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Immigration Legislation and Issues in the 108th Congress

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Immigration Legislation and Issues in the 108th Congress

Summary

The 108th Congress has considered and is considering legislation on a wide range of immigration issues. Chief among these are the transfer of immigration authorities to the Department of Homeland Security (DHS), expedited naturalization through military service, and foreign temporary workers and business personnel.

Since passage of the Homeland Security Act of 2002 (P.L. 107-296) and the creation of DHS, Congress has considered legislation to clarify the allocation of immigration authorities between the Secretary of DHS and the Attorney General. P.L. 108-7 amended the Immigration and Nationality Act (INA) in an apparent effort to clarify the authority that was to remain with the Attorney General. H.R. 1416, as passed by the House and reported by the Senate Governmental Affairs Committee, would further amend the INA to remove certain references to the Attorney General.

The 108th Congress has enacted a measure on expedited naturalization through military service. P.L. 108-136, the FY2004 Defense Department Authorization bill, amends military naturalization and posthumous citizenship statutes and provides immigration benefits for immediate relatives of U.S. citizen servicemembers who die as a result of actual combat service.

In the area of foreign temporary workers and business personnel, the 108th Congress has enacted legislation to implement the Chile (P.L. 108-77) and Singapore (P.L. 108-78) Free Trade Agreements. These agreements address several categories of temporary workers and business personnel currently governed by the INA, including professional workers. Separate legislation on H-1B professional workers (S. 1452/H.R. 2849, H.R. 2235, H.R. 2688, H.R. 3534, and H.R. 4166) and L intracompany transfers (S. 1452/H.R. 2849, S. 1635, H.R. 2154, H.R. 2702, H.R. 4415, and H.R. 4166) has likewise been introduced. Also pending are proposals to reform existing guest worker programs (S. 1645/H.R. 3142, S. 2010, S. 2185, S. 2381/H.R. 4262, H.R. 3534, and H.R. 3604) and establish new guest worker programs (S. 1387, S. 1461/H.R. 2899, S. 2010, S. 2381/H.R. 4262, and H.R. 3651).

Among the other subjects of immigration-related legislation receiving action are adjustment of status of unauthorized alien students (S. 1545), noncitizen eligibility for Medicaid (P.L. 108-173), consular identification cards (H.R. 1950), and employment eligibility verification pilot programs (P.L. 108-156).

This report will be updated as legislative developments occur.

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Immigration Legislation and Issues in the 108th Congress

Introduction

The 108th Congress has considered and is considering legislation on a wide range of immigration issues. Two of these issues — the transfer of immigration authorities and expedited naturalization through military service — relate directly to post-September 11, 2001 U.S. efforts to improve national security. In the aftermath of the terrorist attacks, the 107th Congress established a new Department of Homeland Security (DHS) as part of the Homeland Security Act of 2002 (P.L. 107-296). DHS was tasked with preventing terrorist attacks in the United States and reducing the nation's vulnerability to terrorism, among other responsibilities. Effective March 1, 2003, P.L. 107-296 abolished the Immigration and Naturalization Service (INS) of the Department of Justice (DOJ), the agency which had administered and enforced the Immigration and Nationality Act (INA),[1] and transferred most immigration-related functions to the newly created DHS. Lingering questions remain, however, about the division of authorities between DOJ and DHS in some areas. Pending legislation would amend the INA to explicitly transfer certain authorities to DHS. Like the establishment of DHS, Operation Iraqi Freedom had a goal of protecting U.S. national security. This operation prompted congressional interest in legislation to expand the citizenship benefits of aliens serving in the military. The 108th Congress has enacted a measure (P.L. 108-136) that amends military naturalization and posthumous citizenship statutes and provides immigration benefits for immediate relatives of U.S. citizen servicemembers who die as a result of actual combat service.

Other measures before the 108th Congress — such as those on temporary workers and business personnel, adjustment of status for unauthorized aliens, and noncitizen eligibility for public benefits — concern more perennial immigration-related questions. These include how to use the immigration system to meet U.S. labor needs, how to address unauthorized immigration to the United States, and what types of benefits to provide to noncitizens. Of course, today's heightened security concerns have likewise added new dimensions to these old questions. In the current debate over consular identification cards, for example, issues of unauthorized immigration and security have been raised. This report discusses these and other immigration-related issues that have seen legislative action or are of significant

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[1] 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.

congressional interest.[2] The final section of the report lists enacted legislation and selected bills receiving action.

Transfer of Immigration Authorities

For decades, the administrative authority to interpret, implement, enforce, and adjudicate immigration law within the United States lay almost exclusively with one officer: the Attorney General. The most general statement of this power was found in §103(a)(1) of the INA, the fundamental statute regulating the entry and stay of aliens. With some exceptions, immigration functions were delegated to INS, which was headed by a Commissioner who reported to the Attorney General.

On March 1, 2003, primary responsibility for securing our borders and managing the immigration process shifted to DHS. This transfer was effectuated through general language in the Homeland Security Act (HSA; P.L. 107-296): Congress did not amend every affected section of the INA to change all references to the Attorney General that were effectively superceded by the general transfer of authority. However, Congress did amend the language of §103(a) of the INA, first in §1102 of the HSA and later in Division L, §105, of the Consolidated Appropriations Resolution of 2003 (P.L. 108-7). This section now states:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State .... *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

The revised language reflects the transfer of general authority, but may leave certain issues unresolved. First, exactly what immigration powers and functions are to be retained by the Attorney General? Laws to date make clear that the Attorney General is to remain responsible for administrative adjudications by immigration judges and the Board of Immigration Appeals, and that determinations and rulings by the Attorney General on questions of law are to be controlling. However, the intended extent of these and possible other retained powers may not be altogether clear at the operational level. Second, to the degree that authority over immigration is now fragmented or overlapping, how are the respective authorities of DHS and the Attorney General to be coordinated and reconciled?

