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Nonimmigrant Overstays: Brief Synthesis of the Issue

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Summary

As the 109th Congress debates immigration control (i.e., border security and interior enforcement) and legal reform (i.e., temporary and permanent admissions), concerns arise over the capacity of the Department of Homeland Security to identify and remove temporary aliens who fail to depart when their visas expire. It is estimated that each year hundreds of thousands of foreign nationals overstay their nonimmigrant visas or enter the country illegally (with fraudulent documents or bypassing immigration inspections).¹ The most recent published estimate based upon the March Supplement of the Current Population Survey (CPS) is that 11.1 million unauthorized aliens were residing in the United States in 2005.² Reliable estimates of the number of nonimmigrant overstays are not available, and sample estimates range from 31% to 57% of the unauthorized population (depending on methodology). This report will be updated.

Background

Foreign nationals not legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted.³ Under current law, three departments — the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ) — each play key roles in administering the

¹ CRS Report RS21938, *Unauthorized Aliens in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

² Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*, by Jeffrey S. Passel, Mar. 2006; available at [<http://pewhispanic.org/files/reports/61.pdf>].

³ Authorities to except or to waive visa requirements are specified in law, such as the broad parole authority of the Attorney General under §212(d)(5) of the Immigration and Nationality Act (INA) and the specific authority of the Visa Waiver Program in §217 of the INA.

law and policies on the admission of aliens.⁴ DOS's Bureau of Consular Affairs (Consular Affairs) is the agency responsible for issuing visas, DHS's U.S. Citizenship and Immigration Services (USCIS) is charged with approving immigrant petitions, and DHS's Bureau of Customs and Border Protection (CBP) is tasked with inspecting all people who enter the United States. DHS's Immigration and Customs Enforcement (ICE) is the lead agency on enforcing immigration law in the interior of the United States. DOJ's Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.⁵

In the early 1990s, policy makers became especially concerned about nonimmigrant overstays, specifically aliens who entered legally on a temporary basis and failed to depart. At that time, nearly 2.7 million aliens had established legal status through the provisions of the Immigration Reform and Control Act (IRCA) of 1986 (P.L. 99-603) — a law which also significantly strengthened border and interior immigration enforcement provisions. Nonetheless, demographers at the former Immigration and Naturalization Service (INS) estimated that 3.5 million unauthorized aliens were residing in the United States in 1990. By 1996, the estimated number of unauthorized alien residents was 5.8 million, with about 2.1 million (41%) estimated to have overstayed their nonimmigrant visas. The remaining 59% were assumed to have entered the United States illegally.⁶

Visa Issuances. There are two broad classes of aliens that are issued visas: immigrants and nonimmigrants.⁷ The documentary requirements for visas are stated in §222 of the INA. Generally, the application requirements are more extensive for aliens who wish to permanently live in the United States than those coming for visits. An alien whose situation is straightforward and whose reason for seeking a visa is easily documented generally has fewer forms and procedural hurdles than an alien whose circumstances are more complex. There are over 70 USCIS forms as well as DOS forms that pertain to the visa issuance process.⁸

For almost a decade, the Bureau of Consular Affairs has been issuing machine-readable visas. Consular officers use the Consular Consolidated Database (CCD) to store data on visa applicants. Since February 2001, the CCD stores photographs of all visa applicants in electronic form, and more recently the CCD has begun storing fingerprints of the right and left index fingers. In addition to indicating the outcome of any prior visa

⁴ Other departments, notably the Department of Labor (DOL), and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (DHHS) sets policy on the health-related grounds for inadmissibility discussed below.

⁵ CRS Report RL33319, *Toward More Effective Immigration Policies: Selected Organizational Issues*, by Ruth Ellen Wasem.

⁶ U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States, by Country of Origin and State of Residence: October 1992*, unpublished paper by Robert Warren, 1994; and U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, by Robert Warren, 2003.

⁷ CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

⁸ USCIS forms are available at [<http://uscis.gov/graphics/formsfee/index.htm>].

application of the alien in the CCD, the system links with other databases to flag problems that may affect the issuance of the visa. The CCD is the nexus for screening aliens for admissibility, notably screening on terrorist security and criminal grounds, and links with the United States Visitor and Immigrant Status Indicator Technology (US-VISIT), DHS's automated entry and exit data system, at the time the visa is issued.⁹

Many foreign visitors enter the United States without visas through the Visa Waiver Program (VWP), a provision of the INA that allows the visa requirements to be waived for aliens coming from countries that meet certain standards, e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland.¹⁰ In addition to the VWP, there are exceptions to documentary requirements for a visa that have been established by law, treaty, or regulation — most notably with citizens of Canada.¹¹ In 2003, the Administration narrowed the circumstances in which the visa and passport requirements are waived.¹²

Border Inspections. During February 2006, CBP inspected approximately 11.1 million U.S. citizens and 17.7 million foreign nationals at land, air, and sea ports of entry.¹³ The INA requires the inspection of all aliens who seek entry into the United States; possession of a visa or another form of travel document does not guarantee admission into the United States.¹⁴ As a result, all persons seeking admission to the United States must demonstrate to a CBP inspector that they are a foreign national with a valid visa and/or passport or that they are a U.S. citizen.¹⁵ Border inspections are extremely important because many foreign nationals enter the United States without visas, notably as discussed above through the VWP.

