



# Overview of Immigration Issues in the 112<sup>th</sup> Congress

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March 21, 2011

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R41704

## Summary

There is a broad-based consensus that the U.S. immigration system is broken. This consensus erodes, however, as soon as the options to reform the U.S. immigration system are debated. Substantial efforts to comprehensively reform immigration law failed in the 109<sup>th</sup> and 110<sup>th</sup> Congresses. Whether the 112<sup>th</sup> Congress will address immigration reform in the midst of historically high levels of unemployment and budgetary constrictions is difficult to project.

The number of foreign-born people residing in the United States is at the highest level in U.S. history and has reached a proportion of the U.S. population—12.5%—not seen since the early 20<sup>th</sup> century. Of the 38 million foreign-born residents in the United States, approximately 16.4 million are naturalized citizens. The remaining 21.6 million foreign-born residents are noncitizens. According to the latest estimates by the Department of Homeland Security (DHS), about 10.8 million unauthorized aliens were living in the United States in January 2010, down from a peak of 11.8 million in January 2007. Some observers and policy experts maintain that the presence of millions of unauthorized residents is evidence of inadequacies in the legal immigration system as well as failures of immigration control policies and practices.

This report synthesizes immigration issues as a multi-tiered debate. It breaks down the U.S. immigration law and policy into key elements: border control and visa security; legal immigration; documentation and verification; interior immigration enforcement; integration, status, and benefits; and refugees and other humanitarian populations. It delineates the debate in the 112<sup>th</sup> Congress for a range of issues, including border security, criminal aliens, worksite enforcement, employment eligibility verification, permanent admissions, temporary workers, legalization, noncitizen eligibility for federal benefits, birthright citizenship, and the role of state and local law enforcement in enforcing immigration laws.

Current circumstances may sharpen the social and business cleavages as well as narrow the range of options. Nonetheless, selected immigration issues are likely to be a major concern for the 112<sup>th</sup> Congress, even if legislative action on such contentious issues appears daunting.

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## Introduction

There is a broad-based consensus that the U.S. immigration system is broken. This consensus erodes, however, as soon as the options to reform the U.S. immigration system are debated. Substantial efforts to comprehensively reform immigration law failed in the 109<sup>th</sup> and 110<sup>th</sup> Congresses, prompting some to characterize the issue as a “zero-sum game” or a “third rail.”<sup>1</sup>

The number of foreign-born people residing in the United States is at the highest level in U.S. history and has reached a proportion of the U.S. population—12.5%—not seen since the early 20<sup>th</sup> century. Of the 38 million foreign-born residents in the United States, approximately 16.4 million are naturalized citizens.<sup>2</sup> The remaining 21.6 million foreign-born residents are noncitizens.<sup>3</sup> An estimated 12.5 million foreign-born residents of the United States in 2009 were legal permanent residents.<sup>4</sup>

According to the latest estimates by the Department of Homeland Security (DHS), about 10.8 million unauthorized aliens were living in the United States in January 2010, down from a peak of 11.8 million in January 2007.<sup>5</sup> Some observers and policy experts maintain that the presence of millions of unauthorized residents is evidence of inadequacies in the legal immigration system as well as failures of immigration control policies and practices.<sup>6</sup>

Whether the 112<sup>th</sup> Congress will address immigration reform in the midst of historically high levels of unemployment and budgetary constrictions is difficult to project. Current circumstances may sharpen the social and business cleavages as well as narrow the range of options. Nonetheless, selected immigration issues are likely to be a major concern for the 112<sup>th</sup> Congress, even if legislative action on such contentious issues appears daunting.

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<sup>1</sup> For summaries of legislative activity pertaining to nonimmigrants in recent years, see CRS Report R40848, *Immigration Legislation and Issues in the 111<sup>th</sup> Congress*, coordinated by Andorra Bruno; CRS Report RL34204, *Immigration Legislation and Issues in the 110<sup>th</sup> Congress*, coordinated by Andorra Bruno; CRS Report RL33125, *Immigration Legislation and Issues in the 109<sup>th</sup> Congress*, coordinated by Andorra Bruno; and CRS Report RL32169, *Immigration Legislation and Issues in the 108<sup>th</sup> Congress*, by Andorra Bruno et al.

<sup>2</sup> CRS Report R41592, *The U.S. Foreign-Born Population: Trends and Selected Characteristics*, by William A. Kandel.

<sup>3</sup> A noncitizen is anyone who is not a citizen or national of the United States and is synonymous with the terms *alien* and *foreign national*. Noncitizens include those in the United States permanently (e.g., legal permanent residents, refugees), those in the country temporarily (e.g., students, temporary workers), and those who are in the country without authorization.

<sup>4</sup> Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2009*, U.S. Department of Homeland Security Office of Immigration Statistics, Population Estimates, November 2010, [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2009.pdf).

<sup>5</sup> Michael Hofer, Nancy Rytina, and Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, U.S. Department of Homeland Security Office of Immigration Statistics, Population Estimates, February 2011.

<sup>6</sup> The three main components of the unauthorized resident alien population are (1) aliens who overstay their nonimmigrant visas, (2) aliens who enter the country surreptitiously without inspection, and (3) aliens who are admitted on the basis of fraudulent documents.

