adoption date. Under this change, the adopted child would no longer have to enter the United States to acquire citizenship.

Furthermore, S. 2611 would create a new nonimmigrant W visa for an adoptable child who is coming to the United States to be adopted by a U.S. citizen who has been approved to adopt by DOS. The visa would be valid for four years, and the W visa holder would have all the rights and benefits of an LPR.

³⁶ For more information on international adoptions, see CRS Report RL31769, *Immigration: International Child Adoption*, by Alison Siskin.

³⁷ The United States has not formally ratified the Convention.

³⁸ These amendments are similar to provisions found in H.R. 3896, S. 1934, and S. 3031 in the 108th Congress. All the bills were entitled the Intercountry Adoption Reform Act or ICARE Act.

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 is 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.³⁹

Document Fraud

H.R. 4437, as passed by the House, and S. 2611, as passed by the Senate, 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, these bills would provide for either the establishment of a new DHS Fraudulent Documents Center or increased access to the existing DHS Forensic Document Laboratory 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. 2611 would also provide an exception for legitimate refugees and asylees who often must use fraudulent documents to escape persecution in their countries; and increase the number of fraud detection enforcement agents with regard to worksite enforcement.

³⁹ 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.⁴⁰

Section 218 of S. 2611, as passed by the Senate, includes changes to SCAAP that would require the Secretary of DHS to reimburse states and localities for costs associated with detaining and processing undocumented criminal aliens. The costs covered include indigent defense; criminal prosecution; autopsies; translators and interpreters; and court costs. S. 2611 would authorize appropriations for these processing costs at \$400 million for each fiscal year from FY2007 through FY2012. Additionally, appropriations for compensation under SCAAP would be authorized at such sums as necessary for FY2007; \$750 million for FY2008; \$850 million for FY2009; and \$950 million for FY2010-FY2012.

S Visa. The nonimmigrant S visa is currently available to aliens who are determined to be in possession of critical reliable information concerning a criminal or terrorist organization, enterprise, or operation that they are willing to supply to law enforcement authorities or a court. Section 410 of S. 2611, as passed by the Senate, would expand the S visa to include aliens who: are in possession of critical reliable information concerning the activities of governments or organizations (or their agents, representatives, or officials) regarding weapons of mass destruction and related delivery systems; and are willing to supply that information to U.S. authorities. S. 2611 also would increase the numerical limit on the S visa from 250 to 1,000 per fiscal year.

Additionally, S. 2611 would require DHS to report to Congress should the number of nonimmigrants admitted on S visas fall below 25% of the numerical limit. The report is required to include descriptions of the efforts made by the Secretary of Homeland Security to admit such nonimmigrants; reasons why fewer than 25% were admitted; and any extenuating circumstances contributing to the shortfall in admissions.

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.

⁴⁰ See CRS Report RL33431, *Immigration: Frequently Asked Questions on the State Criminal Alien Assistance Program (SCAAP)*, by Karma Ester.

Foreign Medical Graduates. Unless granted a waiver, foreign medical graduates who are in the United States on J visas to receive graduate medical education or training must return to their home countries and reside there for at least two years before they can apply for an immigrant visa, permanent residence, or an H or L nonimmigrant visa (see “Temporary Immigration,” above). The authority to issue a waiver of the foreign residence requirement to a foreign medical graduate based on the request of a state public health department currently applies to aliens who acquired J status before June 1, 2006. H.R. 4997, as passed by the House, would extend this waiver authority to cover aliens who acquire J status before June 1, 2008.

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.

Nonimmigrant Traders and Investors from Denmark. H.R. 3647, as passed by the House, would make nationals of Denmark eligible to enter the United States on E nonimmigrant visas as treaty traders or treaty investors.

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 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 Financing 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). Violence Against Women and Department of Justice Reauthorization Act of 2005. 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.

P.L. 109-271 (S. 3693). Makes technical corrections to P.L. 109-162. Includes provisions on battered aliens. Passed Senate on July 19, 2006. Passed House on July 29, 2006. Signed on August 12, 2006.

P.L. 109-295 (H.R. 5441). Department of Homeland Security Appropriations Act, 2007. Reported by Appropriations Committee (H.Rept. 109-476) on May 22, 2006. Passed House on June 6, 2006. Reported by Senate Appropriations Committee (S.Rept. 109-273) on June 29, 2006. Passed Senate, as amended, on July 13, 2006. House agreed to conference report (H.Rept. 109-699) on September 29, 2006; Senate agreed on September 29, 2006. Signed on October 4, 2006.

P.L. 109-364 (H.R. 5122). John Warner National Defense Authorization Act for FY2007. Includes H-2B visa provisions. Reported by Armed Services Committee (H.Rept. 109-452) on May 5, 2006. Passed House on May 11, 2006.

Passed Senate, as amended, on June 22, 2006. House agreed to conference report (H.Rept. 109-702) on September 29, 2006; Senate agreed on September 30, 2006. Signed on October 17, 2006.

P.L. 109-367 (H.R. 6061). Secure Fence Act of 2006. Passed House on September 14, 2006. Passed Senate on September 29, 2006. Signed on October 26, 2006.

H.R. 1285 (Rush). Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005. Passed House on June 20, 2006. Passed Senate on December 6, 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. 3647 (Sensenbrenner). Renders nationals of Denmark eligible to enter the United States as nonimmigrant traders and investors. Reported by Judiciary Committee (H.Rept. 109-251) on October 18, 2006. Passed House on November 16, 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, P.). 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.

H.R. 4830 (Dreier). Border Tunnel Prevention Act of 2006. Passed House on September 21, 2006.

H.R. 4997 (Moran, Jerry). Physicians for Underserved Areas Act. Passed House on December 6, 2006.

H.R. 5522 (Kolbe). Foreign Operations, Export Financing and Related Programs Appropriations Act, 2007. Includes refugee provisions. Reported by Appropriations Committee (H.Rept. 109-486) on June 5, 2006. Passed House on

June 9, 2006. Reported by Senate Appropriations Committee (S.Rept. 109-277) on July 10, 2006.

H.R. 5647 (Regula). Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2007. Includes provisions on refugee resettlement funding. Reported by Appropriations Committee (H.Rept. 109-515) on June 20, 2006.

H.R. 6094 (Sensenbrenner). Community Protection Act of 2006. Passed House on September 21, 2006.

H.R. 6095 (Sensenbrenner). Immigration Law Enforcement Act of 2006. Passed House on September 21, 2006.

H.R. 6160 (Rogers, M. [Ala.]). More Border Patrol Agents Now Act of 2006. Passed House on September 26, 2006.

H.R. 6162 (Rogers, M. [Ala.]). Secure Border Initiative Financial Accountability Act of 2006. Passed House on September 28, 2006.

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.

S. 2611 (Specter). Comprehensive Immigration Reform Act of 2006. Passed Senate, as amended, on May 25, 2006.

S. 3708 (Specter). Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2007. Includes provisions on refugee resettlement funding. Reported by Appropriations Committee (H.Rept. 109-287) on July 20, 2006.