

CRS Report for Congress

Received through the CRS Web



Visa Waiver Program

Updated October 18, 2004

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Visa Waiver Program

Summary

Since the events of September 11, 2001, concerns have been raised about the ability of terrorists to enter the United States under the visa waiver program. The visa waiver program (VWP) allows nationals from certain countries to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States. The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa. Under Department of Homeland Security (DHS) regulations, at this time travelers who seek to enter the United States through the VWP are not subject to the biometric requirements of the US-VISIT program; however, as of September 30, 2004, VWP participants arriving at airports and seaports will be subject to US-VISIT.

By eliminating the visa requirement, this program facilitates international travel and commerce and eases consular office workloads abroad, but it also bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. In 2003, 13.5 million visitors entered the United States under this program, constituting 49% of all overseas visitors. To qualify for the VWP, the INA specifies that a country must: offer reciprocal privileges to United States citizens; have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%; certify that the country issues, or will issue, machine-readable passports; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if an emergency occurs that threatens the United States' security interests.

The USA PATRIOT Act enacted a requirement that by October 1, 2003, all aliens applying for admission under the VWP must have machine-readable passports; however, the act allows the Secretary of State to waive the requirement until September 30, 2007, and the requirement was waived for 22 of the 27 countries participating in the VWP. In addition, the Enhanced Border Security and Visa Reform Act of 2002 requires that by October 26, 2004, all countries participating in the VWP must issue their nationals machine-readable passports that incorporate *biometric identifiers*; however, the deadline was extended until October 26, 2004 by P.L. 108-299. Notably, *The 9/11 Commission Report* recommends that DHS complete as quickly as possible a biometric entry-exit screening system. S. 2845 as passed by the Senate, would require that each VWP country, as a condition of being in the VWP, have a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are compatible with the biometric identifiers used in the US-VISIT program. There is no comparable provision in the House-passed version of S. 2845. Additional legislation, H.R. 4550, would require those entering under the VWP to undergo an electronic verification of admissibility before embarkation. Other bills would suspend the VWP (H.R. 2235, H.R. 3522, and H.R. 3534). H.R. 3956/S. 2844 would add Poland to the program. This report will be updated if legislative action occurs.

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Visa Waiver Program

Current Policy

Under the visa waiver program (VWP), the Secretary of the Department of Homeland Security,¹ in consultation with the Secretary of State, may waive the “B” nonimmigrant visa requirement for aliens traveling from certain countries as temporary visitors for business or pleasure (tourists).² Nationals from participating countries simply complete an admission form (I-94) before their arrival and are admitted for up to 90 days. The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa.

Temporary foreign visitors for business or pleasure from most countries must obtain a visa from Department of State (DOS) offices at a consular post abroad before coming to the United States.³ Personal interviews are generally required, and consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may make the alien ineligible for a visa under the so-called “grounds for inadmissibility” of the INA, which include criminal, terrorist, and public health grounds for exclusion. Consular officers are required to check the background of all aliens in the “lookout” databases, including the Consular Lookout and Support System (CLASS) and TIPOFF databases.⁴

¹ The Secretary of Homeland Security is administering the VWP program. Section 402 of the Homeland Security Act of 2002 (HSA; P.L. 107-296), signed into law on Nov. 25, 2002, states: “The Secretary [of the Department of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.” Prior to Mar. 1, 2003, the Attorney General in consultation with the Secretary of State was responsible for designating the VWP countries.

² “B” visa refers to the subparagraph in the Immigration and Nationalization Act (INA §101(a)(15)(B)).

³ To obtain a nonimmigrant visa, individuals submit written applications and undergo interviews and background checks. For more information on temporary admissions, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

⁴ For more information on visa issuances, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

Although the VWP greatly eases the documentary requirements for nationals from participating countries, it has important restrictions. Aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status. Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.⁵ Additionally, with some limited exceptions, aliens entering through VWP are not permitted to adjust status. An alien entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).

VWP Qualifying Criteria

To qualify for the VWP a country must:

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%;
- certify that the country issues, or will issue machine-readable passports; and
- be determined, by the Secretary of Homeland Security, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program.