## Border and Visa Security

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

### Visa Security

All foreign nationals seeking visas must undergo admissibility reviews performed by DOS consular officers abroad. These reviews are intended to ensure that they are not ineligible for visas or admission to the U.S. under the grounds for inadmissibility spelled out in the Immigration and Nationality Act (INA) §212. These criteria include health-related grounds; criminal history; security and terrorist concerns; public charge (e.g., indigence); illegal entrants; and aliens previously removed. While sweeping changes to the grounds for inadmissibility are unlikely, incremental revisions may arise. The provision that makes an alien who is unlawfully present in the United States for longer than 180 days inadmissible for three or ten years, for example, might be waived as part of a legislative package that includes legalization provisions. Tightening up the grounds for inadmissibility, conversely, might be part of the legislative agenda among those who support more restrictive immigration reform policies.<sup>7</sup>

Some have expressed the view that DOS retains too much power over visa issuances and warn that consular officers are too concerned about facilitating tourism and trade to scrutinize visa applicants thoroughly. Some argue that the principal responsibility should be in the VSP, which assigns special agents with expertise in immigration law and counterterrorism to diplomatic posts overseas to perform visa security activities and which does not have competing priorities of diplomatic relations and reciprocity with foreign governments.<sup>8</sup>

### Border Control

Border security involves securing the many means by which people and goods enter the country. Operationally, this means controlling the official ports of entry through which legitimate travelers and commerce enter the country, and patrolling the nation's land and maritime borders to interdict illegal entries. In recent years, Congress has enacted a series of provisions and increased funding aimed at strengthening immigration-related border security.<sup>9</sup> The strategy is to achieve a balance of an effective border protection with an efficient flow of approved people.

At ports of entry (POEs), the lynchpin for border control is the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system, which captures the fingerprints, photographs and other biometric identifiers of many foreign nationals entering the United States and links these

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<sup>7</sup> CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

<sup>8</sup> CRS Report R41093, *Visa Security Policy: Roles of the Departments of State and Homeland Security*, by Ruth Ellen Wasem.

<sup>9</sup> CRS Report R41237, *People Crossing Borders: An Analysis of U.S. Border Protection Policies*, by Alison Siskin.

elements with other relevant databases.<sup>10</sup> However, its entry functions are not fully deployed during primary inspection at land POEs, and as a result, less than one-quarter of nonimmigrant admissions to the United States are recorded in US-VISIT.<sup>11</sup> Since the exit component also has not been implemented, DHS has no easy way to identify those individuals who have overstayed their visas.<sup>12</sup>

Between the POEs, resources for the U.S. Border Patrol and the types of fencing are perennial issues. After \$1 billion in appropriations from FY2006-FY2010, DHS cancelled the Secure Border Initiative Network (SBInet), the “virtual fence” of cameras, radar and communications devices, reportedly due to cost overruns, technical problems, and delays.<sup>13</sup> Along the international land border, the main oversight issue will continue to be what the appropriate mix of technology, infrastructure, and personnel should be to detect and interdict illegal entries. Whether additional statutory provisions are needed to further control the border remains a question.

## Legal Immigration

The scope of legal immigration includes permanent admissions (e.g., employment-based, family-based immigrants) and temporary admissions (e.g., guest workers, foreign students). There are some foreign nationals admitted temporarily in a conditional status who may be on a path to permanent residence. The challenge inherent in reforming the system of legal immigration is balancing the hopes of employers to increase the supply of legally present foreign workers, the longings of families to re-unite and live together, and a widely shared wish among the various stakeholders to improve the policies governing legal immigration into the country.

### Permanent Residence

Four major principles underlie current U.S. policy on permanent immigration: the reunification of families, the admission of immigrants with needed skills, the protection of refugees, and the diversity of admissions by country of origin. The Immigration and Nationality Act (INA) specifies a complex set of numerical limits and preference categories that give priorities for permanent immigration reflecting these principles. Legal permanent residents (LPRs) are foreign nationals who live lawfully and permanently in the United States. The INA provides for a permanent annual worldwide level of 675,000 LPRs, but this level is flexible and certain categories of LPRs, most notably immediate relatives of U.S. citizens,<sup>14</sup> are permitted to exceed the limits.<sup>15</sup>

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<sup>10</sup> U.S. Government Accountability Office, *Key US-VISIT Components at Varying Stages of Completion, but Integrated and Reliable Schedule Needed*, GAO-10-13, November 19, 2009, <http://www.gao.gov/new.items/d1013.pdf>.

<sup>11</sup> U.S. Government Accountability Office, *US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry*, GAO-07-248, December 2006, <http://www.gao.gov/new.items/d07248.pdf>.

<sup>12</sup> CRS Report RS22446, *Nonimmigrant Overstays: Brief Synthesis of the Issue*, by Ruth Ellen Wasem.

<sup>13</sup> For a discussion of SBInet and its problems, see U.S. Government Accountability Office, *Secure Border Initiative: DHS Needs to Strengthen Management and Oversight of Its Prime Contractor*, 11-06, October 2010, <http://www.gao.gov/new.items/d1106.pdf>.

<sup>14</sup> “Immediate relatives” are defined by the INA to include the spouses and unmarried minor children of U.S. citizens, and the parents of adult U.S. citizens.

<sup>15</sup> §201 of INA; 8 U.S.C. § 1151.

