



Immigration Legislation and Issues in the 112th Congress

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Summary

Despite President Obama's calls for a national conversation on immigration reform, immigration has not been a front-burner issue for the 112th Congress. The 112th Congress, however, has taken legislative action on some measures containing provisions on a range of immigration-related topics. The Department of Defense and Full-Year Continuing Appropriations Act, 2011 (P.L. 112-10) terminated a special refugee provision known as the Lautenberg amendment. This amendment was subsequently re-enacted for FY2012 by the Consolidated Appropriations Act, 2012 (P.L. 112-74). P.L. 112-74 also contains provisions on border security and other issues. P.L. 112-58, a narrow immigration law, concerns military service-based immigration benefits.

The House has passed the Fairness for High-Skilled Immigrants Act of 2011 (H.R. 3012), which would make changes to permanent employment-based and family-based admissions. It also has passed legislation to reauthorize the H-1C temporary worker category for nurses coming to work in medically underserved areas in the United States (H.R. 1933).

In other action on immigration-related legislation, the House Judiciary Committee has reported or ordered reported bills on electronic employment eligibility verification (H.R. 2885), immigrant detention (H.R. 1932), visa security (H.R. 1741), and the diversity visa (H.R. 704). Both the House Foreign Affairs Committee and the Senate Judiciary Committee have reported bills on victims of trafficking (H.R. 2830, S. 1301), and the House Natural Resources Committee has reported a bill concerning foreign residents of the Commonwealth of the Northern Mariana Islands (CNMI), a U.S. territory in the Pacific. In addition, House and Senate committees and subcommittees have held hearings on a number of immigration-related issues.

This report discusses immigration-related issues that have received legislative action or are of significant congressional interest in the 112th Congress. Department of Homeland Security (DHS) appropriations are addressed in CRS Report R41982, *Homeland Security Department: FY2012 Appropriations*, and, for the most part, are not covered here.

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Introduction

Despite President Obama's calls for a national conversation on immigration reform and stated commitment to pursue such reform, immigration has not been a front-burner issue for the 112th Congress. Unlike in some past years, there has been little discussion in this Congress of comprehensive immigration reform legislation, which typically has encompassed border security, employment eligibility verification, temporary worker programs, permanent admissions, and unauthorized aliens, among other issues.

The 112th Congress has, however, taken legislative action on some immigration-related measures. For example, the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (P.L. 112-10) included a provision terminating a special refugee provision known as the Lautenberg amendment. This amendment was subsequently re-enacted for FY2012 by the Consolidated Appropriations Act, 2012 (P.L. 112-74). P.L. 112-74 also contains border security provisions and limited language on other immigration issues, such as employment eligibility verification and the H-2B temporary worker visa. P.L. 112-58 concerns military service-based immigration benefits. Among the other subjects of immigration-related legislation before the 112th Congress are immigrant detention (H.R. 1932), permanent family-based and employment-based admissions (H.R. 3012), diversity visas (H.R. 704), foreign temporary nurses (H.R. 1933), and visa security (H.R. 1741).

This report discusses these and other immigration-related issues that have received legislative action or are of significant congressional interest in the 112th Congress. Department of Homeland Security (DHS) appropriations are addressed in a separate report¹ and, for the most part, are not covered here.

Border Security

DHS is charged with protecting U.S. borders from weapons of mass destruction, terrorists, smugglers, and unauthorized aliens. Border security involves securing the many means by which people and things can enter the country. Operationally, this means controlling the official ports of entry (POE) through which legitimate travelers and commerce enter the country, and patrolling the nation's land and maritime borders to safeguard against and interdict illegal entries.

At ports of entry, U.S. Customs and Border Protection's (CBP) Office of Field Operations is responsible for conducting immigration, customs, and agricultural inspections of travelers seeking admission to the United States. Between ports of entry, CBP's border patrol is responsible for enforcing U.S. immigration law and other federal laws along the border and for preventing unlawful entries into the United States. In the course of discharging its duties, the border patrol patrols 8,500 miles of U.S. international borders with Mexico and Canada and the coastal waters around Florida and Puerto Rico.

¹ CRS Report R41982, *Homeland Security Department: FY2012 Appropriations*, coordinated by William L. Painter and Jennifer E. Lake.

Border security has been an important issue for the last several Congresses, with much of the debate focused on whether DHS has sufficient resources to fulfill its border security mission. Some Members of Congress have argued that Congress should not consider other reforms to the immigration system, including any proposed legalization provisions or changes to the family- or employment-based visas systems, until DHS is better able to secure the border. With apprehensions of unauthorized immigrants at a 42-year low, administration officials have argued that significant progress has been made at the border, though continued investments are needed.²

The following discussion focuses on key border-related provisions that have been considered by the 112th Congress and may be considered in the future concerning staffing at ports of entry and enforcement activities between ports of entry, including on federal lands. Some of these issues are debated through the DHS appropriations process.³ The House passed its FY2012 DHS appropriations bill (H.R. 2017) in June 2011. The Senate Appropriations Committee reported its version of the bill in September 2011. Both the House and Senate Appropriations Committees issued written reports on the bill. The full Senate then used H.R. 2017 as a vehicle to pass a short-term FY2012 continuing resolution (P.L. 112-33) to fund DHS and several other agencies. Other FY2012 continuing resolutions followed until enactment of the Consolidated Appropriations Act, 2012 (P.L. 112-74) in December 2011, which appropriates funds for DHS and other agencies for the remainder of FY2012.

At Ports of Entry

The original House-passed FY2012 DHS appropriations bill (H.R. 2017) supported the Administration's request to fund 300 additional CBP officers at new and expanded ports of entry, increase funding for canine units at ports of entry, expand the Immigration Advisory Program from 9 to 13 overseas airports,⁴ and add 45 CBP officers and 20 analysts to the National Targeting Center.⁵ The Senate Appropriations Committee, in its report on H.R. 2017, also supported Administration requests to fund these programs.⁶ Additional bills have been proposed to add up to 5,000 additional CBP officers at POEs, along with support staff, and to make additional investments in port infrastructure.⁷

The House and Senate Appropriations Committee reports on the FY2012 DHS appropriations bill specified how to allocate resources for CBP. For example, while both committees supported the

² See, for example, Testimony of Department of Homeland Security Secretary Janet Napolitano, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Securing the Border: Progress at the Federal Level*, hearing, 112th Cong., 1st sess., May 4, 2011.

³ For a fuller discussion of the DHS appropriations process, see CRS Report R41982, *Homeland Security Department: FY2012 Appropriations*, coordinated by William L. Painter and Jennifer E. Lake.

⁴ The Immigration Advisory Program deploys CBP officers to overseas airports to prevent terrorists and improperly documented passengers from boarding U.S.-bound aircraft.

⁵ The National Targeting Center provides advanced targeting, research, and coordination among numerous law enforcement and intelligence agencies in support of CBP's anti-terrorism mission with respect to passenger and cargo screening. See U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations Bill, 2012*, report to accompany H.R. 2017, 112th Cong., 1st sess., H.Rept. 112-91, May 26, 2011, p. 24 (hereafter cited as House Committee on Appropriations Report on H.R. 2017).

⁶ U.S. Congress, Senate Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations Bill, 2012*, report to accompany H.R. 2017, 112th Cong., 1st sess., S.Rept. 112-74, September 7, 2011, p. 30 (hereafter cited as Senate Committee on Appropriations Report on H.R. 2017).

⁷ See, for example, Putting Our Resources Toward Security (PORTS) Act (H.R. 1561).

Administration's request for additional CBP officers at new and expanded ports, the House also directed the Administration to consider ways to reduce CBP staffing requirements through greater automation, segmentation of high- and low-risk travelers and trade, and technology investments.⁸ The committees also recommended that CBP devote additional resources to Automated Targeting Systems and the National Targeting Center to enhance passenger and cargo targeting efforts.⁹

Between Ports of Entry

Between ports of entry, congressional attention in recent years has focused on border patrol staffing, surveillance technology, and fencing and other physical barriers.¹⁰ The House-passed version of the FY2012 DHS appropriations bill and the House and Senate Appropriations Committee reports included related provisions, and each of these topics may receive additional attention in the 112th Congress, as discussed below. Congress may also consider proposals to establish a formal border enforcement task force, and to broaden DHS authority to conduct enforcement activities on federal lands and waive environmental and other regulations.