Countries can be immediately terminated from the VWP if an emergency occurs in the country that the Secretary of Homeland Security in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.⁶ For example, because of the economic collapse in Argentina in December 2001, and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission, that country was removed from the VWP in February 2002. Similarly, on April 15, 2003, Uruguay was terminated from the VWP because of the high rates of Uruguayan nationals who over-stay their visas, and the high rate of nationals who have been denied admission at the border.⁷

Additionally, there is probationary status for VWP countries that do not maintain a low visa refusal rate. Countries on probation are determined by a formula

⁵ This provision was amended by P.L. 106-406 to provide extended voluntary departure to nonimmigrants who enter under the VWP and require medical treatment.

⁶ An emergency is defined as: (1) the overthrow of a democratically elected government; (2) war; (3) a severe breakdown in law and order in the country; (4) a severe economic collapse; and (5) any other extraordinary event in the program country where that country's participation could threaten the law enforcement or security interests of the United States. INA § 217(c)(5)(B).

⁷ *Federal Register*, Mar. 7, 2003, vol. 68, no. 45, pp. 10954-10957.

based on a disqualification rate of 2%-3.5%.⁸ Probationary countries with a disqualification rate less than 2% over a period not to exceed three years may remain VWP countries.⁹ Countries may also be placed on probation if more time is necessary to determine whether the continued participation of the country in the VWP is in the security interest of the United States. In April 2003, Belgium was placed on provisional status because of concerns about the integrity of nonmachine-readable Belgian passports and the reporting of lost or stolen passports. Belgium's participation in the VWP will be re-evaluated in 2004.¹⁰

VWP Inspections

Unlike other nonimmigrants, no background checks are done on travelers under the VWP prior to their departure for the United States. This expedited process allows only one opportunity — immigration inspectors at port of entry — to identify inadmissible aliens. Prior to the alien's arrival, an electronic passenger manifest is sent from the airline or commercial vessel to immigration inspectors at the port of entry which is checked against security databases.

Since October 1, 2002, passenger arrival and departure information on individuals entering and leaving the U.S. under the VWP has been electronically collected from airlines and cruise lines, through DHS' Bureau of Customs and Border Protection's (CBP) Advanced Passenger Information System (APIS) system. If the carrier fails to submit the information, an alien may not enter under the VWP. APIS sends the data to the DHS' Bureau of Immigration and Customs Enforcement's (ICE) Arrival and Departure Information System (ADIS)¹¹ for matching arrivals and departures and reporting purposes. APIS collects carrier information such as flight number, airport of departure and other data.¹²

At port of entry, immigration inspectors observe and question applicants, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States.¹³ DHS' CBP inspects aliens who seek to enter the United States. Primary inspection consists of a brief interview with an immigration inspector, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS).¹⁴ At 115 airports and 14

⁸ "Disqualification rate" is defined as the percentage of nationals from a country who applied for admission as a nonimmigrant who either violated the terms of the nonimmigrant visa, who were excluded from admission or who withdrew their application for admission as a nonimmigrant.

⁹ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

¹⁰ *Federal Register*, Mar. 7, 2003, vol. 68, no. 45, pp. 10954-10957.

¹¹ ADIS feeds information to the Interagency Border Inspection System (IBIS).

¹² [<http://www.dhs.gov/dhspublic/display?theme=43&content=736&print=true>].

¹³ Although aliens who enter under the VWP do not need a visa, all visa waiver program applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

¹⁴ IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury (continued...)

seaports, many nonimmigrants are entered into the new US-VISIT system that uses biometric identification (finger scans) to check identity and track presence in the United States; however, at this time, entrants under the VWP are not subject to US-VISIT. Currently, inspectors at the border collect the following information on aliens entering under the VWP from the passport: name, date of birth, nationality, gender, passport number, country of issuance. Primary inspections are quick (usually lasting no longer than a minute); however, if the inspector is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.¹⁵

