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Immigration Legislation and Issues in the 111th Congress

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Immigration Legislation and Issues in the 111th Congress

Abstract

[Excerpt] The Speaker of the House and the Senate Majority Leader have pledged to take up comprehensive immigration reform legislation at some point in the 111th Congress. Efforts to enact broad immigration reform in the 109th and 110th Congresses were unsuccessful. It is unclear what the components of any immigration reform proposals that the 111th Congress may consider will be. In the past, comprehensive bills have addressed border security, enforcement of immigration laws within the United States (interior enforcement), employment eligibility verification, temporary worker programs, permanent admissions and, most controversially, unauthorized aliens in the United States.

The 111th Congress has considered various immigration issues and has enacted a number of targeted immigration provisions. It has passed legislation (P.L. 111-8, P.L. 111-9, P.L. 111-68) to extend the life of several immigration programs—the E-Verify electronic employment eligibility verification system, the Immigrant Investor Regional Center Program, the Conrad State J-1 Waiver Program, and the special immigrant visa for religious workers—all of which are currently authorized until October 31, 2009. With respect to these programs, the House-passed and Senate-passed versions of the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892), include different provisions to further extend E-Verify. The Senate-passed bill also would extend the other three programs. Among the other subjects of legislation enacted by this Congress are refugees (P.L. 111-8) and border security (P.L. 111-5, P.L. 111-32).

This report discusses these and other immigration-related issues that have seen legislative action or are of significant congressional interest. Department of Homeland Security (DHS) appropriations are addressed in CRS Report R40642, Homeland Security Department: FY2010 Appropriations, and, for the most part, are not covered here. This report will be updated as legislative developments occur.

Keywords

immigration, reform, public policy, 111th Congress, Department of Homeland Security, legislation

Comments

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Summary

The Speaker of the House and the Senate Majority Leader have pledged to take up comprehensive immigration reform legislation at some point in the 111th Congress. Efforts to enact broad immigration reform in the 109th and 110th Congresses were unsuccessful. It is unclear what the components of any immigration reform proposals that the 111th Congress may consider will be. In the past, comprehensive bills have addressed border security, enforcement of immigration laws within the United States (interior enforcement), employment eligibility verification, temporary worker programs, permanent admissions and, most controversially, unauthorized aliens in the United States.

The 111th Congress has considered various immigration issues and has enacted a number of targeted immigration provisions. It has passed legislation (P.L. 111-8, P.L. 111-9, P.L. 111-68) to extend the life of several immigration programs—the E-Verify electronic employment eligibility verification system, the Immigrant Investor Regional Center Program, the Conrad State J-1 Waiver Program, and the special immigrant visa for religious workers—all of which are currently authorized until October 31, 2009. With respect to these programs, the House-passed and Senate-passed versions of the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892), include different provisions to further extend E-Verify. The Senate-passed bill also would extend the other three programs. Among the other subjects of legislation enacted by this Congress are refugees (P.L. 111-8) and border security (P.L. 111-5, P.L. 111-32).

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Introduction

Comprehensive immigration reform was debated in the 109th and 110th Congresses, but no comprehensive legislation was enacted.¹ The Speaker of the House and the Senate Majority Leader have pledged to take up immigration reform legislation in the 111th Congress. It is unclear what the components of any immigration reform proposals that Congress may consider will be. In the past, comprehensive bills have addressed border security, enforcement of immigration laws within the United States (interior enforcement), employment eligibility verification, temporary worker programs, permanent admissions and, most controversially, unauthorized aliens in the United States. Any consideration of immigration reform legislation will undoubtedly be complicated by competing legislative priorities and by the economic downturn.

The 111th Congress has already considered some immigration-related measures and has enacted a number of targeted immigration provisions. It has passed legislation (P.L. 111-8, P.L. 111-9, P.L. 111-68) to extend the life of several immigration programs—the E-Verify electronic employment eligibility verification system, the Immigrant Investor Regional Center Program, the Conrad State J-1 Waiver Program, and the special immigrant visa for religious workers—all of which are currently authorized until October 31, 2009. With respect to these programs, the House-passed and Senate-passed versions of the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892), include different provisions to further extend E-Verify. The Senate-passed bill also would extend the other three programs. Among the other subjects of legislation enacted by this Congress are refugees (P.L. 111-8) and border security (P.L. 111-5, P.L. 111-32).