Border Patrol Staffing

With ongoing support from Congress, DHS has substantially increased border patrol staffing along the southwest and northern borders over the last decade, with total border patrol staffing increasing from 9,821 in FY2001 to 21,370 projected for FY2012, including 1,000 border patrol agents added by the FY2010 Border Security Supplemental (P.L. 111-230) and funded again in P.L. 112-74.¹¹ A number of bills have been proposed in the 112th Congress to authorize further growth in the border patrol and/or to direct the Department of Defense (DOD) to deploy National Guard troops to the southwest border.¹² Nonetheless, given Congress's interest in fiscal austerity, questions may arise about the cost effectiveness of CBP's enforcement efforts based on statistics that go beyond DHS's traditional measure of enforcement outcomes (i.e., apprehensions) to include "better quantification of the denominators—the number of illegal crossers and volume of contraband coming across the border."¹³

Border Surveillance and Technology

For several years, Congress has supported a series of DHS programs aimed at achieving "border situational awareness." Through these programs, CBP agents track movement in border areas, identify and classify (i.e., prioritize) illegal entries, correlate entries with the positions of nearby agents, and use this information to make tactical interdiction decisions. DHS's primary effort to

⁸ House Committee on Appropriations Report on H.R. 2017, pp. 27-28.

⁹ *Ibid.*, p. 25; Senate Committee on Appropriations Report on H.R. 2017, p. 42.

¹⁰ For a fuller discussion of border enforcement between ports of entry, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Marc R. Rosenblum.

¹¹ U.S. Border Patrol, *Border Patrol Agent Staffing by Fiscal Year*, http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/staffing_92_10.ctt/staffing_92_10.pdf; U.S. Department of Homeland Security, Congressional Budget Justification FY2012, p. CBP S&E – 66.

¹² See, for example, National Guard Border Enforcement Act (H.R. 152) and Secure America Through Verification and Enforcement (SAVE) Act of 2011 (H.R. 2000).

¹³ House Committee on Appropriations Report on H.R. 2017, p. 33.

provide such an integrated surveillance system between 2006 and 2011 was known as SBInet. But cost overruns, technical problems, and scheduling delays led the agency to terminate the SBInet contract in January 2011 in favor of a new Arizona Border Technology Plan that relies on a broader mix of off-the-shelf surveillance technology and continued investment in SBInet-style integrated surveillance towers.¹⁴ In congressional reports on H.R. 2017, House and Senate appropriators expressed frustration with delayed implementation of border technology programs. P.L. 112-74 cuts funding for border security fencing and technology relative to FY2011 and the Administration's FY2012 budget estimate, and withholds \$60 million until DHS submits a detailed expenditure plan.¹⁵ Recent Congresses have also supported DHS's use of surveillance aircraft, including unmanned aerial systems (UASs), and several bills in the current Congress would authorize additional collaboration between DHS and DOD on aerial surveillance.¹⁶

Tactical Infrastructure and Border Fencing

Since Congress passed the Secure Fence Act of 2006 (P.L. 109-367), DHS has installed a total of over 400 miles of pedestrian fencing and vehicle barriers along the southwest border. As of October 2011, DHS reports 351 miles of pedestrian fencing and 299 miles of vehicle fencing in place along the southwest border. This represents 99.8% of the 651 miles of total fencing and barriers that CBP reportedly plans to install,¹⁷ and 92.9% of the 700 miles of fencing and barriers specified by Congress in the Consolidated Appropriations Act, 2008 (P.L. 110-161, Div. E).¹⁸ Several pieces of legislation introduced in the 112th Congress would authorize or require additional fencing and barriers.¹⁹

Border Enforcement Security Task Force (BEST) Initiative

DHS's U.S. Immigration and Customs Enforcement (ICE) has partnered with federal, state, local, and foreign law enforcement in a program known as the Border Enforcement Security Task Force (BEST) initiative. The BEST initiative fosters coordination among law enforcement officials in border communities through a series of multi-agency teams developed to identify, disrupt, and dismantle criminal organizations posing significant threats to border security. H.R. 915, as reported by the House Homeland Security Committee, would establish a formal BEST program

¹⁴ Testimony of U.S. Customs and Border Protection Assistant Commissioner Mark S. Borkowski, U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Strengthening the Border: Finding the Right Mix of Personnel, Infrastructure and Technology*, hearing, 112th Cong., 1st sess., March 15, 2011.

¹⁵ The House Committee recommended \$500 million for border security fencing, infrastructure, and technology—\$74 million below the FY2011 level and \$28 million below the Administration's request; see House Committee on Appropriations Report on H.R. 2017, pp. 41-43. H.R. 2017, as passed by the House, would provide \$500 million for these purposes. The Senate Committee recommended \$400 million for fencing, infrastructure, and technology; see Senate Committee on Appropriations Report on H.R. 2017, pp. 43-44. P.L. 112-74 includes \$400 million for border fencing, infrastructure, and technology.

¹⁶ See, for example, Border Security Enforcement Act of 2011 (H.R. 1507/S. 803) and SAVE Act (H.R. 2000).

¹⁷ CBP Office of Legislative Affairs communication with CRS, October 6, 2011.

¹⁸ Section 564 of P.L. 110-161 requires DHS to install not less than 700 miles of border fencing, but also specifies that DHS is not required to install fencing in any location in which "the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location."

¹⁹ See, for example, Unlawful Border Entry Prevention Act of 2011 (H.R. 1091) and Border Security Enforcement Act (H.R. 1507/S. 803).

along these lines within DHS. The bill would authorize funding for the BEST program for FY2012-FY2016 and would require annual reports on the program's effectiveness.

Activities on Federal Lands and Waivers of Environmental Laws

Over 800 miles of the southwest border and over 1,000 miles of the northern border consist of national forests and parks and other federal lands. The 112th Congress has held hearings on challenges associated with immigration enforcement on federal lands.²⁰ Historically, these challenges have included jurisdictional conflicts between the border patrol and agencies within the Departments of the Interior (DOI) and Agriculture (USDA) that are responsible for law enforcement on federal borderlands,²¹ and lawsuits filed under environmental laws and regulations that have blocked or delayed fence construction.

Administration officials report that recent memoranda of agreement among DHS, DOI, and USDA have led to greater cooperation with respect to immigration enforcement on federal lands,²² and legislation passed between 1996 and 2006 gave DHS broad authority to waive environmental statutes and other requirements that might otherwise delay construction.²³ Nonetheless, a recent GAO report recommended that additional steps be taken to improve information sharing and interagency communication.²⁴ Legislation has been introduced in the 112th Congress that would waive application of certain environmental laws to border enforcement activities on lands within 100 miles of the border and would allow DHS to conduct certain security activities on federal lands without permission from DOI or USDA, including routine motorized patrols and deployment of temporary tactical infrastructure.²⁵

Electronic Employment Eligibility Verification

Employment eligibility verification is receiving attention in the 112th Congress. Several related bills have been introduced, including the Legal Workforce Act (H.R. 2885), which was ordered reported by the House Judiciary Committee in September 2011. An earlier version of this bill (H.R. 2164) was the subject of a hearing by the House Judiciary Committee's Subcommittee on Immigration Policy and Enforcement in June 2011. Employment eligibility verification and the

²⁰ See, for example, U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests and Public Lands and House Committee on Oversight and Government Reform, Subcommittee on National Security, Homeland Defense, and Foreign Operations, *The Border: Are Environmental Laws and Regulation Impeding Security and Harming the Environment?*, hearing, 112th Cong., 1st sess., April 15, 2011.

²¹ See, for example, U.S. Government Accountability Office (GAO), *Border Security: Additional Actions Needed to Better Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, GAO-11-177, November 2010, <http://www.gao.gov/new.items/d11177.pdf>.

²² Testimony of U.S. Customs and Border Protection Deputy Chief Ronald Vitiello, U.S. Congress, House Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands, *The Border: Are Environmental Laws and Regulations Impeding Security and Harming the Environment?*, hearing, 112th Cong., 1st sess., April 15, 2011.

²³ §102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208, Div. C); §102 of the REAL ID Act of 2005 (P.L. 109-13, Div. B).

²⁴ U.S. Government Accountability Office (GAO), *Border Security: Additional Actions Needed to Better Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, GAO-11-177, November 2010, <http://www.gao.gov/new.items/d11177.pdf>.

²⁵ See, for example, National Security and Federal Lands Protection Act (H.R. 1505).

related issue of worksite enforcement are widely viewed as essential components of a strategy to reduce unauthorized immigration.