Under the US-VISIT program, certain foreign nationals are required to provide fingerprints, photographs or other biometric identifiers upon arrival in or departure from the United States. CBP inspectors are currently taking a digital photograph and scanning two fingerprints from each nonimmigrant alien who presents a visa at designated ports of entry. Current DHS regulations exempt about 20 categories of individuals from providing

⁹ CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

¹⁰ CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

¹¹ CRS Congressional Distribution Memorandum, *Waiving the Documentary Requirements for Visas and Passports to Enter the United States*, by Ruth Ellen Wasem and Andorra Bruno, Oct. 27, 2003.

¹² Passports and visas are now required for nationals of 54 British Commonwealth countries and Ireland who are permanent residents of Canada or Bermuda and who previously had been waived from the documentary requirements. *Federal Register*, vol. 68, no. 21, Jan. 31, 2003, pp. 5190-5194.

¹³ U.S. Department of Homeland Security, Office of Immigration Statistics, *Immigration Monthly Statistical Report*, available at [<http://uscis.gov/graphics/shared/aboutus/statistics/msrnov05/index.ht>].

¹⁴ CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, coordinated by Ruth Ellen Wasem with Jennifer Lake, James Monk, Lisa Seghetti, and Stephen Viña.

¹⁵ CRS congressional distribution memorandum, *Western Hemisphere Travel Initiative*, by Ruth Wasem, Blas Nuñez-Neto, Susan Epstein, Todd Tatelman and Angeles Villerreal, Apr. 26, 2006.

biometric identifiers upon entry to or exit from the United State; however, the CBP inspector retains discretion to collect an alien's biometric information.¹⁶

Emigration. With few exceptions, nonimmigrants are required to complete an I-94 Arrival/Departure Record when they arrive in the United States and when they depart. The I-94 Arrival/Departure form is routinely collected from foreign nationals exiting at air and sea ports, but reportedly it is infrequently collected at land ports. As a result, DHS does not have reliable data on emigration from the United States.

Past Legislative Action on Nonimmigrant Overstays

Illegal Immigration Reform and Immigrant Responsibility Act. Congress strengthened the anti-terrorism provisions in the INA and passed provisions that many maintained would ramp up enforcement activities in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208, Division C) and the Antiterrorism and Effective Death Penalty Act (P.L. 104-132). In IIRIRA, there were several provisions aimed at nonimmigrant overstays. Foremost, IIRIRA clarified that the visa of a nonimmigrant is void as soon as the nonimmigrant alien overstays the period of authorized stay. IIRIRA furthermore created new grounds of exclusion for aliens who are unlawfully present in the United States. Those who are unlawfully present for more than 180 days but less than one year and who voluntarily depart the country are ineligible for admission or reentry to the United States for three years. An alien unlawfully present for one year or more who leaves or is removed from the United States is inadmissible for 10 years. These provisions are generally referred to as the three- and 10-year bars.

Finally, §110 of IIRIRA required the Attorney General to develop an automated entry/exit system that among other things (1) collects a record of departure for every alien departing the United States, and matches the record against the record of the alien's arrival in the United States; and (2) allows the identification, through online searches, of nonimmigrants who remain beyond their period of authorized stay. As amended by several subsequent laws, §110 of IIRIRA became the statutory basis of what is now the US-VISIT system, which uses biometric identification (i.e., finger scans and digital photographs) to check identity.¹⁷ US-VISIT exit pilot programs are now in place at several air and sea ports.¹⁸

Enhanced Border Security and Visa Entry Reform Act of 2002. The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) expressly

¹⁶ CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa Seghetti and Stephen Viña.

¹⁷ The Data Management Improvement Act of 2000 (P.L. 106-215) made substantial changes regarding document requirements and the deadline for implementation.