During FY2009, a total of 1.1 million aliens became LPRs in the United States. Many LPRs are adjusting status from within the United States rather than receiving visas issued abroad by Consular Affairs.<sup>16</sup> Of 1.1 million LPRs, 66.1% entered on the basis of family ties.<sup>17</sup> Immediate relatives of U.S. citizens made up the single largest group of immigrants—535,554—in FY2009. Other major categories in FY2009 were employment-based LPRs (including spouses and children) and refugees/asylees adjusting to LPR status—12.7% and 15.7%, respectively. Various constituencies and interests are advocating a significant reallocation from the family-based to the employment-based visa categories or a substantial increase in legal immigration to meet a growing demand from families and employers in the United States for visas.<sup>18</sup>

## Family-Sponsored Immigrants

At the end of FY2010, the U.S. Department of State National Visa Center reported that it had 4.6 million approved family-based petitions waiting for a visa to become available.<sup>19</sup> Proponents of family-based migration point to the significant backlogs in family-based immigration due to the sheer volume of aliens eligible to immigrate to the United States and maintain that any proposal to increase immigration levels should also include the option of family-based backlog reduction. Citizens and LPRs often wait years for their relatives' petitions to be processed and visa numbers to become available. Against these competing priorities for increased immigration, some offer options to scale back immigration levels, with options that include limiting family-based LPRs to the immediate relatives.

## Employment-Based Immigrants

The INA allocates 140,000 visas annually for employment-based immigrants.<sup>20</sup> Even as U.S. unemployment levels remain high, 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 has been dampened by high unemployment levels, proponents argue it is an essential ingredient for economic growth. Against these competing priorities for increased

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<sup>16</sup> In FY2009, 59.0% of all LPRs adjusted to LPR status in the United States rather than abroad. When foreign nationals adjust to LPR status stateside, the U.S. Citizenship and Immigration Services (USCIS) adjudicates and processes the visa petitions, and DOS is not involved.

<sup>17</sup> In addition to immediate relatives, the family-sponsored LPR categories are: the spouses and unmarried minor children of U.S. citizens and the parents of adult U.S. citizens; the unmarried sons and daughters of citizens; the spouses and children of LPRs and unmarried sons and daughters of LPRs; the married sons and daughters of citizens; and the siblings of citizens age 21 and over. §203(a) of INA; 8 U.S.C. §1153.

<sup>18</sup> CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

<sup>19</sup> U.S. Department of State, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2010*, <http://www.travel.state.gov/pdf/WaitingListItem.pdf>. The USCIS has not reported how many petitions it has approved for aliens adjusting to LPR status within the United States.

<sup>20</sup> Employment-based LPR categories are: persons of extraordinary ability in the arts, sciences, education, business, or athletics; outstanding professors and researchers; and certain multinational executives and managers; members of the professions holding advanced degrees or persons of exceptional ability; skilled workers with at least two years training, professionals with baccalaureate degrees, and unskilled workers in occupations in which U.S. workers are in short supply; special immigrants who largely consist of religious workers and certain former employees of the U.S. government; and investors who invest at least \$1 million (or less money in rural areas or areas of high unemployment) to create at least 10 new jobs. §203(b) of INA; 8 U.S.C. §1153.

immigration are those who offer options to scale back immigration levels, with options that include confining employment-based LPRs to exceptional, extraordinary or outstanding persons.<sup>21</sup>

## Diversity Visa Lottery

The diversity lottery makes 50,000 visas available annually to natives of countries from which immigrant admissions were lower than a total of 50,000 over the preceding five years.<sup>22</sup> The INA limits each country to 7%, or 3,850, of the total. To be eligible for a diversity visa, the alien must have a high school education or the equivalent, or the necessary qualifications in an occupation which requires at least two years of training or experience. 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 to 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.

## Temporary Admissions

The INA provides for the temporary admission of various categories of foreign nationals, who are known as nonimmigrants. Nonimmigrants are admitted for a temporary period of time and a specific purpose. They include a wide range of visitors, including tourists, students, and temporary workers. There is agreement that temporary migration is important to the U.S. economy and cultural life. There is also agreement that temporary migration should be managed more effectively. While revisions to temporary migration do not stoke the same intensity of debate that reform of permanent immigration or mechanisms for legalization do, they do provoke some controversies and concerns.<sup>23</sup>

## Visitors and Nonresident Admissions

CBP inspectors tallied 163 million temporary admissions of foreign nationals to the United States during 2009. Mexican nationals with border crossing cards and Canadian nationals traveling for business or tourist purposes accounted for the vast majority of admissions to the United States, with approximately 126.8 million entries in FY2009. The remaining categories and countries of the world contributed 36.2 million admissions in FY2009. Since many types of visas allow people to depart and re-enter the United States, the CBP data record multiple admissions during the same year.<sup>24</sup>

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<sup>21</sup> CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.

<sup>22</sup> §203(c) of INA.

<sup>23</sup> CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

<sup>24</sup> Randall Monger and Macready Barr, *Nonimmigrant Admissions to the United States: 2009*, U.S. Department of Homeland Security Office of Immigration Statistics, Annual Flow Report, April 2010, <http://www.dhs.gov/xlibrary/> (continued...)



In 2009, the United States had a positive \$21.9 billion trade surplus in travel and tourism spending, because foreign visitors spent more in the United States than U.S. tourists spent abroad.<sup>25</sup> Supporters of robust tourism, international education and cultural exchange programs maintain that they foster democratic principles and spread American values across the globe.<sup>26</sup> Some express concern, however, that the user fees paid by foreign nationals on temporary visas do not cover the costs of maintaining the aging infrastructures at ports of entry (POEs), nor do they cover the costs for managing the flow of 163 million annual admissions to the United States.<sup>27</sup> There is considerable pressure to provide rapid processing of nonimmigrant visas and temporary admissions, leading others to warn that national security may be put at risk when there is a high volume of temporary admissions with a corresponding increase in resources at the POEs.<sup>28</sup>