This report discusses these and other immigration-related issues that have seen legislative action or are of significant congressional interest.² Department of Homeland Security (DHS) appropriations are addressed in a separate report³ and, for the most part, are not covered here.

Electronic Employment Eligibility Verification

Employment eligibility verification and worksite enforcement have been mainstays of recent debates over comprehensive immigration reform. They are widely viewed as essential components of a strategy to reduce unauthorized immigration.

Under Section 274A of the Immigration and Nationality Act (INA),⁴ 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.

¹ See archived CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno, and archived CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*, coordinated by Andorra Bruno (hereafter cited as archived CRS Report RL34204).

² Noncitizen eligibility under pending health care reform legislation is not covered in this report. See CRS Report R40773, *Treatment of Noncitizens in H.R. 3200*, by Alison Siskin and Erika K. Lunder.

³ CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake and Chad C. Haddal.

⁴ 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.

Employers violating prohibitions on unlawful employment may be subject to civil and/or criminal penalties. Enforcement of these provisions is termed “worksite enforcement.” While all employers must meet the I-9 requirements, they also may elect to participate in the E-Verify electronic employment eligibility verification system. 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.⁵

At the start of the 111th Congress, E-Verify was scheduled to expire on March 6, 2009. Prompted by the approaching expiration, the House and Senate considered several provisions related to electronic employment eligibility verification, ultimately enacting an extension until September 30, 2009, as part of the Omnibus Appropriations Act, 2009 (P.L. 111-8). The Continuing Appropriations Resolution, 2010 (P.L. 111-68, Division B, §128),⁶ extends E-Verify until October 31, 2009. Language on E-Verify, including further extensions, is included in the House-passed and Senate-passed versions of the Department of Homeland Security Appropriations Act, 2010 (H.R. 2892). The House-passed bill would extend E-Verify until September 30, 2011, and would require SSA and DHS to enter into and maintain an annual agreement to provide funds to SSA to cover the full costs of its E-Verify responsibilities. The Senate-passed version of H.R. 2892 would make E-Verify permanent. It also would direct federal departments and agencies to require, as a condition of contracts they enter into, that the contractors use E-Verify to verify the employment eligibility of all individuals hired during the term of the contract to work in the United States and all individuals (whether new hires or existing employees) assigned to perform work in the United States under the contract.⁷ Another provision in the Senate-passed version of H.R. 2892 would allow any employer participating in E-Verify to verify the employment eligibility of existing employees.

Other bills introduced in the 111th Congress would more broadly change existing law on employment verification. For example, the Secure America Through Verification and Enforcement Act of 2009 (SAVE Act; H.R. 3308) would make E-Verify permanent and would phase in a requirement that all employers use it to verify the employment authorization of new hires and current employees. A similar bill of the same name (S. 1505) has been introduced in the Senate.

Border Security

Border security provisions have likewise been part of recent comprehensive reform bills. 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

⁵ See CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

⁶ The Continuing Appropriations Resolution, 2010, is Division B of P.L. 111-68. Division A of P.L. 111-68 is the Legislative Branch Appropriations Act, 2010.

⁷ A similar DHS rule, applicable as of September 8, 2009, requires certain federal contracts to contain a new clause committing contractors to use E-Verify to verify that all of the contractors’ new hires, and all employees directly performing work under federal contracts are authorized to work. See U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, “Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification,” *73 Federal Register* 67651-67705, November 14, 2008.

(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.

Border security is an important immigration issue for the 111th Congress. There has been much debate about whether DHS has sufficient resources to fulfill its border security mission. A number of bills have been introduced that would add resources for Customs and Border Protection (CBP), the lead agency at DHS charged with securing U.S. borders at and between official ports of entry (POE). At ports of entry, CBP officers are responsible for conducting immigration, customs, and agricultural inspections on entering aliens. Between ports of entry, the U.S. Border Patrol (USBP), a component of CBP, enforces U.S. immigration law and other federal laws along the border. In the course of discharging its duties, the USBP patrols over 8,000 miles of U.S. international borders with Mexico and Canada and the coastal waters around Florida and Puerto Rico. The following discussion focuses on key provisions on border resources that have been enacted by the 111th Congress and selected other provisions that are pending.