Under §274A of the Immigration and Nationality Act (INA),²⁶ it is unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Employers are further required to participate in a paper-based (I-9) employment eligibility verification system in which they examine documents presented by new hires to verify identity and work eligibility, and to complete and retain I-9 verification forms. Employers violating prohibitions on unlawful employment may be subject to civil and/or criminal penalties. Enforcement of these provisions is termed “worksite enforcement” and is the responsibility of DHS’s ICE. While all employers must meet the I-9 requirements, they may also elect to participate in the E-Verify electronic employment eligibility verification system.²⁷ E-Verify is administered by DHS’s U.S. Citizenship and Immigration Services (USCIS). Participants in E-Verify electronically verify new hires’ employment authorization through Social Security Administration (SSA) and, if necessary, DHS databases.²⁸

E-Verify is a temporary program and is currently authorized until September 30, 2012. Several bills introduced in the 112th Congress would variously make E-Verify permanent, require its use for verification of new hires, and permit or require its use for verification of previously hired workers.²⁹ Other bills would authorize a new electronic employment eligibility verification system to replace E-Verify.³⁰ Discussion of proposals to expand electronic employment eligibility verification requirements—whether through E-Verify or another system—have raised some concerns about labor shortages in sectors of the economy that are known to employ large numbers of unauthorized aliens, such as agriculture. (Legislative proposals on foreign agricultural workers are discussed in a subsequent section.)

Among the bills that would authorize a new electronic verification system is H.R. 2885, which has been ordered reported by the House Judiciary Committee. The new system would be modeled on E-Verify and the authorizing language would be added to INA §274A. Under H.R. 2885, as ordered reported, the new verification system would be mandatory for all employers in cases of hiring, recruitment, and referral. The verification requirements with respect to hiring would be phased in by employer size, with the largest employers required to participate six months after the date of enactment and the smallest employers required to participate two years after the date of enactment. The requirements with respect to recruitment and referral would apply one year after the date of enactment. The bill would also provide for mandatory reverification of workers with limited work authorization. These reverification requirements would be phased in on the same schedule as the hiring requirements. Special provisions would apply to agriculture; the hiring, recruitment and referral, and reverification provisions would not apply to agricultural workers until three years after the date of enactment. As introduced, the bill also provided that seasonal

²⁶ Act of June 27, 1952, ch. 477; 66 Stat. 163; codified as amended at 8 U.S.C. §1101 et seq. The INA is the basis of current immigration law.

²⁷ While E-Verify is primarily a voluntary program, there are some mandatory participants. See CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

²⁸ For additional information on E-Verify, see *Ibid.*

²⁹ See, for example, Jobs Recovery by Ensuring a Legal American Workforce Act of 2011 (H.R. 800) and Accountability Through Electronic Verification Act (S. 1196).

³⁰ See, for example, Illegal Immigration Enforcement and Social Security Protection Act of 2011 (H.R. 98), Electronic Employment Eligibility Verification and Illegal Immigration Control Act (H.R. 483), and Legal Workforce Act (H.R. 2885).

agricultural workers returning to work for a previous employer would not be treated as new hires for verification purposes, but an amendment to strike this language was agreed to at the markup.

H.R. 2885, as ordered reported, would require or permit electronic verification in ways not currently allowed under E-Verify. Verification of previously hired individuals would be mandatory in some cases (such as, federal, state, and local government employees), while employers could verify current employees on a voluntary basis beginning 30 days after enactment. Under H.R. 2885, employers could conduct electronic verification after making an offer of employment but before hiring, and could condition a job offer on final verification under the system.

H.R. 2885, as ordered reported by the House Judiciary Committee, would increase existing civil and criminal penalties for violations of INA §274A provisions on unauthorized employment. It would also establish new penalties, including for individuals who knowingly provide social security numbers or DHS identification numbers that belong to others and for employers who submit such numbers for verification knowing that they belong to someone other than the subject of the query. Lastly, the bill would direct the Secretary of Homeland Security, in consultation with the Social Security Commissioner and the Director of the National Institute of Standards and Technology, to establish a biometric employment eligibility verification pilot program that would be voluntary for employers.

P.L. 112-74 contains some E-Verify-related language. For example, a provision in Division D of the bill on DHS appropriations (§530) states that none of the funds made available to the DHS Office of the Secretary and Executive Management under the act may be used for any new hires not checked through E-Verify.

Preemption of State and Local Employment-Verification Measures

Some states and localities have sought to deter unauthorized aliens from entering or remaining within their jurisdiction by requiring employers to use E-Verify and/or imposing sanctions on employers found to have hired unauthorized aliens.³¹ The Supreme Court recently upheld one such measure, the Legal Arizona Workers Act, finding that it was not preempted by federal immigration law.³² Some lower courts had previously found that similar measures were preempted, in part, because of the burdens that employers operating in multiple states would bear in complying with different state laws.³³ Some business groups have responded to the Supreme Court's decision in the Arizona case by lobbying for a single national electronic verification regime.³⁴ H.R. 2885, as ordered reported by the House Judiciary Committee, would establish such a regime, expressly preempting state and local E-Verify measures, along with other measures "relat[ing] to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens." However, H.R. 2885 would allow states and localities to revoke the business or other licenses of employers who fail to electronically verify the employment eligibility of their workers.

³¹ See CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by Kate M. Manuel.

³² *Chamber of Commerce of the United States v. Whiting*, – U.S.—, 131 S. Ct. 1968 (2011).

³³ See, for example, *Lozano v. City of Hazleton*, 620 F.3d 170, 213 (3d Cir. 2010), *vacated and remanded by* 180 L. Ed. 2d 243, 2011 U.S. LEXIS 4259 (U.S. 2011).

³⁴ See, for example, "Uptick in State Immigration Laws May Force Congress to Act, Speakers Say," *5 Workplace Immigration Report* 381 (July 25, 2011).

Other bills introduced in the 112th Congress would expressly preempt state and local measures prohibiting employers from verifying new hires or current employees through E-Verify.³⁵ Illinois once had such a measure, but it was found to be preempted by federal immigration law.³⁶

Immigrant Detention

Certain removable aliens cannot be removed from the United States because they do not have travel documents permitting them to return to their country of origin or because the aliens are more likely than not to be subject to torture if returned to the country of origin.³⁷ The U.S. Supreme Court ruled in *Zadvydas v. Davis* (2001)³⁸ that such aliens could only be detained following an order of removal for so long as is “reasonably necessary to bring about that alien’s removal from the United States,” but that the INA “does not permit indefinite detention.” The Court found that the presumptively reasonable limit for the post-removal-period detention is six months, but indicated that continued detention may be warranted when the policy is limited to specially dangerous individuals, such as terrorists or those in other special circumstances, and strong procedural protections are in place.

Following the Court’s ruling in *Zadvydas*, new regulations were issued to comply with the Court’s holding.³⁹ ICE generally can only detain an alien beyond the initial 90-day removal period if ICE determines that the alien is likely to abscond if released or that the alien poses a danger to the public, or if ICE is likely to obtain travel documents for the alien in the near future.⁴⁰ Under regulation, ICE may not detain an alien for more than six months unless the alien’s removal is likely in the reasonably foreseeable future, except in special circumstances, including aliens who are detained on account of (1) having a highly contagious disease that is a threat to public safety, (2) serious adverse foreign policy consequences of release, (3) security or terrorism concerns, or (4) being considered specially dangerous due to having committed one or more crimes of violence and having a mental condition making it likely that the alien will commit acts of violence in the future.⁴¹

In October 2011, the House Judiciary Committee reported the Keep Our Communities Safe Act of 2011 (H.R. 1932). Among other provisions, the bill would allow DHS to detain indefinitely, subject to six-month reviews, an alien under orders of removal who cannot be removed if (1) there is a significant likelihood that the alien will be removed in the reasonably foreseeable future; (2) the alien would have been removed but for the alien’s refusal to cooperate with the DHS Secretary’s identification and removal efforts; (3) the alien has a highly contagious disease that poses a public safety threat; (4) release would have serious adverse foreign policy consequences; (5) release would threaten national security; (6) release would threaten the safety

³⁵ See, for example, Accountability Through Electronic Verification Act (S. 1196).

³⁶ *United States v. Illinois*, No. 07-3261, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill., March 12, 2009).

³⁷ For a discussion of the Convention Against Torture, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

³⁸ 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

³⁹ See 8 C.F.R. §§241.13-14 and discussion at 66 *Federal Register* 56967 (November 14, 2001) of procedures for determining whether there is no significant likelihood of removal in the reasonably foreseeable future and for determining whether an alien is subject to special circumstances justifying continued detention.

⁴⁰ 8 C.F.R. §241.4.

⁴¹ *Ibid.*

of the community, and the alien has either been convicted of one or more aggravated felonies or other designated crimes or been convicted of one or more crimes of violence and due to a mental condition or personality disorder is likely to engage in future acts of violence; or (7) release would threaten the safety of the community, and the alien has been convicted of at least one aggravated felony. The bill would limit habeas corpus reviews⁴² of such detention and related actions or decisions to the U.S. District Court for the District of Columbia. Also, the bill would permit unlimited detention of certain aliens during pending removal proceedings.