It has been argued that only a section-by-section revision of the INA, replacing references to the Attorney General with references to the Secretary of Homeland Security where appropriate, will truly clarify the allocation of authorities between the two departments.[3] A bill to replace certain INA references to the Attorney General

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[2] For a basic introduction to immigration, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Wasem.

[3] David A. Martin, "Immigration Policy and the Homeland Security Act Reorganization: An (continued...)

with references to the Secretary of Homeland Security (H.R. 1416) was adopted by the House on June 24, 2003, and reported by the Senate Governmental Affairs Committee on November 25, 2003. As passed by the House and reported by the Senate Committee, this bill, the "Homeland Security Technical Corrections Act of 2003," would remove specified references to the Attorney General, INS, and the INS Commissioner in INA §103 (leaving intact the controlling nature of the Attorney General's determinations of law) and in INA §287(g), which concerns acceptance of state services to carry out immigration enforcement. According to the House Select Committee on Homeland Security report on H.R. 1416 (H.Rept. 108-104), the bill "improves the Homeland Security Act of 2002 and honors the original intentions of the drafters by making grammatical and technical corrections." Nonetheless, questions may remain as to how far this provision would fully clarify and resolve outstanding issues of authority.[4]

Expedited Naturalization Through Military Service

Since the beginning of Operation Iraqi Freedom in March 2003 there has been considerable interest in legislation to expand the citizenship benefits of aliens serving in the military. The reported deaths in action of noncitizen soldiers have drawn attention to provisions of the INA that grant posthumous citizenship to those who die as a result of active-duty service during a period of hostilities. The INA also provides for expedited naturalization for noncitizens serving in the United States military. During peacetime, noncitizens in the military may petition to naturalize after three years aggregate military service rather than the requisite five years of legal permanent residence. During periods of military hostilities, noncitizens serving in the armed forces can naturalize immediately.

In the wake of September 11, 2001, and the war against terrorism, President George W. Bush officially designated the period beginning on September 11, 2001, as a "period of hostilities," which triggered immediate naturalization eligibility for active-duty U.S. military servicemembers. At the time of the designation (July 3, 2002), the Department of Defense and the former INS announced that they would work together to ensure that military naturalization applications were processed expeditiously. As of February 2003, there were 37,000 noncitizens serving in active duty in the U.S. armed forces, almost 12,000 noncitizens serving in the selected reserves, and another 8,000 serving in the inactive national guard and ready reserves.

Of the many pending bills containing provisions concerning expedited or posthumous citizenship as the result of military service, H.R. 1588, the "National Defense Authorization Act for Fiscal Year 2004," became P.L. 108-136 on November 24, 2003. Title XVII of H.R. 1588, entitled "Naturalization and Other Immigration Benefits for Military Personnel and Families," amends existing military

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[3] (...continued)
Early Agenda for Practical Improvements," *Interpreter Releases*, vol. 80, Apr. 28, 2003. pp. 601, 613 (note 66).

[4] *See* CRS Report RL31997, *Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues*, by Stephen R. Viña.

naturalization statutes by: reducing the period of service required for naturalization based on peacetime service from three years to one year; waiving fees for naturalization based on military service during peacetime or wartime; permitting discretionary revocation of naturalization granted on or after the date of enactment through peacetime or wartime service if the citizen were discharged from military service under other than honorable conditions before serving honorably for an aggregate period of five years; permitting naturalization processing overseas in U.S. embassies, consulates, and military bases; providing for priority consideration for military leave and transport to finalize naturalization; and extending naturalization based on wartime service to members of the Selected Reserve of the Ready Reserve. Additionally, the Secretary of Defense or the Secretary's designee within the DHS Bureau of Citizenship and Immigration Services is authorized to request posthumous citizenship immediately upon obtaining permission from the next-of-kin.

P.L. 108-136 expands immigration benefits available to the immediate relatives (spouses, children, and parents) of citizens, including posthumous citizens, who die from injuries or illnesses resulting from or aggravated by serving in combat. Such relatives would remain classified as immediate relatives of a U.S. citizen for immigration purposes, notwithstanding the death of the servicemember, and could self-petition for immigrant status. Certain adjustment requirements and the public charge ground of inadmissibility would be waived. In addition, children and parents, as well as spouses, of U.S. citizens who die during honorable active-duty service would be eligible to naturalize without prior residence or a specified period of physical presence in the United States. This includes survivors of posthumous citizens who died on or after September 11, 2001.

P.L. 108-136 also amends the relevant sections of the INA to change references to the Attorney General to references to the Secretary of Homeland Security. The effective date of the provisions in P.L. 108-136 would be retroactive to September 11, 2001, except for the fee waivers and provision for naturalization proceedings abroad, which shall take effect on October 1, 2004.[5]

Temporary Workers and Business Personnel

The INA provides for the temporary admission of various categories of foreign workers and business personnel. Foreign nationals admitted to the United States on a temporary basis are known as nonimmigrants. The major nonimmigrant category for temporary workers is the H visa. The H visa category includes the H-1B visa for professional specialty workers, the H-2A visa for agricultural workers, and the H-2B visa for nonagricultural workers, among other visa classifications. 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

[5] For further information, see CRS Report RL31884, *Expedited Citizenship Through Military Service: Policy and Issues*, by Margaret Mikyung Lee and Ruth Ellen Wasem.

visitors, the E visa for treaty traders and investors, and the L-1 visa for intracompany transfers.[6]

Professional Workers (H-1B Visas)

The economic prosperity of the 1990s fueled a drive to increase the levels of employment-based immigration. Both Congress and the Federal Reserve Board expressed concern at that time that a scarcity of labor could curtail the pace of economic growth. A primary response was to increase the supply of foreign temporary professional (H-1B) workers through FY2003. The 108th Congress now weighs whether to extend these increased H-1B visa ceilings or let the levels revert to the statutory limit of 65,000. Certain labor market protections aimed at firms whose workforce is more than 15% H-1B workers (known as H-1B dependent employers) also sunset at the end of FY2003.