Trends in Use of the VWP

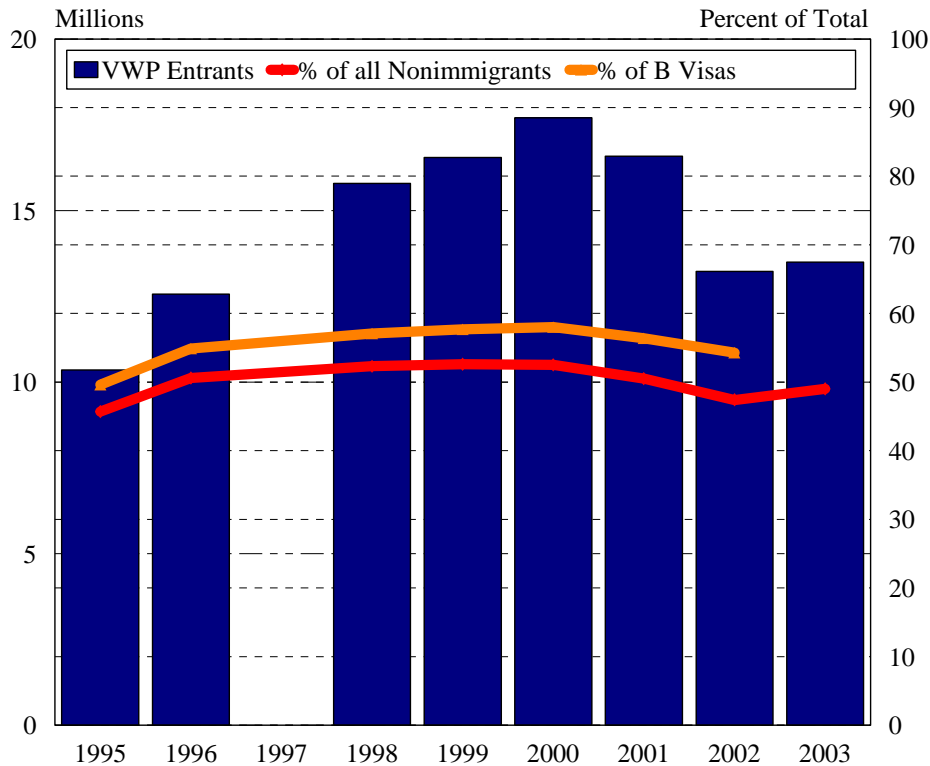
The number of people entering under the VWP grew steadily as countries were added to the program, and reached a peak of 17.7 million in FY2000. The number of visitors entering under the VWP declined by 3.4 million or 20% between FY2001 and FY2002. The number of all nonimmigrants entering the United States declined by 4.9 million or 14.9% during the same period, but the number of nonimmigrants who were not from VWP countries declined by 1.6 million (9.6%). Similarly, the number of foreign nationals entering the United States with B visas between FY2001 and FY2002 declined by 13.4% or 1.7 million, which is a smaller decline than the decline in the percent of visitors entering under the VWP. Between FY2002 and FY2003, the number of people entering under the VWP increased slightly from 13.2 to 13.5 million, while the number of people entering as nonimmigrants decreased slightly from 27.9 to 27.8 million. Importantly, the decrease in the total number of nonimmigrant entrants for FY2003 may actually be an increase, as the data for FY2003 are preliminary and are likely to increase.

¹⁴ (...continued)

Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

¹⁵ Lookout databases such as TIPOFF, which is integrated with CLASS, contain information on aliens who are inadmissible for entry into the United States. NSEERS and SEVIS are also used during secondary inspections. Immigration inspectors may access NAILS II, which is a text-based system that interfaces with IBIS and CLASS. For more information, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

Figure 1. Number of Entrants under the VWP for FY1995-FY2003, Percent of All Nonimmigrant Entrants Who Are VWP Entrants, and Percent of All B Visa Entrants Who Are VWP Entrants



Source: Data for FY1995-FY2001 from the Statistical Yearbook of the Immigration and Naturalization Service. Data for FY2002 from the Department of Homeland Security, 2002 Yearbook of Immigration Statistics. Statistics for FY2003 are preliminary and are unpublished data from DHS. Data are not available for FY1997.

Note: Number of countries participating in the VWP at the end of the Fiscal Year — FY1995: 23; FY1996: 25; FY1998: 26; FY1999-FY2001: 29; FY2002: 28; and, FY2003: 27.

Legislative History

Visa Waiver Pilot Program

The Visa Waiver Program (VWP) was established as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). Congress periodically enacted legislation to extend the program's authorization, and program participation grew to include 29 countries.¹⁶ The pilot

¹⁶ As of Apr. 2003, 27 countries were eligible to participate in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, (continued...)

program was scheduled to expire on September 30, 1997, but temporary extensions were included in both Continuing Resolutions passed in the 105th Congress. The Commerce, Justice, State, and Judiciary (CJS) FY1998 Appropriations Act (P.L. 105-119) also contained an extension through April 30, 1998. In 1998, Congress enacted legislation (P.L. 105-173) that not only extended the program through April 30, 2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.¹⁷