Visa Security

The Department of State (DOS) and DHS both play key roles in administering the law and policies on the admission of aliens to the United States. Although DOS's Consular Affairs is responsible for issuing visas, USCIS in DHS approves immigrant petitions, ICE in DHS operates the Visa Security Program in selected U.S. embassies abroad, and CBP in DHS inspects all people who enter the United States.

All foreign nationals seeking visas must undergo admissibility reviews performed by DOS consular officers abroad. These reviews are intended to ensure that applicants are not ineligible for admission to the United States under the grounds for inadmissibility spelled out in INA §212. These criteria include health-related grounds, criminal history, security and terrorist concerns, public charge (e.g., indigence), and previous immigration offenses.⁴³

Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. Records of all visa applications are now automated in the CCD, with some records dating back to the mid-1990s. Since February 2001, the CCD has stored photographs of all visa applicants in electronic form, and the CCD has stored 10-finger scans since 2007. In addition to indicating the outcome of any prior visa application and comments by consular officers, the system links to other security databases to flag problems that may have an impact on the issuance of the visa.

Congress is particularly interested in the Visa Security Program (VSP), which the ICE Office of International Affairs (OIA) operates in certain high-risk consular posts. As described by DHS, the VSP sends ICE special agents with expertise in immigration law and counterterrorism to foreign consulates, where they perform visa security activities that complement the DOS visa screening process. According to DHS, the VSP provides law enforcement resources not available to consular officers. One of the major tasks for VSP agents is to screen visa applicants to determine their risk profiles.

GAO recently released an evaluation of the VSP that identified several shortcomings. In addition to noting that tensions exist between consular officials and VSP agents, GAO was especially concerned about the lack of standard operating procedures for VSP agents across the various posts. Most importantly, perhaps, GAO stated that ICE has not expanded VSP to key high-risk posts despite well-publicized plans to do so.⁴⁴

⁴² Habeas corpus review is a legal action through which a person's detention is reviewed for legality.

⁴³ CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

⁴⁴ U.S. Government Accountability Office (GAO), *Border Security: DHS's Visa Security Program Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide*, GAO-11-315, March 31, 2011, <http://www.gao.gov/> (continued...)

Despite the VSP's implementation problems, some observers maintain that DHS should play a larger role in visa security. In their view, DOS retains too much power over visa issuances, and consular officers are too concerned about facilitating tourism and trade to thoroughly scrutinize visa applicants. From this perspective, greater responsibility should be given to the VSP, which does not have competing priorities of diplomatic relations and reciprocity with foreign governments, and may subject visa applications to greater scrutiny.⁴⁵

Along these lines, the House Committee on the Judiciary has ordered reported the Secure Visas Act (H.R. 1741) that would give the Secretary of Homeland Security "exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. §1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa."

In addition to these broader concerns about visa security, Congress has also addressed matters of exclusion and inadmissibility. More specifically, Division I, §4505(a)(3)(A), of P.L. 112-74 instructs the Secretary of State not to issue a visa to any alien who has willfully supported the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), the United Self-Defense Forces of Colombia (AUC), or other illegal armed group. The ban also includes aliens who have committed, ordered, incited, assisted, or otherwise participated in the commission of a violation of human rights in Colombia. The law states that the denial must be based upon credible evidence and allows the Secretary to grant waivers on a case-by-case basis if deemed necessary to support the peace process or for urgent humanitarian reasons.

Per-country Limits on Permanent Admissions

The INA specifies that each year, countries are held to a numerical limit of 7% of the total worldwide level of U.S. immigrant admissions,⁴⁶ known as the per-country limit.⁴⁷ This provision was intended to prevent any single country from dominating admissions to the United States. The per-country level is not a "quota" set aside for individual countries, as each country in the world could not receive 7% of the overall limit.

The per-country limit applies to legal permanent resident (LPR) admissions under both the four family-sponsored admission classes and the five employment-based admissions classes.⁴⁸ The limit applies to total annual admissions under the preference system, as well as within the employment-based and family-based preference categories.⁴⁹ In recent years, two countries that

(...continued)

products/GAO-11-315.

⁴⁵ For additional information, see CRS Report R41093, *Visa Security Policy: Roles of the Departments of State and Homeland Security*, by Ruth Ellen Wasem.

⁴⁶ The INA provides for a permanent annual worldwide level of 675,000 LPRs, but this level is flexible and certain categories of LPRs are permitted to exceed the limits. INA §201; 8 U.S.C. §1151.

⁴⁷ INA §202; 8 U.S.C. §1152.

⁴⁸ The INA stipulates a floor of 226,000 for the four family-sponsored preference categories. The numerical limit for the five employment-based preference categories is 140,000. For more information on these limits and their exceptions, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, and CRS Report R42048, *Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings*, both by Ruth Ellen Wasem.

⁴⁹ However, there are circumstances when the employment based per-country limits may be exceeded. For example, the (continued...)

send large numbers of skilled immigrants to the United States, India and China, have been oversubscribed in the 2nd and 3rd employment-based preference categories for persons with advanced degrees and professional and skilled workers, respectively. To be “oversubscribed” means that more visa petitioners are eligible and approved for the preference category than the number allocated for that year, in that category, from that country. As a result, petitioners and their employers applying under these employment-sponsored categories could expect to wait several years to receive a visa.

Even as U.S. unemployment levels remain high, some employers assert that they continue to need the “best and the brightest” workers, regardless of their country of birth, to remain competitive in a worldwide market and to keep their firms in the United States. While support for increasing employment-based immigration may be dampened by current economic conditions, proponents argue it is essential for economic growth.⁵⁰ Those opposing increases in employment-based LPRs assert that there is no compelling evidence of labor shortages and cite the rate of unemployment across various occupations and labor markets.⁵¹ They argue that recruiting foreign workers while unemployment levels remain high would have a deleterious effect on salaries, compensation, and working conditions of U.S. workers.⁵²

The Fairness for High-Skilled Immigrants Act (H.R. 3012), as reported by the House Judiciary Committee, would amend the INA to eliminate per-country ceilings on permanent employment-based admissions and increase the per-country ceiling on permanent family-based admissions from 7% to 15%. The bill would not alter the total number of LPRs admitted under the family-based and employment-based preference systems. This bill would also amend the Chinese Student Protection Act of 1992 (P.L. 102-404) to eliminate the provision requiring the reduction of annual Chinese (PRC) immigrant visas to offset status adjustments under the 1992 act. These changes in H.R. 3012 would be instituted over four years. On November 29, 2011, the House passed H.R. 3012 by a vote of 389-15.⁵³ In the Senate, a similar bill (S. 1983) was introduced in December 2011.

(...continued)

American Competitiveness in the Twenty-First Century Act of 2000 (P.L. 106-313) enabled the per-country ceilings for employment-based immigrants to be surpassed for individual countries that are oversubscribed as long as visas are available within the worldwide limit for employment-based preferences. As a result, employment-based preference allocations may exceed the 7% per-country limit within the overall level of 140,000 annually.

⁵⁰ Many of the comprehensive immigration reform bills since 2000 would have increased the total number of employment-based immigrants. Some would have revised the employment-based preference categories. A merit-based point system was also considered. For further background, see Appendix D in CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

⁵¹ For further discussion, see U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *STEM the Tide: Should America Try to Prevent an Exodus of Foreign Graduates of U.S. Universities with Advanced Science Degrees?*, hearing, 112th Cong., 1st sess., October 5, 2011; and CRS Report R40080, *Job Loss and Infrastructure Job Creation Spending During the Recession*, by Linda Levine.

⁵² For further discussion, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem; and archived CRS Report 95-408, *Immigration: The Effects on Low-Skilled and High-Skilled Native-Born Workers*, by Linda Levine.

⁵³ See CRS Report R42048, *Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings*, by Ruth Ellen Wasem.

Diversity Visas

The purpose of the diversity immigrant visa lottery is, as the name suggests, to encourage legal immigration from countries other than the major sending countries of current immigrants to the United States. Current law weights the allocation of immigrant visas heavily toward aliens with close family in the United States and, to a lesser extent, toward aliens who meet particular employment needs. The diversity immigrant category was added to the INA by the Immigration Act of 1990 (P.L. 101-649) to stimulate “new seed” immigration (i.e., to foster new, more varied migration from other parts of the world).

To be eligible for a diversity visa, the INA requires that the foreign national must have a high school education or the equivalent, or two years of experience in an occupation that requires at least two years of training or experience. The foreign national or the foreign national’s spouse must be a native of one of the countries listed as a foreign state qualified for the diversity visa lottery. Diversity lottery winners, like all other aliens wishing to come to the United States, must undergo reviews performed by DOS consular officers abroad and DHS immigration officers upon entry to the United States. These reviews are intended to ensure that the aliens are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the INA.