The 106th Congress enacted the American Competitiveness in the Twenty-first Century Act of 2000 (P.L. 106-313) with bipartisan support in October 2000. That law raised the number of H-1B visas by 297,500 over three years. It also made changes in the use of H-1B fees for the education and training of U.S. residents, notably earmarking a portion of training funds for skills that are in information technology shortage areas and adding a math, science, and technology education grant program. Separate legislation (P.L. 106-311) increased the H-1B fee, authorized through FY2003, from $500 to $1,000. The 107th Congress enacted provisions that allow H-1B workers to remain beyond the six-year statutory limit if their employers have petitioned for them to become legal permanent residents.

Those opposing any extension of the increased H-1B visa ceilings or an easing of admissions requirements assert that there is no compelling evidence of a labor shortage in these professional areas that cannot be met by newly graduating students and the retraining of the existing U.S. work force. They argue further that the education of U.S. students and training of U.S. workers should be given priority over fostering a reliance on foreign workers.

Proponents of maintaining current H-1B levels assert that the education of students and the retraining of the current workforce are long-term responses to potential labor shortages, and that H-1B workers are essential if the United States is to remain globally competitive. Some proponents argue that employers should be free to hire the best people for the jobs, maintaining that market forces should regulate H-1B visas, not an arbitrary ceiling.

Pending bills would make various changes to current law on H-1B visas. S. 1452/H.R. 2849 would broaden the lay-off protection provisions pertaining to H-1B dependent employers to cover all H-1B employers, and would give the Department of Labor the authority to initiate investigations of H-1B employers if there is reasonable cause. H.R. 4166 would make the following provisions permanent: the attestation requirement concerning nondisplacement of U.S. workers

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

applicable to H-1B-dependent employers and willful violators; the filing fee applicable to H-1B petitioners; and the Secretary of Labor's authority to investigate an employer's alleged failure to meet specified labor attestation conditions. Two other bills (H.R. 2235 and H.R. 2688) would suspend or eliminate H-1B visas. H.R. 3534 would amend the H visa category more generally. It would eliminate the current subcategories, including the H-1B visa, and replace them with a single category covering aliens coming temporarily to the United States to perform skilled or unskilled work.[7]

Intracompany Transfers (L Visas)

Concerns have been voiced that the L visa category, which allows executives and managers of multinational corporations to work temporarily in the United States, is being misused. This visa category permits multinational firms to transfer top-level personnel to their locations in the United States for five to seven years. Intracompany transfers enter on L-1 visas, and their spouses and children enter on L-2 visas. Although the number of L visas (L-1s and L-2s combined) issued has tripled in the past 20 years, the number of L visas that the Department of State issued in FY2002 (112,624) is down from a high of 120,538 in FY2001.

Some are now charging that firms are using the L visa to transfer "rank and file" professional employees rather than limiting these transfers to top-level personnel, thus circumventing immigration laws aimed at protecting U.S. employees from the potential adverse employment effects associated with an increase in the number of foreign workers. Proponents of current law maintain that any restrictions on L visas would prompt many multinational firms to leave the United States, as well as undermine reciprocal agreements that currently permit U.S. corporations to transfer their employees abroad.

Legislation that would amend the L-1 visa is before the 108th Congress (S. 1452/H.R. 2849, S. 1635, H.R. 2154, H.R. 2702, H.R. 4166, and H.R. 4415). All of these bills have provisions aimed at restricting the outsourcing of U.S. jobs to L-1 visa holders (that is, the importing of L-1 workers to perform U.S. jobs). S. 1635, introduced by Senator Saxby Chambliss, chair of the Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship, would amend the INA to prohibit under certain circumstances entry of an alien with specialized knowledge who will be stationed primarily at the worksite of an employer other than the petitioning employer. S. 1635 also would eliminate the six-month requirement of prior continuous overseas employment for blanket petitions (thus subjecting all L-1 aliens to a one-year requirement), and would direct DHS to maintain L-1 statistics. H.R. 4166 has similar provisions revising the L visa. Among the other pending bills, H.R. 4415 would eliminate specialized knowledge as a basis for obtaining an L visa and would limit the number of L-1 visas to 35,000 annually. Several of the bills (S. 1452/H.R. 2849 and H.R. 2702) include labor attestation requirements designed to

[7] See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*, by Ruth Ellen Wasem.

protect U.S. workers from displacement or other potentially adverse effects on the labor market brought on by importing L-1 visa holders.[8]

Free Trade Agreements

The U.S.-Chile Free Trade Agreement (FTA) and the U.S.-Singapore FTA create separate categories of entry for citizens of each country to engage in a wide range of business and investment activities as nonimmigrants. Chapter 14 of the U.S.-Chile FTA and Chapter 11 of the U.S.-Singapore FTA address four specific categories of nonimmigrant admissions currently governed by U.S. immigration law: business visitors (parallel to the INA's B-1 visa category); treaty traders and investors (parallel to the E visa category); intracompany transfers (parallel to the L visa category); and professional workers (parallel to the H-1B visa category).

Legislation to implement the Chile and Singapore FTAs was introduced on July 15, 2003, as S. 1416/H.R. 2738 and S. 1417/H.R. 2739, respectively. The House passed H.R. 2738 and H.R. 2739 on July 24, 2003, and the Senate passed them on July 31,2003. The Chile FTA implementing law is P.L. 108-77, and the Singapore FTA implementing law is P.L. 108-78. These laws amend several sections of the INA. Foremost, the laws amend INA §101(a)(15)(H) to carve out a portion of the H-1B visas — designated as the H-1B-1 visa — for professional workers entering through the FTAs. In many ways the FTA professional worker visa requirements parallel the H-1B visa requirements, notably having similar educational requirements. The H-1B visa, however, specifies that the occupation require *highly* specialized knowledge, while the FTA professional worker visa specifies that the occupation require only specialized knowledge.