Visa Waiver Permanent Program Act

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the Commissioner of the former Immigration and Naturalization Service (INS)¹⁸ exercised the Attorney General's parole authority to extend the program temporarily.¹⁹ Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that:

- mandate that by October 1, 2007 all entrants under the VWP must have machine-readable passports;
- require that all visa waiver program applicants be checked against lookout systems;
- require ongoing evaluations of participating countries (not less than once every five years);
- require the collection of visa waiver program arrival/departure data at air and sea ports of entry; and
- require that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.²⁰

¹⁶ (...continued)

Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and United Kingdom. Argentina was removed from the VWP in February 2002, and Uruguay was removed in Apr. 2003.

¹⁷ For further information, see CRS Report 97-309, *Immigration: Visa Waiver Pilot Program*, by Ruth Ellen Wasem. Report available on request from the author.

¹⁸ The Homeland Security Act of 2002 (P.L. 107-296) abolished the Immigration and Naturalization Service (INS) and effective Mar. 1, 2003, transferred most of its functions to three bureaus in the new Department of Homeland Security (DHS): Citizenship and Immigration Services (USCIS); Bureau of Immigration and Customs Enforcement (ICE); and, Bureau of Customs and Border Protection (CBP).

¹⁹ Parole is a temporary authorization to enter the United States and is normally granted when the alien's entry is determined to be in the public interest (INA § 212(d)(5)(A)).

²⁰ Many of these requirements were included to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

At the time, many maintained that P.L. 106-396 balanced the competing concerns of facilitating travel and tightening immigration controls.

USA Patriot Act of 2001

The USA Patriot Act (P.L. 107-56), signed into law on October 26, 2001, advanced the deadline for all entrants under the VWP to have machine-readable passports to October 1, 2003, but allowed the Secretary of State to waive this requirement until October 1, 2007 if the VWP country can show that it is making progress toward issuing machine-readable passports. In addition, the USA Patriot Act directed the Secretary of State each year until 2007 to ascertain that designated VWP countries have established programs to develop tamper-resistant passports.

On September 24, 2003 the Secretary of State extended the deadline for visitors from 21 VWP countries to present a machine-readable passport at the ports of entry until October 26, 2004.²¹ Each country granted a postponement formally requested that the deadline be extended and certified that the country is making progress toward ensuring that its nationals have machine-readable passports, and is taking steps to prevent the misuse of non-machine-readable passports.

Five countries, Andorra, Brunei, Liechtenstein, Luxembourg, and Slovenia, did not request an extension of the effective date because virtually all their citizens have machine-readable passports. However, on November 11, 2003, Luxembourg was granted an extension of the deadline.²² As a result of being placed on probation, Belgium was not eligible to receive an extension of the effective date. Since February 2003, Belgian citizens have been required to have machine-readable passports as an element of their continued participation in the program.

Enhanced Border Security and Visa Entry Reform Act of 2002

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act),²³ signed into law on May 14, 2002, mandated that by October 26, 2004 the government of each VWP country needs to certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a *biometric identifier*.²⁴ The Border Security Act 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

²¹ The 21 countries granted a postponement are: Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and United Kingdom.

²² Virtually all Luxembourg passports are machine-readable, but Luxembourg diplomatic passports are not.

²³ P.L. 107-173. The original bill, H.R. 3525, was sponsored by Rep. F. James Sensenbrenner.

²⁴ The act tasked the International Civil Aviation Organization (ICAO) with developing the biometric standard.

passport was issued prior to October 26, 2004. The USA Patriot Act established the deadline for all foreign nationals entering under the VWP to have machine-readable, tamper-resistant passports, and the Border Security Act stated that the new requirement of biometrics in the passports does not change the deadline in the USA Patriot Act for the presentation of machine-readable, tamper-resistant passports. Thus, as of October 27, 2004 (the day after the deadline) all entrants under the VWP must present machine-readable, tamper-resistant passports (as required by the USA Patriot Act), but only passports issued after October 26, 2004 must have a biometric identifier. The Border Security Act also required all VWP countries to certify that they report in a timely manner the theft of blank passports, and required, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system.