## Temporary Workers and Other Resident Nonimmigrants

Not all nonimmigrant visas are for brief visits, and some lengths of stay are sufficiently long for a person to establish a residence. The term “resident nonimmigrant” refers to those foreign nationals admitted on nonimmigrant visas whose classes of admission are associated with stays long enough to establish a residence (e.g., diplomats, students and workers). In 2010, the DHS Office of Immigration Statistics (OIS) estimated the average daily population of resident nonimmigrants in the United States to have been 1.8 million in 2008. Of the 1.8 million nonimmigrants, 50.8% (0.93 million) were temporary workers and their families.<sup>29</sup>

The temporary foreign worker categories usually spark the liveliest debates. Those opposing increases in foreign workers assert that such expansions—particularly during a period of high unemployment—would have a deleterious effect on salaries, compensation, and working conditions of U.S. workers. Others question whether the United States should continue to issue foreign worker visas (particularly temporary visas) during sustained high unemployment. Conversely, some employers argue that they will not be able to stay in business without expedient access to the contingent workers, some of whom are temporary foreign workers who meet the need for a specialized, seasonal, intermittent or peak-load workforce that is able to adapt with the market forces.<sup>30</sup>

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assets/statistics/publications/ni\_fr\_2009.pdf.

<sup>25</sup> CRS Report R41409, *U.S. Travel and Tourism Industry*, by Suzanne M. Kirchhoff.

<sup>26</sup> U.S. Department of State Assistant Secretary Ann Stock, Bureau of Educational and Cultural Affairs, “Remarks at the Release of the 2010 Open Doors Report,” press release, November 15, 2010, [http://exchanges.state.gov/assistant-secretary-stock/11152010\\_remarks.html](http://exchanges.state.gov/assistant-secretary-stock/11152010_remarks.html).

<sup>27</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security, testimony of Customs and Border Protection Assistant Commissioner Thomas Winkowski and Border Patrol Chief David Aguilar, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., May 20, 2009.

<sup>28</sup> CRS Report R41237, *People Crossing Borders: An Analysis of U.S. Border Protection Policies*, by Alison Siskin; and CRS Report R41093, *Visa Security Policy: Roles of the Departments of State and Homeland Security*, by Ruth Ellen Wasem.

<sup>29</sup> Bryan C. Baker, *Estimates of the Resident Nonimmigrant Population in the United States: 2008*, DHS Office of Immigration Statistics, Population Estimates, June 2010, [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ni\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_pe_2008.pdf).

<sup>30</sup> CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

## Pathways for Sciences, Technology, Engineering, and Math (STEM) Students

As the United States seeks to rise out of an economic recession, attention is again focused on recruitment of the “best and the brightest” people to the United States. Once a debate limited to the professional specialty worker (H-1B) visas, the global competition for foreign workers with advanced degrees and high-level skills has broadened the debate to encompass more sweeping revisions to legal immigration policies. Some promote amending the INA to create expedited pathways for foreign students earning degrees at U.S. universities in the fields of the sciences, technology, engineering, or math (STEM) to become LPRs. Those opposing such expedited pathways for foreign students assert that there is no compelling evidence of a labor shortage in these professional areas that cannot be met by newly graduating U.S. students and by retraining the existing U.S. work force. They argue that the education of U.S. students and training of U.S. workers should be prioritized.<sup>31</sup>

## Documents and Verification

Efforts to improve the security of immigration documents initially emphasized developing documents that were tamper-resistant and difficult to counterfeit. The objectives were to impede document fraud and unauthorized employment. Since the terrorist attacks of September 11, 2001 the policy priorities have centered on document integrity and personal identification, with a sharp focus on intercepting terrorist travel and other security risks. In recent years, Congress enacted several specific laws aimed directly at closing perceived loopholes of citizenship self-attestation and identity document integrity. In the 112<sup>th</sup> Congress, the issues of how best to verify legal status for employment or to obtain entitlements are likely to arise.

### Document Integrity

Immigration documents issued to foreign nationals include biometric identifiers. In designing these documents, document integrity as well as personal identification have been a priority. The official document issued to LPRs is the permanent resident card, commonly called a “green card” because it had been printed on green stock. Now it is a plastic card that is similar in size to a credit card. For over a dozen years, the card has incorporated security features, including digital images, holograms, micro-printing, and an optical memory stripe.<sup>32</sup> The USCIS also issues an employment authorization document (EAD) that incorporates security features, including digital images, holograms, and micro-printing. All nonimmigrant visas issued by the United States include biometric identifiers (e.g., finger scans) in addition to photographs.<sup>33</sup> While most foreign nationals entering the United States have biometric documents, a longstanding issue remains the number and location of scanners that are able to read these biometric documents.

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<sup>31</sup> CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.

<sup>32</sup> For further analysis, see CRS Report RL34007, *Immigration Fraud: Policies, Investigations, and Issues*, by Ruth Ellen Wasem.

<sup>33</sup> §414 of the USA Patriot Act (P.L. 107-56) and §303 of the Enhanced Border Security and Visa Reform Act (P.L. 107-173) require that visas and other travel documents contain a biometric identifier and are tamper-resistant.