P.L. 108-77 contains a numerical limit of 1,400 new entries under the FTA professional worker visa from Chile, and P.L. 108-78 contains a limit of 5,400 for Singapore. Under the laws, the FTA professional visa is initially issued for one year, but can be renewed without limit; by comparison, an H-1B worker is limited to a total stay of six years. The laws count an FTA professional worker against the H-1B cap the first year he or she enters and again after the fifth year he or she seeks renewal. Although the FTA professional worker would remain a temporary resident and would only be permitted to work for an employer who had met the applicable labor attestation requirements, he or she could legally remain in the United States indefinitely.

These FTA provisions on the temporary entry of business personnel and professional workers are raising concerns among many in the field of immigration because immigration law traditionally is spelled out by Congress, not the executive branch. Some assert that the U.S. Trade Representative (USTR) negotiated these immigration provisions without any authority or direction from Congress. This assertion implies that the USTR did not honor its obligations of the "fast track authority," found in the Trade Promotion Authority objectives of the Trade Act of 2002 (P.L. 107-210), to regularly and formally consult with Congress during the FTA negotiations in return for expedited legislative procedures, which among other things

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[8] See CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, by Ruth Ellen Wasem.

bar amendments to the FTA enabling legislation. More generally, some point out that these provisions would constrain current and future Congresses when they consider revising immigration law on business personnel, treaty investors and traders, intracompany transfers, and professional workers because the United States would run the risk of violating the FTAs.

The USTR maintains that the temporary entry of professionals falls within Trade Promotion Authority objectives regarding the opening of foreign country markets for U.S. services and investment, and that ensuring cross-border mobility of professionals and other business persons is critical for U.S. companies in developing new markets and business opportunities abroad. The USTR further argues that the temporary business personnel provisions in the FTAs are not immigration policy because they only affect temporary entry. The USTR points out that it issued a notice of intent to negotiate provisions to facilitate the temporary entry of business persons in October 2001 and that it briefed congressional staff on the FTA provisions on numerous occasions.[9]

Guest Worker Programs

Currently, the United States has two main programs for temporarily importing low-skilled workers, sometimes referred to as guest workers. Agricultural workers enter through the H-2A program and nonagricultural workers enter through the H-2B program. Pending bills (S. 1645/H.R. 3142, S. 2185, and H.R. 3604) propose to overhaul the H-2A program. 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. With respect to agricultural guest worker proposals, the House Agriculture Committee held a hearing in January 2004 to review the potential impact of such proposals on the agricultural sector. S. 2010 and S. 2381/H.R. 4262 would reform the H-2B program. Among other changes, both would allow the importing of H-2B workers to perform short-term labor or services; current law limits H-2B workers to the performance of temporary work. S. 2010, S. 2381/H.R. 4262, and other bills (S. 2252/H.R. 4052, S. 2258, and H.R. 4041) would increase the potential number of H-2B workers by either raising the statutory cap on the program, currently set at 66,000 per year, or exempting certain H-2B workers from the cap. H.R. 3534 proposes to amend the H visa category more generally. It would eliminate the current subcategories, including the H-2A and H-2B visas, and replace them with a single category covering aliens coming temporarily to the United States to perform skilled or unskilled work.

Also before the 108th Congress are proposals to create new temporary worker programs (S. 1387, S. 1461/H.R. 2899, S. 2010, S. 2381/H.R. 4262, and H.R. 3651). These bills would amend the INA to establish new nonimmigrant visas. S. 1387 would establish two new visas, one for seasonal workers and one for nonseasonal workers. S. 1461/H.R. 2899 would likewise establish two new nonimmigrant visas. One would cover aliens coming to the United States to perform temporary work, and the other would cover unauthorized alien workers. The new visa category proposed in H.R. 3651 would cover unauthorized aliens. In addition to reforming the H-2B

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[9] See CRS Electronic Briefing Book, *Trade*, page on "Immigration Issues in the Free Trade Agreements," available at [http://www.congress.gov/brbk/html/ebtra135.html].

visa, as discussed above, S. 2010 and S. 2381/H.R. 4262 would each establish a new temporary worker visa. S. 2010 would establish a new visa for temporary workers in occupation classifications not covered by the H-1B, H-2A, H-2B, or other specified high-skilled nonimmigrant visa categories. The new visa proposed in S. 2381/H.R. 4262 would be for temporary workers in occupation classifications not covered by the H-1B, H-2A, or other specified high-skilled nonimmigrant visa categories.[10] Provisions in some of the above bills to enable certain aliens to obtain legal permanent residence are discussed in the next section.

Legal Permanent Residence for Unauthorized Aliens

According to estimates by the former INS, the unauthorized (illegally present) alien population in the United States in January 2000 totaled about 7.0 million. More than two-thirds (69%) of these illegal residents were believed to be Mexican nationals. Several bills before the 108th Congress, some of which are discussed below, would enable certain unauthorized aliens to adjust to legal permanent resident (LPR) status. Adjustment refers to the process under immigration law by which an individual present in the United States is granted legal permanent residence.

Adjustment of Alien Workers

Some pending guest worker bills (see above) would establish special mechanisms for alien workers in the United States to become LPRs. S. 1645/H.R. 3142 would establish a two-stage legalization program for agricultural workers; aliens could first apply for temporary resident status and then, after meeting additional requirements, could apply to adjust to LPR status. Under S. 1461/H.R. 2899, S. 2010, and S. 2381/H.R. 4262, certain alien workers could apply directly for LPR status. By contrast, S. 1387, S. 2185, H.R. 3534, H.R. 3604, and H.R. 3651 do not propose special mechanisms for guest workers to obtain LPR status.[11]

Adjustment of Alien Students

A bill that would enable certain unauthorized alien students to become LPRs (S. 1545) has been reported by the Senate Judiciary Committee. Known as the "DREAM Act," S. 1545 would establish a two-stage process through which eligible aliens would first be granted conditional LPR status and then after meeting additional requirements, could become full-fledged LPRs. To be eligible for conditional LPR status under the bill, an alien must have been under age 16 at the time of initial entry into the United States, have resided continuously here for at least five years preceding enactment, and have a high school diploma (or equivalent credential) or have gained admission to an institution of higher education, among other requirements. Related

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[10] See CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

[11] Ibid.

bills have been introduced in the House (H.R. 84, H.R. 1684, and H.R. 3271).[12] In addition, legalization provisions in some guest worker bills and other immigration bills would also enable certain unauthorized alien students to become LPRs. Provisions in the unauthorized student bills cited above related to eligibility for higher education benefits are discussed separately below.