The diversity lottery currently makes 50,000 visas available annually to natives of countries that accounted for fewer than 50,000 immigrant admissions in total over the preceding five years. The formula for allocating visas is based upon the statutory specifications; visas are divided among six global geographic regions according to the relative populations of the regions.

Some argue that the diversity lottery should be eliminated and its visas used for backlog reduction in other visa categories. Supporters of the diversity visa, however, argue that the diversity visa provides “new seed” immigrants for an immigration system weighted disproportionately toward family-based immigrants from a handful of countries. Critics of the diversity lottery warn that it is vulnerable to fraud and misuse, and potentially an avenue for terrorists, citing the difficulties of performing background checks in many of the countries eligible for the diversity lottery. Supporters respond that background checks for criminal and national security matters are performed on all prospective immigrants seeking to come to the United States, including those winning diversity visas. In November 2011, the House Committee on the Judiciary reported H.R. 704, the Security and Fairness Enhancement for America Act of 2011 (SAFE for America Act), which would amend the INA to eliminate the diversity visa lottery.⁵⁴

Foreign Temporary Nurses

The H-1C nonimmigrant category for nurses was established by a 1999 law (P.L. 106-95) and reauthorized in 2006 (P.L. 109-423) as a short-term solution for nursing shortages in a limited number of medically underserved areas. Facilities have to be approved to employ H-1C nurses.⁵⁵ The authority to issue H-1C visas expired on December 20, 2009. Previously, the law allowed for the issuance of 500 nonimmigrant visas to nurses each year, with the proviso that the number of visas issued annually for employment in smaller states could not exceed 25 and the number

⁵⁴ For additional information, see CRS Report R41747, *Diversity Immigrant Visa Lottery Issues*, by Ruth Ellen Wasem.

⁵⁵ There are 14 hospitals approved to hire H-1C nurses.

issued for employment in larger states could not exceed 50. The law limited an H-1C nurse's stay to three years.

H.R. 1933, as passed by the House, would reauthorize the H-1C category for three years. It also would amend the law to allow for the issuance of 300 nonimmigrant visas to nurses each year, and to limit an H-1C nurse's initial stay to three years with the opportunity to renew the visa for another three years (i.e., a total stay of six years). The bill would provide H-1C nurses with portability by allowing an H-1C nurse to begin employment at another hospital approved to employ aliens in this visa category while the petition filed by the new employer is being adjudicated. Employment at the new facility would end if the petition is denied.

U.S. Refugee Program

The admission of refugees to the United States is a perennial immigration issue. Refugee admission and resettlement are authorized by the INA.⁵⁶ Under the INA, a refugee is a person who is outside his or her country and who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Refugees are processed and admitted to the United States from abroad. The Department of State handles overseas processing of refugees, and DHS/USCIS makes final determinations about eligibility for admission.⁵⁷ After one year in refugee status in the United States, refugees are required to apply to adjust to LPR status.

Several bills have been introduced in the 112th Congress that would make various changes to the U.S. refugee program. Some of these measures propose to reform the refugee admissions process, such as by authorizing the President to designate groups of aliens of humanitarian concern that, absent countervailing factors, would be considered refugees for purposes of admission and by changing existing INA provisions regarding the admission of refugee spouses and children.⁵⁸ Other proposals focus more directly on the resettlement assistance program for refugees and other designated groups administered by the Department of Health and Human Services' Office of Refugee Resettlement (HHS/ORR).⁵⁹

Special legislative provisions facilitate relief for certain refugee groups. The "Lautenberg amendment," first enacted in 1989, required the Attorney General (now the Secretary of DHS) to designate categories of former Soviet and Indochinese nationals for whom less evidence is needed to prove refugee status, and provided for adjustment to LPR status for certain former Soviet and Indochinese nationals denied refugee status. P.L. 108-199 amended the Lautenberg amendment to add a new provision, known as the "Specter amendment," to direct the Attorney General to establish categories of Iranian religious minorities who may qualify for refugee status under the Lautenberg amendment's reduced evidentiary standard. The Lautenberg amendment was regularly extended through FY2010. For FY2011, Congress extended the amendment only until June 1, 2011, in P.L. 112-10 (Div. B, §2121(m)), and it temporarily terminated on that date.

⁵⁶ The Refugee Act (P.L. 96-212, March 17, 1980) amended the INA to establish procedures for the admission of refugees to the United States.

⁵⁷ For additional information on the U.S. refugee program, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

⁵⁸ See, for example, Refugee Protection Act of 2011 (H.R. 2185/S. 1202).

⁵⁹ See, for example, Domestic Refugee Resettlement Reform and Modernization Act of 2011 (H.R. 1475).

It was re-enacted for FY2012 by P.L. 112-74 (Div. I, §7034(r)), however, and is now in effect until October 1, 2012.

Other Issues and Legislation

Secure Communities and the Criminal Alien Program

With longstanding support from Congress, ICE makes it a priority to identify, detain, and remove aliens who have been convicted of crimes in the United States, with a particular focus on aliens who have been convicted of aggravated felonies as defined in §101(a)(43) of the INA and on aliens who have been convicted of two or more crimes each punishable by more than one year in jail (i.e., two or more felonies).⁶⁰ Beginning in FY2008, Congress roughly doubled ICE's funding for the Criminal Alien Program, an umbrella program to identify aliens in federal, state, and local jails and initiate removal proceedings against removable aliens prior to the conclusion of their sentences. It also provided additional line-item funding for the Comprehensive Identification and Removal of Criminal Aliens, a program subsequently known as Secure Communities.⁶¹ Under Secure Communities, when participating law enforcement agencies submit the fingerprints of arrestees to the Federal Bureau of Investigation (FBI) for criminal background checks, the fingerprints are also checked against DHS databases. When an arrestee appears to be subject to removal, ICE's Law Enforcement Support Center (LESC) notifies the ICE Enforcement and Removal field office in the arresting jurisdiction.

ICE views Secure Communities, in particular, as an efficient way to carry out the agency's mandate to identify criminal aliens and to make the removal of criminal aliens an enforcement priority. The Obama Administration plans to expand the program to every law enforcement jurisdiction in the country by the end of 2013.⁶² The program has generated controversy, however. This is due, in part, to reports that some aliens identified and removed through Secure Communities have not been convicted of "serious" crimes or any criminal offense, as well as concerns that state and local involvement in enforcing federal immigration law could lead to racial profiling or strain police-community relations.⁶³ In addition, characterization of the program by ICE and DHS appears to have changed over time, prompting questions about whether states and localities may determine whether to participate in it and how, if at all, they may "opt out."⁶⁴

⁶⁰ John Morton, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement, Washington, DC, March 2, 2011, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; also see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

⁶¹ See CRS Report R41189, *Homeland Security Department: FY2011 Appropriations*, coordinated by Jennifer E. Lake and William L. Painter.

⁶² For the Administration's views of Secure Communities, see U.S. Immigration and Customs Enforcement, *Secure Communities*, March 2011, http://www.ice.gov/secure_communities/.

⁶³ See U.S. Department of Homeland Security Advisory Council, "Task Force on Secure Communities Findings and Recommendations," September 2011.

⁶⁴ See, for example, Tara Bahrapour, "Immigration Authority Terminates Secure Communities Agreements," *The Washington Post*, August 7, 2011, http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx80I_story.html; Letter from John Morton, Director, U.S. Immigration and Customs Enforcement, to Gerald Brown, Governor of California, August 5, 2011.

In line with efforts to expand Secure Communities, several bills in the 112th Congress would deny funding for various Department of Justice programs, including the State Criminal Alien Assistance Program (discussed below), to jurisdictions that do not participate fully in Secure Communities and/or in other aspects of ICE's Criminal Alien Program.⁶⁵ Other proposed legislation would respond to concerns about whether state and local participation in Secure Communities leads to racial profiling or interferes with police-community relations.⁶⁶

State Criminal Alien Assistance Program

The State Criminal Alien Assistance Program (SCAAP) provides reimbursement to state and local governments for the direct costs associated with incarcerating unauthorized criminal aliens. Authorization for SCAAP expired on September 30, 2011. Despite this, the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55) provides \$240 million for SCAAP.