## Employment Eligibility Verification

All employers are required to participate in a paper-based employment eligibility verification system in which they examine documents presented by every new hire to verify the person's identity and work eligibility. Employers must retain these employment eligibility verification (I-9) forms. Many observers have maintained that availability of fraudulent documents limited the effectiveness of the I-9 approach to employment verification.<sup>34</sup>

### E-Verify

Employers may opt to participate in an electronic employment eligibility verification program, known as E-Verify, which checks the new hires' employment authorization through Social Security Administration and, if necessary, DHS databases. As of late January 2011, it had more than 240,000 registered employers, representing more than 830,000 hiring sites. Critics of E-Verify have long complained that the system is not sufficiently accurate and results in discrimination.<sup>35</sup> DHS reports that in FY2010, 98.3% of employees were automatically confirmed as work-authorized and an additional 0.3% were confirmed after an initial mismatch.<sup>36</sup> In its 2009 evaluation of E-Verify, the research firm Westat estimated that about half (54%) of the unauthorized aliens processed through the system are erroneously found to be work-authorized. Westat attributed these errors mainly to identity fraud.<sup>37</sup>

## Status Verification for Federal Benefits

As an alternative to relying on the inspection of documents to determine immigrant eligibility for federal benefits, the Systematic Alien Verification for Entitlements (SAVE) system provides federal, state, and local government agencies access to data on immigration status that are necessary to determine noncitizen eligibility for public benefits. The USCIS does not determine benefit eligibility; rather, SAVE enables the specific program administrators to ensure that only those noncitizens and naturalized citizens who meet their program's eligibility rules actually receive public benefits. According to USCIS, SAVE draws on the Verification Information System (VIS) database, which is a nationally accessible database of selected immigration and naturalization status information that contains over 60 million records. Congress's concern with determining immigrant eligibility for federal benefits largely centers on SAVE's inability to detect identity fraud when someone uses the legal documents of another person.

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<sup>34</sup> CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno.

<sup>35</sup> CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

<sup>36</sup> U.S. Citizenship and Immigration Services, *E-Verify: About the Program*, U.S. Department of Homeland Security, Statistics and Reports, <http://www.uscis.gov/e-verify><http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7c579589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=7c579589cdb76210VgnVCM100000b92ca60aRCRD>.

<sup>37</sup> Westat, *Findings of the E-Verify Program Evaluation*, U.S. Citizenship and Immigration Services, December 2009, [http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf).

## Interior Immigration Enforcement

Reassessing immigration control policies and agencies and considering options for more effective enforcement of the INA are integral immigration issues. Immigration control encompasses an array of enforcement tools, policies, and practices to prevent and investigate violations of immigration laws. The spectrum of enforcement issues includes apprehending unauthorized aliens; worksite enforcement; investigating immigration fraud; identifying criminal aliens; and the detention and removal of foreign nationals. The involvement of states and localities in matters relating to immigration enforcement is also likely to arise in the 112<sup>th</sup> Congress.

### Investigations

Immigration enforcement activities include investigating aliens who violate the INA and other related laws. These activities primarily focus on the range of immigration-related probes that are national security priorities. Additionally, the main categories of non-terrorism immigration-related crimes that are investigation priorities are suspected criminal acts—notably suspected fraudulent activities (i.e., possessing or manufacturing fraudulent immigration documents) and suspected smuggling and trafficking of aliens as well as worksite enforcement of illegal employment.

### Worksite Enforcement

For over two decades it has been 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. The large number of unauthorized aliens in the United States, the majority of whom are in the labor force, leads many to criticize the adequacy of the current worksite enforcement measures. During the George W. Bush Administration, Immigration and Customs Enforcement (ICE) conducted highly visible worksite raids that led to the arrest and removal of thousands of unauthorized workers, which sparked praise among some and alarm among others. Today, ICE worksite enforcement is focused on employers, with the stated purpose of criminally investigating and prosecuting employers who exploit their workers and knowingly hire unauthorized workers. In addition to the tension over whom ICE should be targeting, there are concerns that more stringent worksite enforcement may inadvertently foster discrimination.<sup>38</sup>

### Alien Smuggling

The INA prohibits the smuggling of aliens across the U.S. border and the transport and harboring of aliens within the United States. Thus, the statute covers a broad spectrum of activities that may subject U.S. citizens as well as foreign nationals to criminal liability if they provide assistance to an alien who is unlawfully present within the United States.<sup>39</sup> Many contend that the smuggling of aliens into the United States constitutes a significant risk to national security and public safety. Some further warn that terrorists may use existing smuggling routes, methods, and organizations to enter undetected. In addition to generating billions of dollars in revenues for criminal

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<sup>38</sup> CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno.

<sup>39</sup> CRS Report RL34501, *Alien Smuggling: Recent Legislative Developments*, by Michael John Garcia.

enterprises, alien smuggling can lead to collateral crimes including kidnapping, homicide, high speed flight, identity theft, and the manufacturing and distribution of fraudulent documents. Past efforts to tighten laws on alien smuggling, however, sparked opposition from religious and humanitarian groups who asserted that the forms of relief and assistance that they may provide to aliens might be deemed as the facilitation of alien smuggling.<sup>40</sup>

## Document Fraud

Immigration-related document fraud includes the counterfeiting, sale, and use of identity documents (e.g., birth certificates or Social Security cards), as well as employment authorizations, passports, or visas. The INA has civil enforcement provisions for individuals and entities proven to have engaged in immigration document fraud.<sup>41</sup> In addition, the U.S. Criminal Code makes it a criminal offense for a person to knowingly produce, use, or facilitate the production or use of fraudulent immigration documents. More generally, the U.S. Criminal Code criminalizes the knowing commission of fraud in connection with a wide range of identification documents. The integrity of the documents issued for immigration purposes, the capacity to curb immigration fraud, and the distinctions between identity theft and immigration fraud are among the central elements of the document fraud issue.<sup>42</sup>

## Criminal Aliens

A criminal alien, put simply, is a foreign national convicted of certain criminal offenses; however, whether that conviction triggers deportation is a key factor. Criminal offenses in the context of immigration law cover violations of federal, state, or, in some cases, foreign criminal law. Most crimes affecting immigration status fall under a broad category of crimes defined in the INA, notably those involving moral turpitude or aggravated felonies. Some violations of the INA are not defined as crimes, such as being an unauthorized alien in the United States.<sup>43</sup> There has been bipartisan agreement for over a decade to dedicate a portion of immigration enforcement resources to the location and removal of criminal aliens.<sup>44</sup>