Noncitizen Eligibility for Public Benefits

Prior to 1996, LPRs were eligible for federal public benefits, such as Medicaid, under terms comparable to citizens, and states were not permitted to restrict access to federal programs on the basis of immigration status. The 1996 welfare reform law (P.L. 104-193) made most newly entering LPRs ineligible for federal public benefits for five years; after five years, it allowed states to continue barring LPRs from federal public benefits, including Medicaid and the State Children's Health Insurance Program (SCHIP).[13] Nonetheless, all noncitizens, regardless of status, who otherwise meet the eligibility requirements for Medicaid, are eligible for emergency Medicaid.[14]

On December 8, 2003, President Bush signed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (P.L. 108-173). It includes a provision to reimburse healthcare providers for uncompensated treatment given to unauthorized aliens, aliens paroled[15] into the United States for the purpose of receiving eligible services, and Mexican citizens permitted to enter the United States with border crossing cards (also referred to as "laser visas"). Specifically, P.L. 108-173 instructs the Secretary of Health and Human Services (HHS) to pay local governments, hospitals, or other providers such amounts as they can demonstrate were used to provide uncompensated emergency health services to unauthorized aliens, aliens paroled into the United States, and Mexican citizens entering with border crossing cards. Funding is allocated to states based on a formula, and the state allotment is available to reimburse health care providers in that state. For each of fiscal years 2005 through 2008, the provision appropriates $250 million, of which:

- $167 million is designated to states based on the percentage of unauthorized aliens residing in the state compared to the total number of unauthorized aliens in the United States; and
- $83 million is designated to the 6 states with the highest percentage of unauthorized alien apprehensions for the fiscal year.

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[12] See CRS Report RL31365, *Unauthorized Alien Students: Issues and Legislation*, by Andorra Bruno and Jeffrey J. Kuenzi.

[13] See CRS Report RL31114, *Noncitizen Eligibility for Major Federal Public Assistance Programs: Policies and Legislation*, by Ruth Ellen Wasem.

[14] See CRS Report RL31630, *Federal Funding for Unauthorized Aliens' Emergency Medical Expenses*, by Alison M. Siskin.

[15] "Parole" is a term in immigration law which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States, and parolees are required to leave when the parole expires or, if eligible, to be admitted in a lawful status.

P.L. 108-173 also requires the Secretary of HHS to establish a process, including measures to protect against fraud and abuse, for hospitals and other health care providers to apply for reimbursement.

Higher Education Benefits

Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA; Division C of P.L. 104-208) made unauthorized aliens ineligible for postsecondary education benefits based on state residence unless equal benefits were made available to all U.S. citizens regardless of state of residence. Bills before the 108th Congress (including S. 1545, as reported) would repeal IIRIRA §505 and, as discussed above, would enable certain unauthorized alien students to become LPRs. Pending House bills (H.R. 84 and H.R. 1684) also would make alien students who apply for relief under their terms eligible for federal postsecondary education benefits, such as student financial aid, while their applications are pending. S. 1545, as reported, does not contain such provisions.[16]

Biometric Deadlines for Travel Documents

The Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVER; P.L. 107-173) required that by October 26, 2004 all visas issued have biometric identifiers. Although the Department of State (DOS) has said that it will meet the deadline, it is not clear that DHS will have the readers for the new biometric visas in place at all points of entry by the specified date.[17]

EBSVER also established biometric requirements for visa waiver program (VWP) countries, whose nationals are allowed to enter the United States as temporary visitors for business or pleasure without first obtaining a visa from a U.S. consulate abroad.[18] The act mandated that by October 26, 2004, the government of each VWP country must certify that it has established a program to issue machine-readable passports that are tamper-resistant and incorporate a biometric identifier. EBSVER also specified that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier, unless the passport was issued prior to October 26, 2004. DOS and DHS have stated that no country will be able to meet the biometric deadline, effectively suspending the VWP for a time. Under EBSVER, there is no mechanism other than congressional action to extend the deadline. Concerns have been raised that DOS does not have enough consular staff to process all the visas that would have to be issued if there were no VWP. Others argue that the VWP is a security risk and should be suspended until passport security can be improved.

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[16] See CRS Report RL31365, *Unauthorized Alien Students: Issues and Legislation*, by Andorra Bruno and Jeffrey J. Kuenzi.

[17] For more information on visa issuances and biometric identifiers in visas, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

[18] For more information on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

H.R. 4417, as passed by the House, would provide a one-year extension to both the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers, and the requirement that all visas issued have biometric identifiers. The new biometric deadline would be October 26, 2005. Under H.R. 4417, any person applying for admission to the United States under the VWP as of that date would have to have a tamper-resistant, machine-readable passport with a biometric identifier, unless the passport was issued prior to October 26, 2005.

Consular Identification Cards

The current debate about consular identification cards in the United States has centered around the matrícula consular, the consular card issued by the Mexican government to its citizens in the United States when they register with a consulate. In recent years, and especially since the September 11, 2001 attacks, Mexican consulates in the United States and other interested parties have worked to gain acceptance of the matrícula consular as identification for a variety of purposes, with considerable success.

The matrícula consular raises a number of questions for domestic and foreign policy. With respect to domestic policy, there is much debate about the costs and benefits of the cards in the areas of immigration, public safety and law enforcement, and homeland security. Relevant foreign policy issues include the U.S.-Mexico bilateral relationship, reciprocity of treatment of citizens abroad, and consular notification in law enforcement situations.