Legislation has been introduced to reauthorize the program and make changes to the grant formula.⁶⁷ The President's FY2012 budget request for SCAAP includes a new requirement to only provide reimbursement for costs associated with DHS-verified unauthorized criminal aliens. In order to prepare for this change, SCAAP jurisdictions have been encouraged to work with DHS to increase inmate alien status verifications through the Secure Communities, 287(g), and the Law Enforcement Support Center (LESC) programs.⁶⁸

State and Local Immigration Measures

In recent years, several states and localities have sought to deter the presence of unauthorized aliens within their jurisdictions through a variety of enforcement measures, with Arizona's S.B. 1070 being perhaps the most notable example.⁶⁹ Many of these measures have been challenged in federal court, with litigation generally focusing on whether these enactments are consistent with federal immigration law. The Supreme Court recently held that states are not precluded from requiring employers to use the federal government's E-Verify system to determine the work eligibility of employees, or requiring the suspension or revocation of the business licenses of entities that knowingly employ unauthorized aliens.⁷⁰ Several other state and local measures intended to deter the presence of unlawfully present aliens—including measures that sanction conduct that may facilitate unauthorized immigration, authorize state and local police to investigate and arrest persons suspected of violating federal immigration law, or limit unauthorized aliens' access to housing or public resources—are the subject of ongoing litigation

⁶⁵ See, for example, Enforce the Law for Sanctuary Cities Act (H.R. 1134), Strengthening Our Commitment to Legal Immigration and America's Security Act (S. 332), and H.R. 1764/S. 169.

⁶⁶ See, for example, Traffic Stops Along the Border Statistics Study Act of 2011 (H.R. 228).

⁶⁷ See, for example, CLEAR Act of 2011 (H.R. 100), SCAAP Reimbursement Protection Act of 2011 (S. 638), and Comprehensive Immigration Reform Act of 2011 (S. 1258).

⁶⁸ Further information about these programs is available on the ICE website, <http://www.ice.gov>.

⁶⁹ See, generally, CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig.

⁷⁰ *Chamber of Commerce of the United States v. Whiting*, – U.S. —, 131 S. Ct. 1968 (2011); CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Kate M. Manuel, Jody Feder, and Alison M. Smith.

and, in many cases, conflicting judicial rulings.⁷¹ Given the unsettled state of the law in this area, Members have introduced legislation that would purport to recognize that state and local officers have “inherent authority” to enforce federal immigration law,⁷² or conversely, would establish that state and local officers may only enforce federal immigration law pursuant to a written agreement authorized under Section 287(g) of the INA.⁷³

Limits on Executive Branch Discretion

The Obama Administration has observed that ICE does not have the funding or capacity to deport every potentially removable alien identified by DHS, especially with the advent of Secure Communities. In March and June 2011, ICE published a pair of updated agency guidance memoranda governing the use of prosecutorial discretion during immigration enforcement to ensure that removal resources go to high-priority cases.⁷⁴ And on August 18, 2011, DHS Secretary Janet Napolitano announced in a letter to Senator Richard Durbin and others that the March and June guidance would apply to all DHS immigration agencies.⁷⁵ DHS and the Department of Justice also created an interagency working group to review about 300,000 pending removal cases on a case-by-case basis to consider administratively closing certain cases, and to conduct expedited reviews of those cases that are not administratively closed. The working group began these reviews with a pair of pilot programs in Baltimore, MD, and Denver, CO, in December 2011.⁷⁶

Some Members of Congress object to the Administration’s prosecutorial discretion policies and have argued that for the Administration explicitly to identify certain types of cases that may be closed amounts to an “administrative amnesty”; others describe prosecutorial discretion as a critical tool to prevent misallocation of agency resources.⁷⁷ Partly in response to the June 2011 agency guidance,⁷⁸ the Hinder the Administration’s Legalization Temptation (HALT) Act (H.R. 2497) would suspend for the remainder of President Obama’s term in office (i.e., through January

⁷¹ See, generally, CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

⁷² See, for example, CLEAR Act (H.R. 100).

⁷³ See, for example, Comprehensive Immigration Reform Act (S. 1258).

⁷⁴ John Morton, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Department of Homeland Security, Immigration and Customs Enforcement, March 2, 2011, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Department of Homeland Security, Immigration and Customs Enforcement, June 17, 2011, <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁷⁵ Letter from Janet Napolitano, Secretary of Homeland Security, to Senator Richard Durbin, August 18, 2011. Also see Robert Pear, “Few Youths to be Deported in New Policy,” *New York Times*, August 18, 2011, p. A1; Testimony of DHS Secretary Janet Napolitano, at U.S. Congress, Senate Committee on the Judiciary, *Oversight of the Department of Homeland Security*, hearing, 112th Cong., 1st sess., October 19, 2011.

⁷⁶ U.S. Department of Justice, Executive Office of Immigration Review, “EOIR Statement Regarding Prosecutorial Discretion,” press release, November 17, 2011, <http://www.justice.gov/eoir/press/2011/EOIRProsecutorialDiscretion11172011.htm>.

⁷⁷ See, for example, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law*, 112th Cong., 1st sess., October 12, 2011.

⁷⁸ Press releases announcing the introduction of the Hinder the Administration’s Legalization Temptation (HALT) Act explicitly mentioned the June 17, 2011, ICE memorandum on prosecutorial discretion.

21, 2013) the executive branch's authority to grant several types of discretionary relief, including (1) waivers of the three- and 10-year bars to admissibility for certain unauthorized immigrants (INA §212(a)(9)(B)(v)); (2) "parole," or temporary permission to enter and be present in the United States (INA §212(d)(5)(A)); (3) cancellation of removal and adjustment of status for certain lawful permanent residents (INA §240A(b)(1)); (4) temporary protected status (INA §244(b)); and (5) deferred action and extended voluntary departure.

Other bills introduced in the 112th Congress also address issues of executive branch discretion and judicial review. Some, along similar lines as the HALT Act, would tighten the standards for parole and deferred action. Other proposed legislation, by contrast, could expand judicial relief from removal by allowing immigration judges to consider factors not currently considered when determining whether to grant cancellation of removal.⁷⁹

Victims of Trafficking

It is an international and a domestic crime to engage in trafficking in persons (TIP) for the purposes of exploitation. TIP involves violations of labor, public health, and human rights standards. Congress passed the Victims of Trafficking and Violence Protection Act (TVPA, P.L. 106-386) in 2000 and has reauthorized the TVPA several times since, most recently in the 110th Congress (P.L. 110-457). The current program authorizations expired at the end of FY2011. Domestically, TVPA and its subsequent reauthorizations⁸⁰ created two nonimmigrant (temporary) visa categories: one for victims of severe forms of trafficking (T visa) and the other for victims of certain specified crimes (U visa).⁸¹ The 2000 act and the reauthorizations also created several grant programs to aid trafficking victims and to train law enforcement to combat TIP.

A House reauthorization bill, the Trafficking Victims Protection Reauthorization Act of 2011 (H.R. 2830), was reported by the House Foreign Affairs Committee in October 2011.⁸² A Senate reauthorization bill, the Trafficking Victims Protection Reauthorization Act of 2011 (S. 1301), was reported by the Senate Judiciary Committee in November 2011. H.R. 2830 would extend current authorizations in TVPA and its reauthorizations for FY2012 and FY2013, and would maintain most programs at current authorization levels. S. 1301 would extend current authorizations in the TVPA and its reauthorizations through FY2015 and would increase authorization levels by \$2 million each for the two main victim service grant programs.

Both H.R. 2830 and S. 1301 would make it a criminal offense to knowingly destroy—or, for a period of more than 48 hours, to conceal, remove, confiscate, or possess—another person's passport or immigration or personal identification documents in the course of attempting to commit fraud in foreign labor contracting or alien smuggling, or in order to unlawfully maintain, prevent, or restrict the labor or services of the individual. In addition, both bills would make several changes to the INA related to the custody and care of unaccompanied alien children. The Senate bill would further specify that children who receive U status and are in the custody of

⁷⁹ See, for example, H.R. 250.

⁸⁰ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457), Trafficking Victims Protection Reauthorization Act of 2005 (P.L. 109-164), and Trafficking Victims Protection Reauthorization Act of 2003 (P.L. 108-193).

⁸¹ For more information on these visa categories, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Sun Wyler

⁸² A related bill of the same name with same sponsor was introduced in the House (H.R. 3589) in December 2011.

HHS are eligible for programs and services to the same extent as refugees. S. 1301 would also create a new grant program to provide services to child victims of sex trafficking.