¹⁸ CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program*, by Lisa Seghetti and Stephen Viña, states: "According to many, implementing the exit process of an automated entry and exit data system at most ports of entry will entail expanding the infrastructure, which may be challenging at some ports. The Administration is currently in the third phase of implementation of the system, and reportedly the exit process is operable at selected ports of entry. The full implementation of the exit process will be one of the challenges to the successful development of an automated entry and exit data system."

targeted the improvement of visa issuance and alien tracking procedures. Among its provisions, it required the development of an interoperable electronic data system to be used to share information relevant to alien admissibility and removability and the implementation of an integrated entry-exit data system.¹⁹ It also required that all visas have biometric identifiers.²⁰ The act placed new requirements on the VWP, specifically mandating that the government of each VWP country certify that it has established a program to issue tamper-resistant, machine-readable passports with a biometric identifier. The act also required all VWP countries to certify that they report in a timely manner the theft of blank passports.

Legislation implementing the 9/11 Commission. The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 (P.L. 108-458) included visa policy and immigration-related provisions aimed at curbing nonimmigrant overstays as well as the specific recommendations offered by the 9/11 Commission.²¹ The IRTPA required accelerated deployment of the biometric entry and exit system to process or contain certain data on aliens and their physical characteristics.²² The act also expanded the pre-inspection program that places U.S. immigration inspectors at foreign airports, increasing the number of foreign airports where travelers would be pre-inspected before departure to the United States. Moreover, it required all individuals entering the United States (including U.S. citizens and visitors from Canada and other Western Hemisphere countries) to bear a passport or other documents sufficient to denote citizenship and identity. The IRTPA required the establishment of new standards aimed at ensuring the integrity for federal use of birth certificates, state-issued driver's licenses and identification cards, and social security cards. States may receive grants to assist them in implementing the proposed birth certificate and driver's license standards.²³

Estimating Overstays

In the past few years it became apparent that the data on nonimmigrant overstays were unreliable because these data were based upon the I-94 Arrival/Departure form. Although the I-94 forms are usually collected from foreign nationals at air and sea ports, the forms are infrequently collected from foreign nationals exiting at land ports. Moreover, two major classes of nonimmigrants are exempt from filling out the I-94 when

¹⁹ §414 of the USA PATRIOT Act (P.L. 107-56) also encouraged the full implementation of the integrated, automated entry and exit data system “with all deliberate speed and as expeditiously as practicable.”

²⁰ The Border Security and Visa Reform Act also required the establishment of electronic means to monitor and verify the status of the students and exchange visitors. CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by Alison Siskin.

²¹ CRS Report RL32616, *9/11 Commission: Current Legislative Proposals for U.S. Immigration Law and Policy*, by Michael John Garcia and Ruth Ellen Wasem.

²² CRS RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program*, by Lisa Seghetti and Stephen Viña

²³ CRS Report RL32722, *Intelligence Reform and Terrorism Prevention Act of 2004: National Standards for Drivers' Licenses, Social Security Cards, and Birth Certificates*, by Todd Tatelman.

visiting the United States for business or pleasure: Canadian citizens admitted for up to six months and Mexican citizens entering with a border crossing card (laser visa) along the southwestern border who intend to limit their stay to less than thirty days and intend not to travel beyond a set perimeter, generally 25 miles (75 miles in Arizona) from the border.

The former INS attempted to estimate nonimmigrant overstays based on the percentage overstays for each country that yielded an estimate that 2.3 million, or 33%, of the 7.0 million unauthorized immigrants residing in the United States in January 2000 were nonimmigrant overstays.²⁴ In 2004, the U.S. Government Accountability Office (GAO) attempted to estimate the nonimmigrant overstays using samples based upon three different methodologies. GAO concluded, “three alternative data sources on illegal immigrants indicate varying — but uniformly substantial — percentages of overstays: 31%, 27%, and 57%.”²⁵

In 2003, the INS demographer reached the following conclusion: “In general, the net nonimmigrant overstay figures are more likely to be overestimates than underestimates because the collection of departure forms for long-term overstays who depart probably is less complete than for those who depart within the first year.”²⁶ The 2004 GAO study, however, drew two different conclusions: “The extent of overstaying is significant and may be understated by DHS’s most recent estimate.”²⁷

Estimates of nonimmigrant overstays residing in the United States are plagued by the broader difficulties in measuring all three components of unauthorized migration — aliens entering without inspection between ports of entry and aliens entering with fraudulent documents, as well as aliens overstaying or otherwise violating the terms of legal entry. The extent that some nonimmigrant overstays become “quasi-legal” aliens (e.g., those who have LPR petitions pending or have sought relief from removal from an immigration judge) further complicate the estimates.²⁸

²⁴ U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, by Robert Warren, 2003 (hereafter *Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*).

²⁵ U.S. Government Accountability Office, *Overstay Tracking: A Key Component of Homeland Security and a Layered Defense*, GAO-04-82, May 2004 (hereafter *Overstay Tracking*, GAO-04-82).

²⁶ *Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*.

²⁷ *Overstay Tracking*, GAO-04-82.

²⁸ *Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*.