One initiative aimed at criminal aliens—the Secure Communities Program—has stirred controversy. It enables the fingerprints of all those arrested and booked by local law enforcement to be run through DHS immigration records, as well as Federal Bureau of Investigation (FBI) criminal history records. Proponents of Secure Communities maintain it improves public safety by using information-sharing capability to quickly and accurately identify deportable aliens who are arrested for a crime and booked into local law enforcement custody. Opponents of Secure

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<sup>40</sup> Distinct from alien smuggling is human trafficking. In some instances, an individual who appears to have consented to being smuggled may actually be a trafficked person if, for example, force, fraud, or coercion are found to have played a role. Trafficking in persons for the purposes of exploitation is both an international and a domestic crime that involves violations of labor, public health, and human rights standards. CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Sun Wylar.

<sup>41</sup> Immigration benefit fraud involves misrepresentation of a material fact to qualify for a specific immigration status or benefit. CRS Report RL34007, *Immigration Fraud: Policies, Investigations, and Issues*, by Ruth Ellen Wasem.

<sup>42</sup> CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Michael John Garcia.

<sup>43</sup> CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>44</sup> ICE has a Criminal Alien Program (CAP), which is responsible for identifying, processing and removing criminal aliens incarcerated in federal, state and local prisons and jails.

Communities warn that it fosters distrust of police officers in immigrant communities, incentivizes racial profiling, and increases costs for local jails.

## Detaining and Removing Foreign Nationals

### Detention

The INA requires that certain categories of aliens must be detained (i.e., the aliens must be detained during removal proceedings, and, if ordered removed, until their removal is effectuated). Other foreign nationals who are not subject to mandatory detention nonetheless may be detained, paroled, or released on bond.<sup>45</sup> The majority of detained aliens have committed a crime while in the United States, have served their criminal sentence, and are detained while undergoing removal proceedings. Citing the sheer number of aliens subject to mandatory detention, some critics question the fairness of the law, especially the requirement that asylum seekers lacking documentation are subject to mandatory detention. Others, however, point out that aliens who are not detained often disappear in the United States rather than face deportation. At the crux of this issue are two questions: who should be detained and what is the appropriate amount of detention resources necessary to sustain the population?<sup>46</sup>

### Removal

A foreign national is removable if (1) the alien has not been admitted to the United States and is inadmissible under INA §212 as discussed earlier,<sup>47</sup> or (2) the alien has been admitted to the United States and is deportable under INA §237.<sup>48</sup> The efficacy of alien removal proceedings hinges on an expeditious and respected immigration court system. According to a number of observers, while the system has witnessed a large increase in its caseload, it has not received a commensurate increase in resources. Advocates of increasing resources to immigration courts believe that funding more judges, law clerks, and the like would reduce detention times of apprehended aliens and generally result in cost savings and improved quality for judicial hearings. Other observers, however, contend that the problems related to immigration caseloads lie less in the funding shortages and more in the quality of immigration judges. Although some administrative efforts have been made to address these concerns, the 112<sup>th</sup> Congress may consider legislative action as well.<sup>49</sup>

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<sup>45</sup> §236 of INA.

<sup>46</sup> CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Chad C. Haddal and Alison Siskin.

<sup>47</sup> CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

<sup>48</sup> INA §237 specifies six broad classes of deportable aliens including aliens who: are inadmissible at time of entry or violate their immigration status; commit certain criminal offenses (e.g., crimes of moral turpitude, aggravated felonies, alien smuggling, high speed flight); fail to register (if required under law) or commit document fraud; are security risks (such as aliens who violate any law relating to espionage, engage in criminal activity which endangers public safety, partake in terrorist activities, or assisted in Nazi persecution or genocide); become a public charge within five years of entry; or vote unlawfully.

<sup>49</sup> CRS Report RL33410, *Immigration Litigation Reform*, by Margaret Mikyung Lee; and CRS Report R41190, *Ineffective Assistance of Counsel: Deportation Consequences of Guilty Pleas*, by Larry M. Eig.

## State and Local Enforcement

While the federal government exercises preeminent authority in the field of immigration, there has been longstanding debate regarding the scope and propriety of state and local efforts to deter the presence of unlawfully present aliens within their jurisdictions. Supporters of such measures argue that federal enforcement of immigration law has not adequately deterred the migration of unauthorized aliens, and that state action is both necessary and appropriate to combat the negative effects of unlawful migration. Opponents argue, among other things, that state and local involvement in immigration enforcement could be expensive and disruptive to federal enforcement efforts, could result in civil rights violations, and could undermine community policing by discouraging cooperation with state and local law enforcement.

The 112<sup>th</sup> Congress may weigh three aspects of this issue. The first question centers on the ability of states and localities to adopt legislation aimed at deterring unauthorized aliens who are in their jurisdictions. The second question focuses on the role of state and local police in directly enforcing federal immigration law and if such enforcement interferes with or disrupts federal immigration policies and objectives. Traditionally, the prevailing view has been that state and local police are permitted, to the extent allowed under state and local law, to enforce the criminal violations of federal immigration law. By contrast, the enforcement of the civil provisions, including the apprehension of deportable aliens, was viewed as a federal responsibility, with state and local police playing, at most, a supporting role. The third question addresses the effectiveness and propriety of existing cooperative initiatives (i.e., INA §287(g) agreements) between the federal government and states and localities regarding immigration enforcement. These agreements enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens.<sup>50</sup>

## Integration, Status, and Benefits

The degree to which foreign nationals should be accorded certain rights and privileges as a result of their presence in the United States, along with the duties owed by such aliens given their legal status, sparks debate. Any immigration legislation—whether it expands, alters, or retracts migration levels—will likely prompt a debate over potential trade-offs and impacts on alien rights and responsibilities. All persons in the United States, whether U.S. nationals or foreign nationals, are accorded certain rights under the U.S. Constitution. However, foreign nationals do not enjoy the same degree of constitutional protections as U.S. citizens.