Immigrant Investors

There is currently one immigrant visa category specifically for foreign investors (LPR investors) coming to the United States. LPR investors comprise the fifth preference category under the employment-based immigration system in the INA, and this immigrant visa is commonly referred to as the EB-5 visa.⁸³ The basic purpose of the LPR investor visa is to benefit the U.S. economy, primarily through employment creation and an influx of foreign capital into the United States. Employment-based LPR investor visas are designated for individuals wishing to develop a new commercial enterprise in the United States. The INA stipulates that for the investor to qualify for the EB-5 visa, the enterprise must employ at least 10 people, the investor must invest \$1 million into the enterprise, and the business and jobs created must be maintained for a minimum of two years.⁸⁴

In 1992, a pilot program was authorized under the EB-5 visa category to achieve the economic activity and job creation goals of that category by encouraging investment in economic units known as Regional Centers.⁸⁵ The Regional Center Pilot Program is intended to provide a coordinated focus for foreign investment toward specific geographic regions. The majority of EB-5 immigrant investors come through the pilot program. The Regional Center Pilot Program is authorized through September 30, 2012.⁸⁶ There are bills in the 112th Congress that would permanently authorize the program,⁸⁷ and others that would amend the requirements for EB-5 visas⁸⁸ or create a new, sixth employment-based preference (EB-6) for sponsored alien entrepreneurs.⁸⁹

Foreign Temporary Agricultural Workers

Under current law, there is one program that provides for the admission of foreign temporary agricultural workers to the United States: the H-2A nonimmigrant visa program. This program allows for the temporary admission of foreign workers to the United States to perform agricultural labor or services of a seasonal or temporary nature, provided that U.S. workers are not available. An approved H-2A visa petition is generally valid for an initial period of up to one year. An employer can apply to extend an H-2A worker's stay in increments of up to one year, but an alien's total period of stay as an H-2A worker may not exceed three consecutive years. The H-2A program, which is not subject to a numerical cap, is administered by the Employment and

⁸³ For a discussion of employment-based immigration and the preference categories, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

⁸⁴ INA §203(b)(5), §216A.

⁸⁵ P.L. 102-395, Title VI, §610, October 6, 1992. A Regional Center is defined as any economic unit, public or private, engaged in the promotion of economic growth, improved regional productivity, job creation, and increased domestic capital investment.

⁸⁶ P.L. 108-156 extended the program through FY2008, and §548 of P.L. 111-83 extended the authorization through September 30, 2012.

⁸⁷ See, for example, Creating American Jobs Through Foreign Capital Investment Act (S. 642).

⁸⁸ See, for example, Immigration Driving Entrepreneurship in America Act of 2011 (H.R. 2161).

⁸⁹ See, for example, StartUp Visa Act of 2011 (H.R. 1114/S. 565).

Training Administration (ETA) of the Department of Labor (DOL) and USCIS of DHS. The Obama Administration issued new final rules on the H-2A program in 2010.⁹⁰

An employer who wants to import H-2A workers must first apply to DOL for a certification that (1) there are not sufficient U.S. workers who are qualified and available to perform the work; and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. Prospective H-2A employers must attempt to recruit U.S. workers and must cooperate with DOL-funded state workforce agencies (SWAs) in local, intrastate, and interstate recruitment efforts. In addition, under the “50 percent rule,” H-2A employers are required to hire any qualified U.S. worker who applies for a position until 50% of the work contract under which the H-2A workers are employed has elapsed. H-2A employers must pay their H-2A workers and similarly employed U.S. workers the highest of several wage rates (including the adverse effect wage rate) and must provide workers with housing, transportation, and other benefits.⁹¹

The American Specialty Agriculture Act (H.R. 2847), which was the subject of a hearing by the House Judiciary Committee’s Subcommittee on Immigration Policy and Enforcement in September 2011, would establish a new H-2C visa for temporary agricultural workers as an alternative to the H-2A visa. Unlike the H-2A visa, the H-2C visa would not be limited to agricultural labor of a temporary or seasonal nature and could be used to bring in workers to perform non-seasonal agricultural work. An H-2C worker’s continuous period of stay would be limited to 10 months, and the program would be capped at 500,000 annually. The new program would be administered by the USDA and would not be subject to the same labor certification process as the H-2A visa. Instead, prospective H-2C employers would attest in their applications that they had satisfied applicable recruitment, wage, and benefit requirements, which would differ from those under the H-2A visa. With respect to wages, the H-2C visa would not be subject to the adverse effect wage rate; H-2C employers would be required to pay the higher of the prevailing wage rate or the applicable minimum wage rate. Among other differences between the H-2A program and the proposed H-2C program, the H-2C program would be subject to more limited U.S. worker recruitment requirements; the H-2C program would not have a “50 percent rule;” and H-2C employers could provide housing vouchers instead of housing. Other bills would establish different new foreign agriculture worker programs or would amend the existing H-2A program.⁹²

Unauthorized Students

Unauthorized alien students are a subpopulation of the larger unauthorized alien population in the United States.⁹³ They are able to receive free public education through high school despite their illegal status, but face various obstacles in the pursuit of higher education. More broadly, as unauthorized aliens they are unable to work legally and are subject to removal from the United States.

⁹⁰ For a discussion of these DOL and DHS rules, see CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

⁹¹ See *Ibid.*

⁹² See, for example, Legal Agricultural Workforce Act (H.R. 2895) and HARVEST Act of 2011 (S. 1384).

⁹³ For information and analysis of the unauthorized alien population generally, see CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno.

Legislation commonly referred to as the “DREAM Act” (whether or not a particular bill carries that name) has been introduced in the past several Congresses to provide unauthorized alien students with access to both educational opportunities and immigration status. Typically, DREAM Act bills propose to enable eligible individuals to obtain LPR status in the United States through a two-stage process. In the first stage, aliens meeting specified criteria could go through an immigration procedure known as “cancellation of removal” to obtain a conditional legal status. In the second stage, aliens, after meeting additional requirements, could apply to become full-fledged LPRs. DREAM Act bills also often contain a repeal of a provision of current law (§505 of the Illegal Immigration Reform and Immigrant Responsibility Act) that restricts the ability of states to provide postsecondary educational benefits to unauthorized aliens.⁹⁴

Attempts to enact a DREAM Act bill in the 110th and 111th Congresses were unsuccessful.⁹⁵ DREAM Act bills have once again been introduced in the current Congress, both as stand-alone measures and as parts of larger bills.⁹⁶

Birthright Citizenship

Over the past decade or so, concern about illegal immigration has led some legislators to reexamine the long-established tenet of U.S. citizenship that a person, who is born in the United States, and subject to its jurisdiction, is a citizen of the United States regardless of the race, ethnicity, or alienage of the parents. This concept of birthright citizenship is codified in the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution and §301(a) of the INA. The war on terror and the case of Yaser Esam Hamdi, a U.S.-Saudi dual national captured in Afghanistan fighting with Taliban forces, further heightened attention to and interest in restricting automatic birthright citizenship. Although Hamdi’s parents were Saudi nationals in the United States on nonimmigrant work visas, Hamdi was a U.S. citizen by right of his birth in Louisiana and arguably entitled to rights not available to foreign enemy combatants.

In the 112th Congress, some Members have supported introducing legislation that would revise or reinterpret the Citizenship Clause to address concerns that (1) children born to unauthorized aliens become an avenue to legal status for their parents and siblings when they turn 21 years old, and (2) affluent pregnant foreigners come to the United States on tourist visas to give birth to their children and thus provide them with U.S. citizenship.⁹⁷ Several bills have been introduced to amend the Constitution and/or the INA to exclude persons born in the United States from citizenship at birth if their parents were unlawfully present in the United States or were nonimmigrant aliens.⁹⁸ In order for a child to be a citizen at birth under these proposals, at least one parent would have to be a U.S. national, an LPR who resides in the United States, or an alien serving on active duty in the U.S. Armed Forces.

⁹⁴ For analyses of these bills, see *Ibid.*

⁹⁵ See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno.

⁹⁶ See, for example, H.R. 1842, S. 952, and S. 1258 (Title I, Subtitle A, Part IV).

⁹⁷ See, for example, Daniel González, “Births by U.S. visitors: A real issue? Data indicate ‘birth tourism’ is not a widespread practice,” *The Arizona Republic*, August 17, 2011, <http://www.azcentral.com/news/articles/2011/08/17/20110817births-by-us-visitors-smaller-issue.html>.

⁹⁸ See, for example, H.R. 140, §301 of H.R. 1196, S. 723, and S.J.Res. 2. For further information, see CRS Report RL33079, *Birthright Citizenship Under the 14th Amendment of Persons Born in the United States to Alien Parents*, by Margaret Mikyung Lee.