Resources at Ports of Entry

The American Recovery and Reinvestment Act of 2009 (ARRA; P.L. 111-5) provides an emergency supplemental appropriation of \$680 million for CBP during FY2009. The funding for CBP includes \$160 million for salaries and expenses, of which \$100 million is designated for the procurement and deployment of nonintrusive inspection technology and \$60 million is designated for the procurement and deployment of tactical communications equipment and radios. The act includes \$420 million for the construction and modification of ports of entry.

In response to the drug-related violence on the Mexican side of the Southwest border, Congress has appropriated additional resources for border activities. Title VI of the FY2009 Supplemental Appropriations Act (P.L. 111-32) contains \$140 million to support activities along the Southwest border with Mexico in response to reports of increasing drug-related violence. This funding includes \$40 million for CBP for various activities and \$5 million for CBP Air and Marine to support additional air operations along the Southwest border.

Resources Between Ports of Entry

In addition to providing resources for use at POE, the ARRA includes \$100 million for the deployment of SBInet technology to the border.⁸ Some pending legislation in the 111th Congress would authorize additional increases in USBP resources. H.Amdt. 247 to House-passed H.R. 2892 would fund the hiring of an additional 200 Border Patrol agents. S.Amdt. 1399 to Senate-passed H.R. 2892 would impose a reporting requirement on the Secretary of Homeland Security to identify “additional Border Patrol sectors that should be utilizing Operation Streamline programs” and the resources needed to make the program more effective. Operation Streamline is a program that brings low-level criminal charges for illegal entry against unauthorized aliens apprehended in certain sectors along the Southwest border—with exceptions made for some humanitarian cases. Finally, the House has passed H.R. 1148, which would direct DHS to conduct a program in the maritime environment for the mobile biometric identification of suspected

⁸ SBInet is the so-called “virtual fence” currently being installed along the Southwest border of the United States. For more information, see CRS Congressional Distribution Memorandum “SBInet: Background, Implementation, and Issues,” by Chad C. Haddal (available upon request).

individuals. This program would test the feasibility and cost of expanding DHS biometric identification capabilities to the maritime environment.

Barriers at the Border

Congress has repeatedly shown interest in the deployment of barriers along the U.S. international land border.⁹ In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which, among other provisions, explicitly gave the Attorney General broad authority to construct barriers along the border and specified where fencing was to be constructed. In 2008, Congress included provisions in P.L. 110-161 requiring DHS to construct reinforced fencing or other barriers along not less than 700 miles of the Southwest border, in locations where fencing is deemed most practical and effective. In carrying out this requirement, the Secretary is further directed to identify either 370 miles or “other mileage” along the Southwest border where fencing would be most practical and effective in deterring smugglers and illegal aliens, and to complete construction of fencing in identified areas. These requirements would again be modified by S.Amdt. 1399 to Senate-passed H.R. 2892 to require that DHS construct reinforced fencing to “restrain pedestrian traffic” along the entire 700 miles of border identified by the Secretary for barrier construction.

Unauthorized Immigration

Unauthorized immigration remains a vexing issue for policy makers. The number of unauthorized aliens living in the United States in early 2008 has been estimated at about 12 million.¹⁰ While many observers believe that the unauthorized alien population is decreasing, the sheer number of such aliens commands attention and has elicited a range of ideas about the appropriate policy response. Some legislative proposals for addressing the unauthorized population focus on enforcement and include provisions on border security, worksite and other interior enforcement, and employment eligibility verification. H.R. 3308 and S. 1505 in the 111th Congress are examples of these types of proposals. Other policy makers take a different approach and support some type of legalization program for unauthorized aliens—which they often term “earned adjustment”—sometimes in combination with enforcement measures. Legalization programs were included in some of the comprehensive immigration reform bills considered in the 109th and 110th Congresses, and are included in some measures before the 111th Congress, such as the similar Senate and House Agricultural Job Opportunities, Benefits, and Security Acts of 2009 (AgJOBS Act; S. 1038, H.R. 2414) and the DREAM Act bills discussed in the next section.

⁹ See CRS Report RL33659, *Border Security: Barriers Along the U.S. International Border*, by Chad C. Haddal, Yule Kim, and Michael John Garcia.