## Citizenship

### Birthright Citizenship

Children born in the United States to parents who are unlawfully present in the United States are U.S. citizens, consistent with the British common law principle known as *jus soli*. This principle

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<sup>50</sup> 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; 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.

is codified in the Citizenship Clause of the Fourteenth Amendment of the U.S. Constitution and by §301(a) of the INA, which provides that a person who is born in the United States, subject to its jurisdiction, is a citizen of the United States regardless of the race, ethnicity, or immigration status of the parents. The question of whether the Citizenship Clause encompasses children born to unauthorized aliens, (i.e., are they subject to its jurisdiction?) arises in this debate. Some proponents of immigration reform have advocated either constitutional or statutory amendments to limit automatic citizenship upon birth in the United States. These proposals would not permit children born in the United States to parents who are unlawfully present to become U.S. citizens. Some of these proposals would also deny automatic citizenship to children born to foreign nationals who are present in the United States legally, but temporarily (i.e., those on nonimmigrant visas). Supporters of the Citizenship Clause of the Fourteenth Amendment, however, maintain that the principles it embodies—notably citizenship to all persons born in the United States and subject to its jurisdiction regardless of race, ethnicity or alienage of the parents—should not be altered.<sup>51</sup>

## **Integration and Naturalization**

The central elements of immigrant integration in the United States are knowledge of the language, history, and government of the United States as well as participation in the labor market and involvement in community institutions. The naturalization provisions in the INA provide the opportunity to all LPRs to become U.S. citizens. To naturalize, they must: have continuously resided in the United States for five years (three years in the case of spouses of U.S. citizens); show that they have good moral character; demonstrate the ability to read, write, speak, and understand English; and pass an examination on U.S. government and history. Whether the responsibility to integrate rests solely on the immigrant, or whether the government and other institutions (e.g., schools, religious groups, labor unions, employers or voluntary agencies) share the responsibilities, are issues of debate.

## **Legalization**

Foreign nationals residing in the United States without legal authorization (i.e., unauthorized aliens) poses an especially thorny issue. Proposals to enable unauthorized aliens to legalize their status generally would require unauthorized aliens to meet specified conditions and terms as well as pay penalty fees to legalize their status. Examples of conditions include documenting physical presence in the United States over a specified period; demonstrating employment for specified periods; showing payment of income taxes; or leaving the United States to obtain a legal status. Using a point system that credits aliens with equities in the United States (e.g., work history, tax records, and family ties) would be another possible option. Other potential avenues for legalization would be guest worker visas tailored for unauthorized aliens in the United States or a legalization program that would replace guest worker visas.

Advocates for legalization maintain that unauthorized residents are working, paying taxes, and contributing to the community. Some also point out that legalization would provide employers with a substantially increased legal workforce without importing additional foreign workers. They argue that beneficiaries of legalization must demonstrate that they are integrating in the United

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<sup>51</sup> CRS Report RL33079, *Birthright Citizenship Under the 14<sup>th</sup> Amendment of Persons Born in the United States to Alien Parents*, by Margaret Mikyung Lee.



States to be eligible. Opponents maintain that legalization rewards illegal actions at the expense of potential immigrants who are waiting to come legally. They further argue that it would serve as a magnet for future flows of unauthorized migrants. Instead, they support more rigorous enforcement of immigration control laws on illegal presence, unauthorized employment, detention, and removal as the most appropriate policy responses to issue of unauthorized aliens.<sup>52</sup>

## DREAM Act

In addition to the legalization options mentioned above, there are more narrowly drawn proposals (commonly referred to as the Development, Relief, and Education for Alien Minors Act, or the DREAM Act) that would enable some unauthorized alien students to become LPRs. In most cases, these bills have proposed to repeal a 1996 provision that discourages states and localities from providing certain postsecondary education benefits to unauthorized aliens. The DREAM Act would also enable unauthorized alien students to adjust to legal permanent resident (LPR) status in the United States if they meet specified conditions. Supporters point out that these unauthorized alien students were brought, as children, to the United States by their parents, and should not be held responsible for their parents' violation of immigration law. The broader arguments against legalization are also used by opponents of the DREAM Act: it would reward unlawful behavior and serve as a magnet for future violations.<sup>53</sup>

## Noncitizen Eligibility for Benefits

Federal laws place comprehensive restrictions on noncitizens' access to means-tested public assistance, with exceptions for LPRs with a substantial U.S. work history. Aliens in the United States without authorization (i.e., illegally present) are ineligible for federal public benefits, except for specified emergency services. There is, however, a widely held perception that many unauthorized migrants obtain federal benefits—despite legal restrictions and verification procedures. Families with mixed-immigration status members (i.e., families with unauthorized migrants and their U.S. citizen children) are another factor that arises in the debate on benefit receipt. Other components of the issue involve foreign nationals who have temporary employment authorizations and social security numbers, but who are not LPRs. Although it does not address the legality of an alien's immigration status, the Internal Revenue Code makes clear that "resident aliens" are generally taxed in the same manner as U.S. citizens. Those who are temporary legal residents or "quasi-legal" migrants pose a particular dilemma to some because they are permitted to work and have likely paid into the system that finances a particular benefit, such as social security or a tax refund, for which they may not be eligible.<sup>54</sup>

The extent to which residents of the United States who are not U.S. citizens should be eligible for federally funded public aid has been a contentious issue since the 1990s. These issues come to the intersection of major policy areas: immigration, health, welfare, and income security policies. Noncitizen eligibility issues arise in the context of specific legislation on access to health care, tax liabilities and refunds, educational opportunities, and means-tested federal assistance. Some

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<sup>52</sup> CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno.