Furthermore, some state legislators have voiced support for state legislation that would define state citizenship as excluding persons born to undocumented aliens and for a state compact under which states would issue a different type of birth certificate to such persons. State legislators from Arizona and 13 other states unveiled model legislation in January 2011, intending to set the stage for a U.S. Supreme Court review of the Citizenship Clause.⁹⁹ Such legislation has been introduced in some states but has not been enacted.¹⁰⁰

Commonwealth of the Northern Mariana Islands

Title VII of P.L. 110-229 made the INA applicable to the Commonwealth of the Northern Mariana Islands (CNMI), a U.S. territory in the Pacific. Previously, in accordance with an agreement known as the Covenant¹⁰¹ that sets forth the relationship between the CNMI and the United States, the CNMI had not been subject to U.S. immigration law. Among other provisions, P.L. 110-229 established a transition period for implementing the INA in the CNMI that began on November 28, 2009. It aimed, in particular, to provide federal regulation and oversight of the admission of foreign workers to the CNMI, including by establishing a CNMI-only transitional worker visa. Aliens who were not eligible for the transitional foreign worker visas were able to remain in the CNMI on entry permits issued under the former territorial immigration laws until the earlier of the original permit expiration date or November 28, 2011.¹⁰²

In the 112th Congress, H.R. 1466 would resolve the status of certain long-term foreign residents of the CNMI who otherwise may not be able to remain in the territory after November 28, 2011. The bill was reported by the House Natural Resources Committee, while the House Judiciary Committee discharged it without a report. Some long-term foreign residents of the CNMI have U.S. citizen spouses and children who, for various reasons, are unable to sponsor them for U.S. immigrant status. For example, some have U.S. citizen spouses and adult sons or daughters who are eligible to file a family-based immigrant petition on their behalf; however, due to the economic conditions in the CNMI, many citizens apparently are unable to satisfy the requisite household income level for sponsoring a relative as an immigrant under U.S. law. Other long-term foreign residents were granted permanent resident status in the CNMI under former territorial immigration laws, but this status will no longer be valid under federal immigration law after November 28, 2011. Still other persons who were born in the CNMI were not eligible for U.S. citizenship under the terms of the Covenant. As reported, H.R. 1466 would authorize admission of these various long-term foreign residents, subject to certain requirements, as

⁹⁹ State Rep. Daryl Metcalfe, State Legislators for Legal Immigration, “State Lawmakers Convened in D.C. to Deliver Historic, Nationwide Correction of 14th Amendment Misapplication,” January 5, 2011, <http://www.statelegislatorsforlegalimmigration.com/NewsItem.aspx?NewsID=10195>; Associated Press, “Lawmakers in 14 States Craft Bill to Deny Citizenship to ‘Anchor Babies’,” October 19, 2010, listed the 13 other states as Alabama, Delaware, Idaho, Indiana, Michigan, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Texas, and Utah, at <http://www.foxnews.com/politics/2010/10/19/lawmakers-states-craft-deny-citizenship-anchor-babies/?test=latestnews>. Some legal scholars think it is unlikely the Supreme Court will hear such a case. Valeria Fernández, “Birthright Citizenship’s Unlikely Road to Supreme Court,” *New America Media*, December 22, 2010, <http://newamericamedia.org/2010/12/birthright-citizenships-unlikely-road-to-supreme-court.php>.

¹⁰⁰ For example, Arizona S.B. 1308, 50th Leg., 1st Reg. Sess., failed to pass in the State Senate on March 17, 2011.

¹⁰¹ The Covenant To Establish a Commonwealth of the Northern Mariana Islands In Political Union with the United States of America, codified at 48 U.S.C. §1801 note.

¹⁰² The CNMI had issued so-called “umbrella permits,” valid through November 28, 2011, to most persons who had a valid permit expiring earlier.

immigrants to the CNMI only, and provide a path for most of these CNMI-only residents to adjust later to regular LPR status.

On November 23, 2011, USCIS announced that certain prospective beneficiaries of H.R. 1466, namely immediate relatives of U.S. citizens and certain persons born in the CNMI who did not receive U.S. citizenship (also their spouses and unmarried children under 21 years old), would be eligible for parole. Parole would be granted on a case-by-case, discretionary basis and would permit recipients to stay lawfully in the CNMI.¹⁰³ On December 9, 2011, USCIS issued guidelines clarifying that a grant of parole based on an application filed on or before January 31, 2012, would be backdated to November 27, 2011. If parole is denied, unlawful presence would accrue after the expiration of the CNMI permit on November 27, 2011. A grant of parole based on an application filed after January 31, 2012, would be valid from the date of grant, so unlawful presence would accrue after the expiration of the CNMI permit on November 27, 2011, until the date for the grant of parole. The maximum grant would be until December 31, 2012. Reportedly, the CNMI government is considering challenging the new USCIS parole policy for some of the bill's beneficiaries, while some supporters of the bill want its benefits extended to other groups of long-term foreign workers.¹⁰⁴

Professional Foreign Temporary Employees

The 112th Congress is taking renewed interest in foreign temporary workers engaged in professional occupations. One issue focuses on whether Congress should revise the immigration law to expand temporary visas for professional specialty occupations, particularly for graduates with degrees in science, technology, engineering, or mathematics (STEM) fields.¹⁰⁵ Another issue is whether other temporary visa categories, such as those designated for foreign study, cultural exchange, and intracompany transfers, are being misused by employers unable to obtain numerically limited professional workers visas. A corollary to these two issues is whether the wages and working conditions of U.S. workers are adversely affected by the recruitment of temporary foreign workers.¹⁰⁶

Other Legislation Receiving Action

Military Service-Based Immigration Benefits

Since 2003, Congress has enacted a range of measures to facilitate naturalization and maintenance of LPR status for military service members and their families, particularly when

¹⁰³ Parole is a form of immigration relief that does not constitute formal admission into the United States but permits an alien to come to and/or stay in the United States temporarily for humanitarian or public interest reasons. See USCIS guidelines for parole benefitting immediate relatives of U.S. citizens in the CNMI and certain "stateless" persons born in the CNMI, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2ae38614e90d3310VgnVCM100000082ca60aRCRD&vgnnextchannel=4d3314dd2b635210VgnVCM100000082ca60aRCRD>.

¹⁰⁴ Haidee V. Eugenio, "HR 1466 ready for House action; Fitial admin's 'tentative action' may be lawsuit vs USCIS," *Saipan Tribune*, December 13, 2011, <http://www.saipantribune.com/newsstory.aspx?newsID=114945&cat=1>.

¹⁰⁵ See, for example, H.R. 399 and H.R. 2161.

¹⁰⁶ For related information, see CRS Report CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.

such persons are posted abroad. In the 112th Congress, several bills have been introduced to address additional issues that have resulted from military service. One of these bills (H.R. 398) has been enacted as P.L. 112-58. The new law extends the time to qualify for non-conditional LPR status to account for military service.

Under the INA, an alien who obtains LPR status through a marriage to a U.S. citizen or LPR that was entered into less than two years earlier is initially granted LPR status on a conditional basis. In order to have the condition removed, both spouses must jointly satisfy certain requirements during specified periods, including appearing together at a personal interview with DHS. P.L. 112-58 tolls the time for meeting such requirements during any period in which either spouse is a member of the U.S. Armed Forces and serving abroad in active-duty status. Although DHS had discretion to waive the requirements in certain circumstances before the new law, it obviates the need for discretionary waivers by tolling the time periods.

The enactment of P.L. 112-74 added a new statute, 10 U.S.C. §1790, providing for reimbursement to USCIS by the Department of Defense of fees for processing military-service-based naturalization applications (Div. A, §8070). Current law prohibits charging the applicants fees for such applications.¹⁰⁷

Wage Requirements for H-2B Temporary Employment

The H-2B visa allows for the temporary admission of foreign workers to the United States to perform temporary nonagricultural labor or service if unemployed U.S. workers cannot be found. H-2B employers are required to pay workers the highest of the prevailing wage rate or the federal, state, or local minimum wage. In January 2011, DOL issued a final rule to change the methodology for determining prevailing wage rates for the H-2B program.¹⁰⁸ This rule has not yet gone into effect. P.L. 112-55 (Div. B, §546) prohibited any funds made available by the act or another act for FY2012 to be used to implement or enforce the H-2B wage rule before January 1, 2012. P.L. 112-74 contains language to prohibit any funds made available under the act to be used to implement the rule (Div. F, §110). In response, DOL has postponed the effective date of the new H-2B wage methodology until October 1, 2012.

¹⁰⁷ INA §329(b)(4), regarding military-service-based naturalization during periods of hostilities, codified as amended at 8 U.S.C. §1440(b)(4):

[N]otwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing a petition for naturalization or for the issuance of a certificate of naturalization upon citizenship being granted to the applicant, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

See also INA §328(b)(4), regarding military-service-based naturalization during peacetime, codified as amended at 8 U.S.C. §1439(b)(4), and 8 U.S.C. §1440e (not part of the INA), regarding prohibition on fees charged by a federal court for military-service-based naturalization during the Vietnam and subsequent hostilities.

¹⁰⁸ U.S. Department of Labor, Employment and Training Administration, “Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,” 76 *Federal Register* 3452-3484, January 19, 2011.

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