¹⁰ U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008*, by Michael Hofer, Nancy Rytina, and Bryan C. Baker, September 2008 (estimate of 11.6 million in January 2008); Jeffrey S. Passel and D’Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008 (estimate of 11.9 million in March 2008).

Unauthorized Students

Unauthorized alien students compose a subpopulation of the larger unauthorized alien population in the United States. 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 relief to this group in terms of both educational opportunities and immigration status. In the aftermath of failed efforts to enact comprehensive immigration reform in the 110th Congress, some supporters of comprehensive reform argued for an incremental approach, in which components of reform, such as DREAM Act legislation, would be pursued individually.¹¹ An attempt in the Senate to enact a DREAM Act bill in the 110th Congress (S. 2205) was unsuccessful.¹²

Similar, but not identical, DREAM Act bills (S. 729, H.R. 1751)¹³ have been introduced in the House and Senate this Congress. Both bills would repeal a provision of current law that restricts the ability of states to provide postsecondary educational benefits to unauthorized aliens. They also would enable eligible unauthorized students to adjust to LPR status in the United States through an immigration procedure known as “cancellation of removal.” Cancellation of removal is a discretionary form of relief authorized by the INA that an alien can apply for while in removal proceedings before an immigration judge. If cancellation of removal is granted, the alien’s status is adjusted to that of an LPR. There would be no limit under either bill on the number of aliens who could be granted cancellation of removal/adjustment of status.¹⁴

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.¹⁵ 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 State Department handles overseas processing of refugees, and DHS/USCIS makes final determinations about eligibility for admission.¹⁶

The Foreign Relations Authorization Act, Fiscal Years 2010 and 2011 (H.R. 2410, Division A, Title II, Subtitle C), as passed by the House, proposes to make various changes to the U.S.

¹¹ Other supporters of comprehensive reform opposed this approach, arguing that it would stymie efforts to enact a comprehensive bill. For both points of view, see, for example, Fawn Johnson, “Student Immigration Bill May Presage Other Senate Votes,” October 23, 2007, CongressDailyPM, <http://www.nationaljournal.com/congressdaily>; and Michael Sandler, “Even Limited Immigration Measures Appear Off the Table for Now,” October 24, 2007, <http://www.cq.com>.

¹² See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno (hereafter cited as CRS Report RL33863).

¹³ S. 729 is the Development, Relief, and Education for Alien Minors (DREAM) Act of 2009; H.R. 1751 is the American Dream Act.

¹⁴ See CRS Report RL33863.

¹⁵ 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.

¹⁶ For additional information on the U.S. refugee program, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno (hereafter cited as CRS Report RL31269).

refugee admissions and resettlement program. It would authorize the admission of refugees at the start of a fiscal year, as specified, in the absence of a timely presidential determination setting the refugee ceiling for that year. It would direct the Department of State (DOS) to expand the training of U.S. embassy and consular personnel and nongovernmental organizations to enable them to refer individuals to the refugee admissions program. It also would require DOS to establish overseas programs in the English language and in cultural and work orientation for refugees who have been approved for U.S. resettlement.

Special legislative provisions facilitate relief for certain refugee groups. The “Lautenberg amendment,” first enacted in 1989 and regularly extended, requires 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 provides 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,” that directs the Attorney General to establish categories of Iranian religious minorities who may qualify for refugee status under the Lautenberg amendment’s reduced evidentiary standard. P.L. 111-8 (Division H, Title VII, §7034(g)) extends the Lautenberg amendment through FY2009. House and Senate versions of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010, include language to further extend the amendment. Both House-passed H.R. 3081 (Title VII, §7034(g)) and S. 1434 (Title VII, §7034(f)), as reported by the Senate Appropriations Committee, would extend the Lautenberg amendment through FY2010.

The “McCain amendment,” first enacted in 1996, made the adult children of certain Vietnamese refugees eligible for U.S. refugee resettlement. P.L. 107-185 revised the amendment for FY2002 and FY2003. Among its provisions, this law enabled adult children previously denied resettlement to have their cases reconsidered. The amendment, as revised, has been regularly extended. P.L. 110-161 (Division J, §634(f)) extended the amendment through FY2009, and P.L. 111-8 (Division H, Title VII, §7034(d)) extends it through FY2010. House-passed H.R. 3081 (Title VII, §7034(d)) would further extend the amendment through FY2011.