<sup>53</sup> CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

<sup>54</sup> Not all unauthorized aliens lack legal documents, leading many observers to characterize these *documented* aliens as "quasi-legal" migrants. CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem, p.5.

assert that noncitizen eligibility should be further restricted, perhaps based upon work history or narrower categories of LPR. Others would extend benefits to certain vulnerable populations, such as pregnant women. Some maintain that current law is sufficient; instead, they emphasize that sponsorship rules should be enforced and that verification systems should be expanded. There may be unintended consequences of ramped up verification—most notably when tightening up the identification requirements to stymie false claims of citizenship results in denying benefits to U.S. citizens—which add complexity to the debate.<sup>55</sup>

## Refugees and Other Humanitarian Populations

The United States grants refugee status to aliens overseas, and grants asylum to aliens in the United States, who are unwilling or unable to return to their home countries due to persecution or a well-founded fear of persecution based on one of five characteristics (race, religion, nationality, membership in a particular social group, or political opinion) and who meet other criteria. An overriding issue in U.S. refugee and asylum policy is how to adapt policies forged during the Cold War to a changing world and the war on terrorism. Some argue that current law does not offer adequate protections for people fleeing persecution and other abuses occurring around the world. Others assert that forms of humanitarian relief intended to provide protection in extraordinary cases are being misused as alternative pathways for immigration.

### Refugee Admissions

The Bureau of Population, Refugees and Migration in DOS handles overseas processing of refugees, and the USCIS in DHS makes final determinations about eligibility for admission.<sup>56</sup> In the post-September 11 world, there is particular concern that potential terrorists—especially aliens from trouble spots in the Mideast, northern Africa and south Asia—could try to gain legal entry into the United States as refugees or asylees.<sup>57</sup> More generally, some regard as a key challenge for refugee and asylum policy the increasing difficulty in differentiating the persecuted from the persecutors in light of the religious, ethnic, and political violence in various countries around the world.<sup>58</sup>

### Asylum Policy

Foreign nationals present in the United States may apply for asylum with the USCIS after arrival into the country, or may seek asylum before a Department of Justice's Executive Office for Immigration Review (EOIR) immigration judge during removal proceedings. Aliens arriving at a

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<sup>55</sup> CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by Ruth Ellen Wasem; and CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem.

<sup>56</sup> Overseas processing of refugees is conducted through a system of three priorities for admission. Priority 1 comprises cases involving persons facing compelling security concerns. Priority 2 comprises cases involving persons from specific groups of special humanitarian concern to the United States (e.g., Iranian religious minorities). Priority 3 comprises family reunification cases involving close relatives of persons admitted as refugees or granted asylum.

<sup>57</sup> CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

<sup>58</sup> CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

U.S. port who lack proper immigration documents or who engage in fraud or misrepresentation are placed in expedited removal; however, if they express a fear of persecution, they receive a “credible fear” hearing with an USCIS asylum officer and—if found credible—are referred to an EOIR immigration judge for a hearing.<sup>59</sup> Asylum issues that may arise in the 112<sup>th</sup> Congress include the one-year time limit on filing asylum cases, the mandatory detention of asylum seekers who lack proper documents, and the thresholds for establishing religious persecution.

## Other Humanitarian Relief

While refugee status and asylum are permanent forms of relief, the United States also offers temporary humanitarian relief in certain circumstances. Temporary, or nonimmigrant, visas, known as “T” and “U” visas, may be granted to aliens who are victims of a severe form of trafficking in persons or who have suffered substantial physical or mental abuse due to having been victims of criminal activity, respectively, and who assist in investigations or persecutions. Current debate surrounding the T visa epitomizes the debate over U.S. humanitarian policies generally, with some questioning whether the application process may make it difficult for victims to obtain T status and others expressing concern about the possibility of aliens’ falsely claiming that they qualify for T status in order to remain in the country.<sup>60</sup>

When civil unrest, violence, or natural disasters erupt in spots around the world, concerns arise over the safety of foreign nationals from these troubled places who are in the United States. Provisions exist in the INA to offer temporary protected status (TPS) or relief from removal under specified circumstances. A foreign national who is granted TPS receives a registration document and an employment authorization for the duration of TPS. The United States currently provides TPS or deferred enforced departure (DED) to over 300,000 foreign nationals from a total of seven countries: El Salvador, Haiti, Honduras, Liberia, Nicaragua, Somalia, and Sudan. Under the INA, the executive branch grants TPS or relief from removal; however, Congress has also provided TPS legislatively. As a consequence, legislation may emerge when the Administration is perceived as slow to grant TPS after a humanitarian crisis or opts not to grant TPS to foreign nationals whom some Members of Congress think warrant temporary protections.<sup>61</sup>

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<sup>59</sup> Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture. For a full legal analysis of this convention, 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.

<sup>60</sup> CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Sun Wyler.

<sup>61</sup> CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.