Policy Issues

The VWP is supported by the U.S. travel and tourism industry, the business community, and DOS. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the United States.²⁵ DOS argues that by waiving the visa requirement for high volume/low risk countries, consular workloads are significantly reduced, allowing for streamlined operations, cost savings, and concentration of resources on greater-risk nations in the visa process. Additionally, some contend that currently DOS does not have the resources to resume issuing visas to all the visitors from VWP countries.²⁶

Nonetheless, while the program has significantly reduced the consular workload and facilitated travel to the United States, it has increased the workload of immigration inspectors at ports of entry by shifting background checks to ports of entry. Furthermore, others contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security. Immigration inspectors have stated that terrorists and criminals believed they would receive less scrutiny during the immigration inspection process if they applied for admission into

²⁵ The example of Argentina was frequently used to illustrate this relationship; during the first year Argentina was in the VWP, tourism from that country to the United States grew by 11.5%. Some cite Korea as a country that should be participating in VWP because of the trade and tourism growth it could generate, and contend that this factor should be added to the criteria used to select participating countries. Other proponents of the VWP, however, contend that the criteria should not be broadened to include tourism potential if the thresholds of refusal rates and visa overstay violations are weakened, arguing that these provisions are essential to safeguard and control our borders.

²⁶ In his testimony before the House Immigration and Claims Subcommittee on Feb. 28, 2002, William S. Norman, President and Chief Executive Officer of the Travel Industry Association of America, stated that it would take hundreds of new consular staff and tens of millions of dollars to issue visas to visitors currently entering under the VWP.

the United States under the VWP.²⁷ On February 28, 2002, the House Judiciary Committee's Immigration and Claims Subcommittee held a hearing on the VWP. Testimony by the Inspector General of the Department of Justice pointed out several shortcomings in the current program. Of particular concern were the former INS's inability to account for nonimmigrant overstays, stolen passports from VWP countries, and INS's ability to correctly and consistently check applicants against the lookout system.

Biometric Deadline

On March 17, 2004, the Secretary of Homeland Security, Thomas Ridge, and the Secretary of State, Colin Powell, sent a letter to Representative James Sensenbrenner stating that none of the VWP countries will be able to meet the October 26, 2004 deadline for establishing a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier.²⁸ The letter states that countries are trying to meet the deadline, but are unable due to "interoperability issues, privacy issues, chip durability concerns, as well as production and procurement delays."²⁹ Secretary Ridge and Secretary Powell asked Representative Sensenbrenner to extend or waive the deadline for two years, as they contend, by 2006, the majority of VWP countries will be issuing biometric passports. On April 21, 2004, the House Judiciary Committee held an oversight hearing entitled "Should the Congress extend the October, 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports?" Secretary Ridge and Secretary Powell testified at the hearing.³⁰ Under the law, there is no mechanism other than Congressional action to extend the deadline. P.L. 108-299, signed into law on August 9, 2004, extends the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers until October 26, 2005.

Linkage with US-VISIT

The United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program was established in accordance with several Congressional mandates

²⁷ U.S. Department of Justice, Office of Inspector General Report I-2002-002, *Follow-Up Report on the Visa Waiver Program*, Dec. 2001. (Hereafter cited as DOJ, *Follow-Up Report*.)

²⁸ The letter is available at [<http://www.house.gov/judiciary/ridge031704.pdf>].

²⁹ Previously, DOS has stated that the timetable for the biometric requirement is too quick since the International Civil Aviation Organization (ICAO) finalized the standards for the biometric identifier in May 2003. DOS also maintains that research, development and testing of new passports usually takes several years. Testimony of Maura Harty, in U.S. Congress, House Select Committee on Homeland Security, Infrastructure and Border Subcommittee, *Hearing to Evaluate the US-VISIT Program*, 108th Cong., 2nd sess., Jan. 28, 2004. (Hereafter cited as *Testimony, Maura Harty*.) Department of Homeland Security, DMIA Task Force, *Data Management Improvement Act (DMIA) Task Force Second Annual Report to Congress*, Dec. 2003, p. D-6.