Beyond the formal refugee program, other immigration mechanisms have been established over the years to facilitate the admission to the United States of foreign nationals who have worked for or been closely associated with the U.S. government, including the U.S. military. The 111th Congress has created one such program for refugee-like Afghans as part of P.L. 111-8 (see the “Special Immigrants” section below).

Refugee Resettlement Funding

The Department of Health and Human Services’ Office of Refugee Resettlement (HHS/ORR), within the Administration for Children and Families, administers an initial transitional assistance program for temporarily dependent refugees and Cuban/Haitian entrants. P.L. 110-8 (Division F, Title II) provided \$633.4 million for refugee assistance for FY2009. For FY2010, the President has requested \$740.7 million for refugee assistance. The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2010 (H.R. 3293), as passed by the House, would provide \$715.0 for ORR programs. The version of H.R. 3293

reported by the Senate Appropriations Committee would provide \$730.7 million for these programs. Needy refugees are also eligible for federal public assistance programs.¹⁷

Special Immigrants

The permanent employment-based immigration system consists of five preference categories.¹⁸ The fourth preference category is known as “special immigrants.” Over the years, the special immigrant category has been used to confer immigration benefits on particular groups. There are various subcategories of special immigrants under current law. The 111th Congress has acted to extend an existing special immigrant program for religious workers and to create a new one for certain Afghans employed by, or on behalf of, the U.S. government.

Religious workers

Ministers of religion and religious workers make up the largest number of special immigrants. Religious work is currently defined as habitual employment in an occupation that is primarily related to a traditional religious function and that is recognized as a religious occupation within the denomination. While the INA provision for the admission of ministers of religion is permanent, the provision admitting religious workers has always had a sunset date. The provision is currently set to expire on October 31, 2009, in accordance with H.R. (Division B, §133). Section 571(a) of the Senate-passed version of H.R. 2892 would extend the special immigrant visa for religious workers until September 30, 2012.

Afghan Allies

P.L. 111-8 (Division F, Title VI) authorizes DHS or DOS, in consultation with DHS, to provide special immigrant status to certain nationals of Afghanistan. An Afghan is eligible if he or she was employed by or on behalf of the U.S. government in Afghanistan on or after October 7, 2001, for not less than one year; provided documented valuable service to the U.S. government; and has experienced “an ongoing serious threat as a consequence of the alien’s employment by the United States government.” This special immigrant program is capped at 1,500 principal aliens (excluding spouses and children) annually for FY2009 through FY2013. It is modeled on a special immigrant program established for Iraqis in the 110th Congress.¹⁹

¹⁷ See CRS Report RL31269.

¹⁸ The five categories, in order from first preference to fifth preference, are priority workers; professionals holding advanced degrees or aliens of exceptional ability; skilled workers, professionals, and unskilled workers; special immigrants; and employment creation investors. See CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

¹⁹ See archived CRS Report RL34204.

Other Issues and Legislation

Immigrant Investor Regional Center Program

There is currently one immigrant visa set aside specifically for foreign investors (immigrant investors) coming to the United States. Immigrant investors comprise the fifth employment-based preference category, and the visa is commonly referred to as the EB-5 visa. 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.²⁰ These Regional Centers were designed to more easily facilitate investment, as well as target investment toward specific geographic areas. This pilot program has been extended multiple times, most recently through October 31, 2009, by the Continuing Appropriations Resolution, 2010 (H.R. 2918, Division B, §130). Separately, the Senate agreed to a floor amendment (S.Amdt. 1407) to the Homeland Security Appropriations bill (H.R. 2892) to permanently reauthorize the EB-5 Regional Center Program (§549). On July 22, 2009, the Senate Judiciary Committee held a hearing to assess the Regional Center Program.²¹

Widow Penalty in Permanent Admissions

Proposed legislation, including provisions in the Senate-passed version of H.R. 2892, would eliminate the so-called “widow penalty.” This penalty is the termination of a pending immigrant petition for an alien spouse and of a related, pending application for LPR adjustment of status or an immigrant visa, upon the death of the U.S. citizen spouse, when the couple has been married less than two years. An approved petition may be revoked where the related application for LPR status has not been granted or where the alien spouse has not been admitted into the United States on an immigrant visa.²² This penalty results from the interpretation by USCIS of the statutory definition of “immediate relative.” USCIS interprets the definition to mean that an alien spouse ceases to be married to a U.S. citizen spouse and to be an “immediate relative” of a U.S. citizen upon the death of the U.S. citizen spouse.²³ Where the couple has been married at least two years at the time of the U.S. citizen’s death, USCIS converts the immigrant petition filed by a U.S. citizen for an alien spouse into a self-petition by the surviving alien spouse.²⁴

²⁰ §610 of P.L. 102-395. 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. For more information on Regional Centers for immigrant investors, see CRS Report RL33844, *Foreign Investor Visas: Policies and Issues*, by Chad C. Haddal.