Legislation related to consular identification cards is before the 108th Congress. The House-passed Foreign Relations Authorization Act for FY2004-FY2005 (H.R. 1950) contains provisions to restrict the issuance of such cards by foreign missions. Other pending measures concern acceptance of consular identification cards by U.S. federal entities (H.R. 502, H.R. 687, and H.R. 3534), and acceptance of the cards for banking purposes (H.R. 773 and H.J.Res. 58). H.R. 4440 would establish consequences under immigration law for the possession or use of consular identification cards.[19]

Employment Eligibility Verification Pilot Programs

IIRIRA (in Title IV, Subtitle A) directed the Attorney General to conduct three pilot programs for employment eligibility confirmation (i.e., to confirm that new hires are legally eligible to work). It further directed the Attorney General to establish an employment eligibility confirmation system to be used by employers

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[19] See CRS Report RL32094, *Consular Identification Cards: Domestic and Foreign Policy Implications, the Mexican Case, and Related Legislation*, by Andorra Bruno and K. Larry Storrs; and CRS Report RS21627, *Implications of the Vienna Convention on Consular Relations upon the Regulation of Consular Identification Cards*, by Jennifer K. Elsea and Michael John Garcia.

participating in the pilot programs. Each program was authorized initially for four years. P.L. 107-128 extended the life of each program from four years to six years.

The first program to be implemented, known as the "basic pilot program," began in November 1997. Under IIRIRA, the basic pilot is to operate in at least five of the seven states with the largest estimated unauthorized alien populations. Currently, it is operating in six states (California, Florida, Illinois, Nebraska, New York, and Texas). Although some employers are required to participate in a pilot program, participation in the programs is, for the most part, voluntary.

S. 1685, as reported by the Senate Judiciary Committee, would amend IIRIRA's pilot program provisions. It would extend each program for an additional five years, thereby authorizing the basic pilot program until 2008. S. 1685 also would provide for the operation of the basic pilot program in all states by December 1, 2004. It would not change the IIRIRA provisions concerning voluntary or mandatory participation.

During Senate floor consideration, S. 1685 was amended to add unrelated provisions concerning the immigrant investor regional center pilot program. These provisions, which were previously passed by the Senate in another bill (S. 1642), are discussed below in the "Other Legislation Receiving Action" section. S. 1685, as amended, was passed by the Senate and House. On December 3, 2003, the President signed the bill into law (P.L. 108-156).

Earlier in the session, a related bill (H.R. 2359) had been considered in the House. As reported by the House Judiciary Committee, H.R. 2359, like S. 1685, would have extended each pilot program for an additional five years and would have provided for the operation of the basic pilot program in all states. Additionally, H.R. 2359 would have allowed the pilot program confirmation system to be used for government inquiries about an individual's immigration status. A separate provision of IIRIRA (§642(c)) directed the former INS to respond to inquiries by federal, state, or local government agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agencies for any purpose authorized by law. H.R. 2359 would have provided that such inquiries may be submitted and responded to using the employment eligibility confirmation system. A modified version of H.R. 2359, which contained all the above provisions, was considered on the House floor on October 28, 2003. A motion to suspend the rules and pass the bill, as amended, failed. The 231 to 170 vote on the motion fell short of the required two-thirds vote.

Other Legislation and Issues

Refugees

The refugee ceiling for FY2003 was 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, the need for additional refugee slots arose. Actual FY2003 refugee admissions totaled about 28,400. The Presidential Determination for FY2004, signed on October 21, 2003, again sets the refugee

ceiling at 70,000 and includes 20,000 unallocated refugee numbers. Refugee numbers that are unused in a fiscal year are lost; they do not carry over into the following year.

The "Lautenberg amendment" requires the Attorney General 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. 108-7 extended the Lautenberg amendment through FY2003. The Consolidated Appropriations Act for FY2004 (P.L. 108-199) extends the amendment through FY2004. In addition, it amends the Lautenberg amendment to also require the designation of categories of Iranian nationals, specifically religious minorities, for whom less evidence is needed to prove refugee status.

Another provision in P.L. 108-199 instructs the Secretary of State to utilize private voluntary organizations with refugee-related expertise in the identification, referral, and processing of refugees overseas. Currently, the identification and referral of refugees for the U.S. refugee program is done primarily by the United Nations High Commissioner for Refugees.

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 and re-enacted the amendment for FY2002 and FY2003. Among its provisions, this law enabled adult children previously denied resettlement to have their cases reconsidered. In the 108th Congress, H.R. 2792 would extend the amendment, as revised by P.L. 107-185, through FY2005.

Resettlement Funding. For FY2003, Congress provided $478.0 million for HHS's Office of Refugee Resettlement (ORR). This total included $34.2 million transferred to ORR from the former INS for the unaccompanied alien minors program, pursuant to P.L. 107-296. For FY2004, P.L. 108-199 provides $450.3 million for ORR programs. The Bush Administration's request for ORR for FY2005 is $473 million.[20]

Religious Workers

P.L. 108-99 extends a provision in immigration law that allows for the admission of immigrants to perform religious work. These religious workers enter under the fourth preference category of employment-based immigration, known as "special immigrants," and are subject to an annual cap of 5,000. P.L. 108-99 extends this religious worker provision for five additional years, through September 30, 2008. Ministers of religion are treated separately from religious workers; the special immigrant provision covering them is permanent.

Prior to the Immigration Act of 1990 (P.L. 101-649), ministers of religion were admitted to the United States without numerical limits, and there was no separate provision for religious workers. Religious workers immigrated through one of the

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[20] See CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

more general categories of numerically-limited, employment-based immigration that were in effect at that time. The Immigration Act of 1990 amended the INA to redefine the special immigrant category (which is subject to an overall cap) to include ministers of religion as well as religious workers, and created a new nonimmigrant (i.e., temporary) visa for religious workers, commonly referred to as the R visa. The 1990 Act also contained a "sunset"of the special immigrant provision for religious workers on September 30, 1994. The provision was subsequently extended through September 30, 1997, and then again through September 30, 2003.[21]

Victims of Trafficking

P.L. 106-386 created a new nonimmigrant category, known as the T visa or T status, for aliens who are victims of severe forms of trafficking in persons. To qualify for the T category, in addition to being a victim of a severe form of trafficking in persons, the alien must:

- be physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or a U.S. port of entry because of such trafficking;
- have complied with any reasonable request for assistance to law enforcement in the investigation or prosecution of acts of trafficking, or be under age 15; and
- be likely to suffer extreme hardship involving unusual and severe harm upon removal.