³⁰ The hearing testimony is available at [<http://www.house.gov/judiciary/full.htm>].

that required DHS to create an integrated, automated entry and exit data system.³¹ The first increment of US-VISIT became operational on January 5, 2004, at 114 airports and 15 seaports requiring nonimmigrants who apply for admission pursuant to a nonimmigrant visa to provide biometric information (a digital photograph and two fingerprints) at time of arrival.³² Under DHS' regulations, biometric identifiers are not required for travelers who seek to enter the United States through the VWP.³³ Thus, at this time, entrants under the VWP are not included in US-VISIT. On April 2, 2004, DHS released a press statement announcing that since DHS and DOS asked Congress to extend the biometric passport requirement, beginning September 30, 2004, entrants under the VWP at airports and seaports would be processed in US-VISIT.³⁴ Notably, *The 9/11 Commission Report* recommends that DHS complete as quickly as possible a biometric entry-exit screening system.³⁵

Management and Oversight

In April 2004, the Inspector General for the DHS released a report entitled *An Evaluation of the Security Implications of the Visa Waiver Program*.³⁶ The report details security concerns with the VWP, some of which result from establishment of DHS in March 2003, and the transfer of the VWP's administration to DHS' Border and Transportation Security Directorate (BTS). The report found that since the abolishment of the Immigration and Naturalization Service (INS), the VWP has had a series of acting managers and officials, and that many within DHS and other federal agencies were unsure who was in charge of the program. The report also stated that due to several issues, including lack of funding and trained personnel, BTS is unable to perform the Congressionally mandated reviews of each VWP country to see if the countries should continue to be included in the program. In addition the report found that there was no process for re-evaluating Belgium's probationary status to determine whether Belgium should continue to be a VWP country. This review was supposed to be completed by May 15, 2004.

The report also found that due to lack of country reviews, BTS is unable to assess the information provided by the countries on lost and stolen passports. The information provided by VWP governments on lost and stolen passports has not been checked against United States' entry/exit data to determine whether the passports have been used to enter the United States. The report also found that collection of data on lost and stolen passports is not proactive, uniform, nor disseminated in an

³¹ See generally, 8 U.S.C. §§ 1187, 1365a and note, 1379, 1731-31.

³² Implementation of the United States Visitor and Immigrant Status Indicator Technology System ("US-VISIT"); Biometric Requirements, 69 *Federal Register*, p. 468 (Jan. 5, 2004).

³³ Notice to Nonimmigrant Aliens Subject to Be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System, 69 *Federal Register*, p. 482 (Jan. 5, 2004).

³⁴ Press release available at [<http://www.state.gov/r/pa/prs/ps/2004/31103.htm>].

³⁵ *The 9/11 Commission Report*, p.389.

³⁶ U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews OIG-04-26, *An Evaluation of the Security Implications of the Visa Waiver Program*, Apr. 2004.

organized manner. The report also noted that the lack of international standardization in passport numbering systems complicates the ability to identify people using stolen VWP country passports.

Overstays

Some maintain that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers rather than the actual behavior of nonimmigrants. When the program was conceived, it was expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation. Reportedly, since December 2002, DHS has been matching the entry and exit portions of the I-94 forms for participants in the VWP to create an entry/exit system for VWP nationals. Some question whether this system can produce accurate counts of those who overstay the terms of their entry. Until an automated entry-exit system is fully operational and the data produced are trusted and easily accessible, it is difficult for immigration agents to identify those who have overstayed their 90-day admission periods. Thus, aliens could enter under the VWP and stay indefinitely.³⁷

Legislation in the 108th Congress

Biometrics

P.L. 108-299/H.R. 4417. On June 14, 2004 the House passed H.R. 4417. The Senate passed the bill without any amendments on July 22, 2004. H.R. 4417, which was introduced by Representative F. James Sensenbrenner, was enacted on August 9, 2004 (P.L. 108-299). P.L. 108-299 provides a one-year extension of the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers. The new biometric deadline is October 26, 2005. The bill also amends the law so 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, 2005.

S. 2845. S. 2845, the “National Intelligence Reform Act of 2004,” as passed by the Senate, would require that each VWP country, as a condition of being in the VWP, have a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are compatible with the biometric identifiers used in the US-VISIT program. The House-passed version of S. 2845 does not contain a similar provision.