²¹ U.S. Congress, Senate Committee on the Judiciary, *Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program*, hearing on S.Amdt. 1407 to H.R. 2892, 111th Cong., 1st sess., July 22, 2009.

²² 8 C.F.R. §205.1(a)(3) provides for automatic revocation where the beneficiary of an immigrant petition for an immediate relative has not begun his/her journey to the United States (on an immigrant visa) or has not received a final decision on an LPR application. So if the U.S. citizen spouse died while the alien spouse was in transit to the United States, the surviving spouse would be admitted as an immigrant into the United States upon arrival.

²³ INA §201(b)(2)(A)(i) defines “immediate relative” (codified at 8 U.S.C. §1151(b)(2)(A)(i)). Under 8 C.F.R. §205.1(a)(3)(i)(C)(2), an immigrant petition for an alien spouse is automatically revoked upon the death of the U.S. citizen, but may be reinstated at the discretion of the agency if the alien spouse requests humanitarian reinstatement of the immigrant petition and has a qualified relative who agrees to be a substitute sponsor.

²⁴ See 8 C.F.R. §§204.2(i)(1)(iv), 205.1(a)(3)(i)(C)(1), and USCIS Adjudicator’s Field Manual §21.2(a)(4).

Several lawsuits, including a class-action lawsuit,²⁵ have been filed to challenge the widow penalty on the grounds that, under the INA, a widowed, surviving spouse still qualifies as an immediate relative for the purpose of an immigrant petition and related, pending LPR/visa application, and that therefore the petition should not be terminated. Four federal appellate courts have ruled on the issue, with the U.S. Court of Appeals for the Third Circuit ruling differently than the First, Sixth, and Ninth Circuits, thus creating a circuit split that may be resolved by the U.S. Supreme Court.²⁶ The Third Circuit held that a surviving spouse did not qualify as an immediate relative spouse where the U.S. citizen spouse died before the couple had been married two years. The other circuits held that the surviving spouse still qualified as an immediate relative and that the immigrant petition should not be terminated or revoked. A petition by the plaintiff in the Third Circuit case for certiorari by the U.S. Supreme Court is currently pending.²⁷

In response to litigation, USCIS has issued a memorandum authorizing deferred action on widow-penalty cases outside the jurisdiction of the First, Sixth, and Ninth Circuits (USCIS must follow the statutory interpretation of the federal appellate courts in those jurisdictions). This means that further agency action (including deportation proceedings) regarding a surviving spouse whose alien relative petition has been or could be terminated is currently suspended for up to two years from the grant of deferred action.²⁸ This policy remains in effect until further notice.

Meanwhile, several bills have been introduced to abolish automatic termination or revocation of an immigrant petition for an alien spouse based on the death of the U.S. citizen spouse, while retaining the discretion of USCIS to deny an application if it finds that the underlying marriage was not bona fide. Among the relevant legislative proposals, §§571(c) and (d) of the Senate-passed version of H.R. 2892 have advanced furthest in the legislative process; H.R. 2892 is currently in conference negotiations. Aside from bills to amend the immigration laws generally, a private bill may provide relief for a surviving spouse whose petition/application has been revoked because of the widow penalty, but this type of relief assists only the individual named in the bill.²⁹

Waivers for Foreign Medical Graduates

Foreign medical graduates (FMGs) may enter the United States on J-1 nonimmigrant visas in order to receive graduate medical education and training. Such FMGs must return to their home countries after completing their education or training for at least two years before they can apply for certain other nonimmigrant visas or LPR status, unless they are granted a waiver of the foreign residency requirement. States are able to request waivers on behalf of FMGs under a temporary program, known as the Conrad State Program. Established by a 1994 law, this program initially applied to aliens who acquired J status before June 1, 1996. The Conrad State Program

²⁵ Hootkins v. Chertoff, No. CV 07-5696 CAS (MANx), 2009 U.S. Dist LEXIS 3243, 2009 WL 57031 (C.D. Cal. Jan. 6, 2009) (order granting plaintiffs' motion for class certification of a class within the Ninth Circuit, but not nationwide).