To receive T status, the alien must also be admissible to the United States or obtain a waiver of inadmissibility. The act also makes aliens who have a bona fide application for T status eligible to receive certain public benefits to the same extent as refugees. Additionally, the spouse, children, and, in some cases, parents of an alien granted T status may be given derivative T status in order to avoid extreme hardship.

The Trafficking Victims Protection Reauthorization Act of 2003 (P.L. 108-193) changes eligibility for T status by: (1) raising the age of the exemption for complying with reasonable requests for assistance in the investigation and prosecution of traffickers from age 15 to age 18; (2) making unmarried aliens under age 18, who are the siblings of trafficking victims who are under age 21, eligible for derivative T status; (3) preventing the aging-out of children who were under age 21 when their parents filed applications for T status; and (4) removing public charge as a ground for inadmissibility to T status. P.L. 108-193 also authorizes $15 million in each of fiscal years 2004 and 2005 for the Secretary of HHS to provide services to victims of trafficking.

Anti-Atrocity Legislation

S. 710, as reported by the Senate Judiciary Committee, would make aliens who commit acts of torture, extrajudicial killings, or severe violations of religious

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[21] See CRS Report RS21630, *Immigration of Religious Workers: Background and Legislation*, by Ruth Ellen Wasem.

freedom abroad inadmissible to, and removable from, the United States. Aliens who committed acts of torture or extrajudicial killings also would be ineligible for asylum, refugee status, or withholding of removal. In addition, S. 710 would expand the authority of the Office of Special Investigations, within DOJ's Criminal Division, to detect, investigate, and take legal action to denaturalize aliens who participated in torture, extrajudicial killings, or genocide abroad. The bill would authorize such sums as necessary to ensure that the Office of Special Investigations can carry out its new obligations while continuing its original duties regarding Nazi War criminals.

Unaccompanied Alien Children

S. 1129, as reported by the Senate Judiciary Committee, would create procedures for DHS officers to follow when they encounter an unaccompanied alien child, and would require the establishment of procedures to determine the age of an unaccompanied minor. S. 1129 also would establish conditions for the detention of unaccompanied alien children, and would allow an unaccompanied alien to be released to specified persons other than the child's parents. The bill 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.

Other Legislation Receiving Action

Iraqi Scientists. S. 205, as passed by the Senate, would amend the INA to provide for the nonimmigrant admission of certain scientists and others with information about the Iraqi weapons of mass destruction program, and their families. S. 205 would place a numerical limit of 500 on this category. The bill also would grant the Attorney General discretion to adjust these nonimmigrants to LPR status.

Irish Peace Process Program. H.R. 2655, as passed by the House, would amend and extend through FY2008 a visa program that enables young adults residing in Northern Ireland or certain counties within the Republic of Ireland to work temporarily in the United States.

Immigrant Investor Pilot Program. S. 1642, as passed by the Senate, would extend the immigrant investor regional center pilot program for five additional years. It also would authorize DHS to give priority in processing immigrant investor visa petitions to aliens seeking admission under the pilot program. The text of S. 1642 was added as an amendment to an unrelated bill to extend and expand the employment eligibility verification pilot programs (S. 1685, discussed above) during consideration of that bill on the Senate floor. S. 1685, as amended to include the text of S. 1642, was passed by the Senate and House, and signed into law by the President as P.L. 108-156.

State Criminal Alien Assistance Program (SCAAP). SCAAP provides reimbursement to state and local governments for the direct costs associated with incarcerating undocumented criminal aliens. For FY2003 and FY2004, the INA authorizes the appropriation of such sums as necessary for SCAAP. P.L. 108-199 provides $300 million for SCAAP for FY2004. S. 460, as passed by the Senate,

would authorize appropriations for SCAAP, as follows: such sums as necessary for FY2003; $750 million for FY2004; $850 million for FY2005; and $950 million each year for FY2006-FY2010. The House companion bill is H.R. 933. Other pending bills (H.R. 1095, H.R. 1519) would authorize different levels of funding for SCAAP for FY2004 through FY2008.[22]

Waivers for Nonimmigrant Physicians. Foreign physicians in the United States on J-1 visas must return to their home country after completing their education or training unless they are granted a waiver. Waiver recipients are eligible to change status to H-1B status, which is discussed above. State departments of health can request waivers under the "Conrad 30" or "State 30" program. Under current law, the "Conrad 30" program provisions apply to foreign physicians admitted to the United States in J-1 status, or acquiring such status, before June 1, 2004. Pending bills, including H.R. 4453, would make changes to the "Conrad 30" program. H.R. 4453, which has been approved by the House Judiciary Subcommittee on Immigration, Border Security, and Claims, would strike the June 1, 2004 cut-off date and instead make the Conrad program provisions applicable to foreign physicians admitted in or acquiring J-1 status before the date that is one year after enactment of the bill. In addition, H.R. 4453 would exempt state-sponsored waiver recipients from the H-1B cap.[23]

Nonpayment of Child Support. S. 1609, as reported by the Senate Judiciary Committee, would establish consequences under immigration law for failure to pay child support. The bill would amend the INA to make nonpayment of child support a ground of inadmissibility as well as a basis for determining that an individual is not a person of good moral character for various purposes, including naturalization.

Legislation List

P.L. 108-7 (H.J.Res. 2)

Consolidated Appropriations Resolution, 2003. Includes provisions related to transfer of immigration authorities to DHS and refugee-related provisions. Passed House on January 8, 2003. Passed Senate, as amended, on January 23, 2003. House and Senate agreed to conference report (H.Rept. 108-10) on February 13, 2003. Signed on February 20, 2003.

P.L. 108-77 (H.R. 2738)

United States-Chile Free Trade Agreement Implementation Act. Reported by Ways and Means Committee (H.Rept. 108-224, Part I) on July 21, 2003. Reported by Judiciary Committee (H.Rept. 108-224, Part II) on July 22, 2003. Passed House on July 24, 2003. Passed Senate on July 31, 2003. Signed on September 3, 2003.

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

[23] See CRS Report RL31460, *Immigration: Foreign Physicians and the J-1 Visa Waiver Program*, by Karma A. Ester.

P.L. 108-78 (H.R. 2739)

United States-Singapore Free Trade Agreement Implementation Act. Reported by Ways and Means Committee (H.Rept. 108-225, Part I) on July 21, 2003. Reported by Judiciary Committee (H.Rept. 108-225, Part II) on July 22, 2003. Passed House on July 24, 2003. Passed Senate on July 31, 2003. Signed on September 3, 2003.

P.L. 108-99 (H.R. 2152)

Amends INA to extend special immigrant religious worker program for 5 additional years. Reported by Judiciary Committee (H.Rept. 108-271) on September 16, 2003. Passed House on September 17, 2003. Passed Senate on October 3, 2003. Signed on October 15, 2003.

P.L. 108-136 (H.R. 1588)

National Defense Authorization Act for Fiscal Year 2004. Reported by Armed Services Committee (H.Rept. 108-106) on May 16, 2003; supplemental report (H.Rept. 108-106, Part II) filed on May 21, 2003. Passed House on May 22, 2003. Passed Senate, as amended, on June 4, 2003. Signed on November 24, 2003.

P.L. 108-156 (S. 1685)

Basic Pilot Program Extension and Expansion Act of 2003. Reported by Judiciary Committee (without written report) on November 6, 2003. Passed Senate, as amended, on November 12, 2003. Passed House on November 19, 2003. Signed on December 3, 2003.

P.L. 108-173 (H.R. 1)

Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Passed House on June 27, 2003. Passed Senate, as amended, on July 7, 2003. House agreed to conference report (H.Rept. 108-391) on November 22, 2003; Senate agreed on November 25, 2003. Signed on December 8, 2003.

P.L. 108-193 (H.R. 2620)

Trafficking Victims Protection Reauthorization Act of 2003. Reported by International Relations Committee (H.Rept. 108-264, Part I) on September 5, 2003. Reported by Judiciary Committee (H.Rept. 108-264, Part II) on September 29, 2003. Passed House, as amended, on November 5, 2003. Passed Senate on December 9, 2003. Signed on December 19, 2003.

P.L. 108-199 (H.R. 2673)

Consolidated Appropriations Act, 2004. Originally introduced as the FY2004 Agriculture Appropriations bill. Includes refugee-related and SCAAP provisions. Reported by Appropriations Committee (H.Rept. 108-193) on July 9, 2003. Passed House on July 14, 2003. Passed Senate, as amended, on November 6, 2003. House agreed to conference report (H.Rept. 108-401) on December 8, 2003; Senate agreed on January 22, 2004. Signed on January 23, 2004.

H.R. 1416 (Cox)

Homeland Security Technical Corrections Act of 2003. Reported by Select Committee on Homeland Security (H.Rept. 108-104) on May 15, 2003. Passed House, as amended, on June 24, 2003. Reported by the Senate Governmental Affairs Committee (S.Rept. 108-214) on November 25, 2003.

H.R. 1950 (Hyde)

Foreign Relations Authorization Act, Fiscal Years 2004 and 2005. Reported by International Relations Committee (H.Rept. 108-105, Part I) on May 16, 2003; supplemental report (H.Rept. 108-105, Part II) filed on June 12, 2003. Reported by Armed Services Committee (H.Rept. 108-105, Part III) on June 30, 2003. Reported by Energy and Commerce Committee (H.Rept. 108-105, Part IV) on July 11, 2003. Passed House on July 16, 2003.

H.R. 2655 (Walsh)

Amends and extends the Irish Peace Process Cultural and Training Program Act of 1998. Reported by Judiciary Committee (H.Rept. 108-260, Part I) on September 4, 2003. Passed House, as amended, on October 7, 2003.

H.R. 4417 (Sensenbrenner)

Amends the Enhanced Border Security and Visa Entry Reform Act of 2002 to modify certain deadlines for machine-readable, tamper-resistant entry and exit documents. Passed House on June 14, 2004.

S. 205 (Biden)

Iraqi Scientists Immigration Act of 2003. Reported by Judiciary Committee (without written report) on January 30, 2003. Passed Senate on March 20, 2003.

S. 460 (Feinstein)

State Criminal Alien Assistance Program Reauthorization Act of 2003. Passed Senate on November 25, 2003.

S. 710 (Leahy)

Anti-Atrocity Alien Deportation Act of 2003. Reported by Judiciary Committee on November 6, 2003; S.Rept. 108-209 filed on November 24, 2003.

S. 1129 (Feinstein)

Unaccompanied Alien Child Protection Act of 2003. Reported by Judiciary Committee (without written report) on June 3, 2004.

S. 1545 (Hatch)

Development, Relief, and Education for Alien Minors Act of 2003. Reported by Judiciary Committee on November 25, 2003; S.Rept. 108-224 filed on February 9, 2004.

S. 1609 (Hatch)

Parental Responsibility Obligations Met through Immigration System Enforcement Act. Reported by Judiciary Committee (without written report) on May 13, 2004.

S. 1642 (Leahy)

Extends the immigrant investor regional center pilot program for 5 additional years and authorizes giving immigrant investor visa priority to aliens seeking admission under the program. Passed Senate, as amended, on October 3, 2003. Provisions incorporated into S. 1685 (P.L. 108-156).