As discussed above, on October 26, 2005, all foreign nationals from VWP countries seeking entrance to the United States will be required to present a machine-

³⁷ For further information, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William J. Krouse and Raphael F. Perl; and CRS Report 98-89, *Immigration: Visa Entry/Exit Control System*, by William J. Krouse and Ruth Ellen Wasem.

readable, tamper-resistant passport with a biometric identifier. However, there is no requirement for nationals from other countries to present such a passport. S. 2845, as passed by the House, contains a provision that would require the Comptroller General, the Secretary of State, and the Secretary of Homeland Security each no later than May 31, 2005 to submit two studies. The studies shall examine the feasibility, cost, potential benefits, and relative importance to tracking and apprehending terrorists of: (1) requiring all foreign nationals to present machine-readable, tamper-resistant passports that incorporate biometric and document authentication identifiers; and (2) creating a database containing information on the lifetime travel history of each foreign national or U.S. citizen who seeks to enter the United States or another country, so that border and consular officers may determine a person's travel history by means other than a passport. The studies should also make recommendations on incentives that could be offered to foreign nations to participate in the initiatives. S. 2845 as passed by the Senate contains a similar provision requiring the Secretary of State to explore expanding the use of biometric passports. Unlike the provision in the S. 2845 as passed by the House, the provision in the Senate-passed version of S. 2845 requires implementation of a plan obligating U.S. citizens and aliens from contiguous territories to present biometric passports for travel into the United States.

H.R. 4550. H.R. 4550, introduced by Representative Turner on June 14, 2004 would extend the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers until October 26, 2005, and would allow the Secretary of Homeland Security, in consultation with the Secretary of State, to grant two six-month extensions to countries who have made a good faith effort to meet the deadline.

In addition, H.R. 4550 would establish, as part of the entry/exit system, an electronic system that uses biographical data to determine eligibility for admission to the United States. The bill would require that prior to embarkation, those entering under the VWP electronically submit biographical information through the system. Airlines and other carriers would have to perform an electronic check through the system to determine whether the alien passenger entering under the VWP has been determined to be eligible for admission. H.R. 4550 would mandate that the system be deployed as soon as possible, and would require a fee from the aliens using the system to cover the cost of establishing and operating the system.

S. 2324. Introduced by Senator Saxby Chambliss on April 20, 2004, S. 2324 would extend the deadline for VWP countries to certify that they have a program to issue machine-readable passports with biometric identifiers until November 30, 2006.

Suspending the VWP

H.R. 3534. On November 19, 2003, Representative Thomas G. Tancredo introduced H.R. 3534, which would suspend the VWP until the Secretary of Homeland Security determines and certifies to Congress that:

- the automated entry-exit system authorized under Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is fully implemented and functional,³⁸
- all United States ports of entry have functional biometric machine readers, and
- all countries that participate in the VWP issue their nationals machine-readable biometric passports.

H.R. 2235 and H.R. 3522. H.R. 2235, introduced by Representative Sam Graves on May 22, 2003, and H.R. 3522, introduced by Representative J. Gresham Barrett on November 19, 2003, contain similar provisions and would suspend the VWP until the Secretary of Homeland Security certifies to Congress that 13 different requirements (11 requirements for H.R. 3522) have been met including:

- the integrated entry and exit data system is fully operational at all ports of entry;
- the system of machine-readable, tamper-resistant visas and other travel and entry documents and the technology standard for visa waiver program participants required by the Enhanced Border Security and Visa Entry Reform Act of 2002 are fully operational at all ports of entry and, where applicable, at consular posts abroad;
- DHS has the operational capability to take into custody and remove from the United States any deportable alien who has been brought to the attention of the DHS by a state or local law enforcement agency;
- the backlog of immigration benefit applications has been eliminated, as required in the HSA; and
- the number of aliens removed from the United States, during each of four months preceding the month in which the certification under this section is executed, was at least 25% higher than in the comparable months of the previous year.

In addition, H.R. 3522 would extend until October 1, 2005 the requirement that VWP countries issue tamper-resistant passports that include biometric identifiers.

Adding Countries to the VWP

H.R. 3956/S. 2844. H.R. 3956, introduced on March 11, 2004 by Representative Nancy L. Johnson, and S. 2844, introduced by Senator Rick Santorum on September 23, 2004, would designate Poland as a VWP country.³⁹ It is not clear that Poland meets the criteria to be a VWP country. Additionally, there are indications that a formal determination of Poland's B1/B2 visa refusal rate would

³⁸ The automated entry and exit system has been administratively named the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. For more information on US-VISIT see CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, by Lisa M. Seghetti and Stephen R. Viña.

³⁹ Bills were introduced in previous Congresses to legislate countries into the VWP; however, none of the bills were enacted.

reveal a refusal rate that is significantly higher than what is required for participation in the program. Nonetheless, as discussed above, some contend that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers and does not reflect the propensity of nationals from that country to overstay their visas.