²⁶ Lockhart v. Napolitano, 573 F.3d 251, (6th Cir. 2009); Taing V. Napolitano, 567 F.3d 19 (1st Cir. 2009); Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009), *petition for cert. filed* (U.S. July 23, 2009) (No.09-94); Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006).

²⁷ Robinson v. Napolitano, No. 09-94, *petition for cert. filed* (U.S. July 23, 2009).

²⁸ Donald Neufeld, Acting Associate Director, Office of Domestic Operations, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children*, September 4, 2009, <http://www.ssad.org/deferredaction.html>.

²⁹ An example of a private bill for the relief of a surviving spouse is H.R. 1290, for the relief of Kumi Iizuka-Barcena; H.Rept. 110-826, accompanying similar bill H.R. 5243 from the 110th Congress, describes Iizuka-Barcena's case, frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr826.110.pdf.

has been extended several times, most recently by H.R. (Division B, §134), which makes the program applicable to aliens who acquire J before October 31, 2009. The Senate-passed version of H.R. 2892 includes a provision (§571(b)) to extend the program until September 30, 2012.

Alien Smuggling

Some contend that the smuggling of aliens into the United States constitutes a significant risk to national security and public safety. Because smugglers facilitate the illegal entry of persons into the United States, some maintain that terrorists may use existing smuggling routes and organizations to enter undetected. In addition to generating billions of dollars in revenue for criminal enterprises, alien smuggling can lead to other collateral crimes.³⁰ The main alien smuggling statute (INA §274) delineates the criminal penalties, asset seizure rules, and prima facie evidentiary requirements for smuggling offenses.

The Alien Smuggling and Terrorism Prevention Act of 2009 (H.R. 1029), which has been passed by the House, would amend the alien smuggling provisions of both the INA and Title 18 of the U.S. Code. It would essentially expand the scope of activity prohibited under INA §274. It would, for example, add a provision to INA §274 that would affirmatively assert extraterritorial jurisdiction for acts of alien smuggling that occur outside the United States. This proposal would also heighten the criminal penalties for various smuggling offenses. Furthermore, this bill would alter §2237 of Title 18 of the U.S. Code by increasing the penalties for individuals piloting a maritime vessel who fail to heed the orders of a federal law enforcement officer if the offense is committed in the course of violating INA §274 or certain other provisions related to human trafficking.

Other Legislation Receiving Action

Immigration Relief for Immediate Family of Victims of September 11, 2001

The September 11 Family Humanitarian Relief and Patriotism Act of 2009 (H.R. 3290), as ordered reported by the House Judiciary Committee, would enable certain spouses and children of aliens who died as a direct result of the September 11 terrorist attacks to adjust to LPR status. These adjustments of status would not count against the numerical limits in the INA.

Victims of Violence and Trafficking

The Improving Assistance to Domestic and Sexual Violence Victims Act of 2009 (S. 327) would amend the Violence Against Women Act of 1994 and the Omnibus Crime Control and Safe Streets Act of 1968 to expand victim protections. As reported by the Senate Judiciary Committee, the bill includes provisions related to T nonimmigrants (victims of severe forms of trafficking) and U nonimmigrants (individuals who have experienced substantial physical or mental abuse as a result of having been victims of certain criminal activities).³¹

³⁰See, for example, U.S. Government Accountability Office, *Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response*, GAO-05-305, May 27, 2005, <http://www.gao.gov>.

³¹For information on immigration-related trafficking issues, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Liana Sun Wyler, Alison Siskin, and Clare Ribando Seelke.

Temporary Professional Specialty (H-1B) Workers

P.L. 111-5 includes a provision (Division A, Title XVI, §1611) that requires H-1B employers receiving Troubled Asset Relief Program (TARP) funding to comply with the more rigorous labor market rules of H-1B dependent companies.³² This provision is scheduled to sunset in February 2011.

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³² For further discussion, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem.