Congressional Research Service

U.S. Immigration Policy on Haitian Migrants

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March 31, 2010

Congressional Research Service
7-5700
www.crs.gov
RS21349

CRS Report for Congress
Prepared for Members and Committees of Congress

AILA InfoNet Doc. No. 10050566. (Posted 05/05/10)

Summary

The environmental, social, and political conditions in Haiti have long prompted congressional interest in U.S. policy on Haitian migrants, particularly those attempting to reach the United States by boat. While some observers assert that such arrivals by Haitians are a breach in border security, others maintain that these Haitians are asylum seekers following a decades old practice of Haitians coming by boat without legal immigration documents. Migrant interdiction and mandatory detention are key components of U.S. policy toward Haitian migrants, but human rights advocates express concern that Haitians are not afforded the same treatment as other asylum seekers.

The devastation caused by the January 12, 2010, earthquake in Haiti has led Department of Homeland Security (DHS) Secretary Janet Napolitano to grant Temporary Protected Status (TPS) to Haitians in the United States at the time of the earthquake. The scale of current humanitarian crisis—estimated thousands of Haitians dead and reported total collapse of the infrastructure in the capital city of Port au Prince—resulted in this TPS announcement on January 15, 2010.

Secretary Napolitano also announced that Haitian children who were legally confirmed as orphans eligible for intercountry adoption by the government of Haiti and who were in the process of being adopted by U.S. residents prior to the earthquake have been given humanitarian parole to come to the United States. Other Haitian orphans potentially eligible for humanitarian parole include children who were identified by an adoption service provider or facilitator as eligible for intercountry adoption and who were matched to prospective American adoptive parents prior to January 12, 2010.

Those Haitians who are deemed Cuban-Haitian Entrants are among the subset of foreign nationals who are eligible for federal benefits and cash assistance. Those Haitians who are newly arriving legal permanent residents, however, are barred from the major federal benefits and cash assistance for the first five years after entry. The President has included funding to cover additional costs for federal benefits and cash assistance resulting from Haitian evacuees, among other activities in his FY2010 supplemental request.

According to the U.S. Department of State (DOS), there are 54,716 Haitians who have approved petitions to immigrate to the United States and who are waiting for visas to become available. Advocates for Haitians are asking Secretary Napolitano to give humanitarian parole to those Haitians with approved petitions for visas. Proponents of expediting the admission of Haitians with family in the United States maintain that it would relieve at least some of the humanitarian burden in Haiti and would increase the remittances sent back to Haiti to provide critical help as the nation tries to rebuild. Those opposed to expediting the admission of Haitians assert that it would not be in the national interest, nor would it be fair to other foreign nationals waiting to reunite with their families.

More broadly, there are concerns that the crisis conditions in Haiti may result in mass migration from the island. Agencies within DHS that are the leads in handling a potential mass migration include the U.S. Coast Guard (interdiction); Customs and Border Protection (apprehensions and inspections); Immigration and Customs Enforcement (detention and removal); and the U.S. Citizenship and Immigration Services (credible fear determinations). The balancing of DHS's border security and immigration control responsibilities in the midst of a humanitarian disaster poses a challenge.

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Current Context

The devastation caused by the January 12, 2010, earthquake in Haiti is focusing world attention on the humanitarian crisis and prompting U.S. leaders to reconsider current policies on Haitian migration.[1] Some Members of Congress have long criticized the interdiction and mandatory detention of Haitians who attempted to enter the United States without proper immigration documents as too harsh given country conditions. Proponents of immigration control policies have held sway for many years in large part because they argue that more lenient treatment of Haitians would serve as a magnet for illegal migration from the poorest nation in this hemisphere. Whether the balance should tip more toward humanitarian policies as a consequence of the earthquake is an issue before the 111th Congress.

Immigration Trends

Migration by Sea

The phenomenon of Haitians coming to the United States by boat without proper travel documents dates back at least to the 1970s. An estimated 25,000 Haitians were among the mass migration of over 150,000 asylum seekers who arrived in South Florida in 1980 during the Mariel boatlift.[2] The U.S. Coast Guard, as described below, has been interdicting vessels carrying Haitians since 1981. **Figure 1** presents the U.S. Coast Guard data on Haitian migrants that the Coast Guard has encountered on boats and rafts in the years following the Mariel boatlift. Most notably, there was a drop of migrants after the Haitian elections in 1990 followed by a dramatic upturn after the 1991 coup (discussed in "Crisis After the Coup" below). As country conditions in Haiti[3] and U.S. policy responses to the surges in Haitian boat people are considered, the spikes and valleys in **Figure 1** become more understandable. Since FY1998, the Coast Guard had interdicted over 1,000 Haitians each year, with 1,198 in FY2006 and 1,610 in FY2007. Haitian interdictions were second only to Cuban interdictions (2,868) in FY2007. In FY2009, interdictions of 1,782 Haitians led all other countries. As of January 12, 2010, the Coast Guard had interdicted 17 Haitians in FY2010.[4]

[1] For further discussion on current conditions in Haiti, see CRS Report R40507, *Haiti: Current Conditions and Congressional Concerns*, by Maureen Taft-Morales, and CRS Report R41023, *Haiti Earthquake: Crisis and Response*, by Rhoda Margesson and Maureen Taft-Morales.

[2] During a seven-month period in 1980, approximately 125,000 Cubans and 25,000 Haitians arrived by boats to South Florida. This mass migration became known as the Mariel boatlift because most of the Cubans departed from Mariel Harbor in Cuba.

[3] For historical analysis of conditions in Haiti, see CRS Report RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns*, by Maureen Taft-Morales and Clare Ribando Seelke.

[4] For interdiction data, see http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/currentstats.asp

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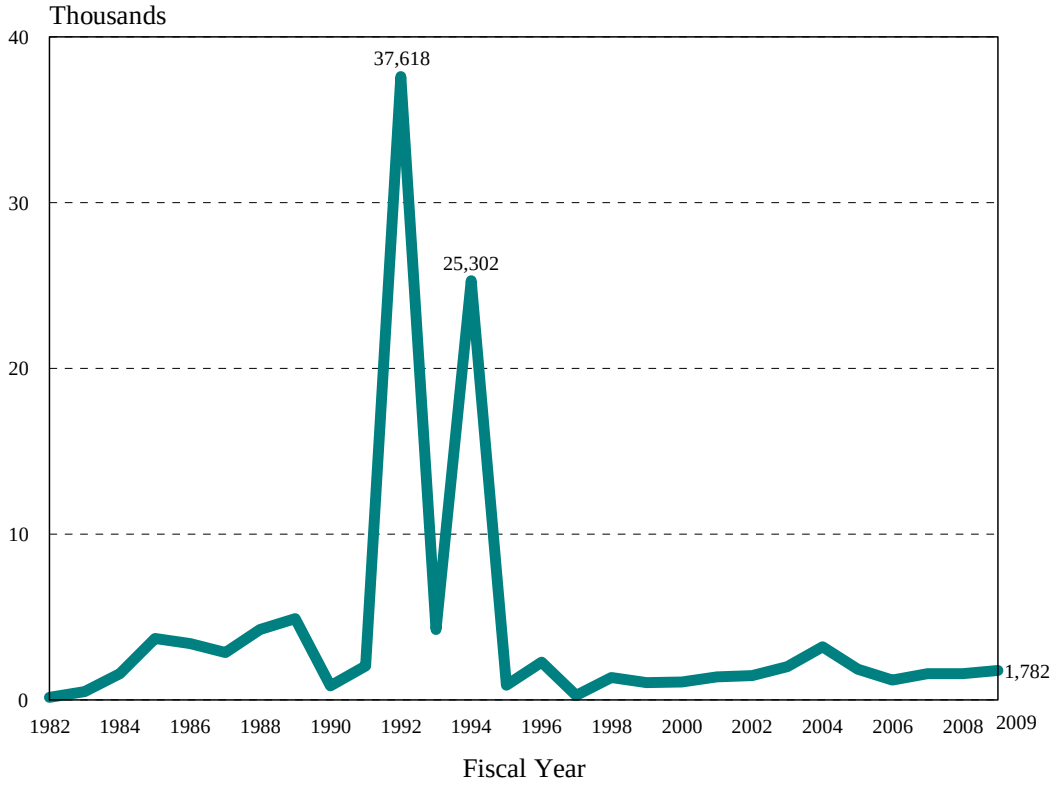
Figure 1. U.S. Coast Guard Interdiction of Haitians, 1982-2009



Source: CRS presentation of U.S. Coast Guard data.

Not all Haitian migrants are interdicted by the Coast Guard, as witnessed in the widely televised landing of over 200 Haitians in Biscayne Bay, FL, in October 2002. Another noteworthy incident occurred in December 2001 when a boat bringing 167 Haitians ran aground in South Florida. In March 2007, the U.S. Border Patrol apprehended 100 Haitians who came ashore near Miami. During 2007, there were also reports of deaths at sea when boats with Haitians capsized or—in one report—caught fire.[5]

Haitians Currently Residing in the United States

In the 2000 Decennial census of the U.S. population, there were 532,000 persons reporting Haitian ancestry residing in the United States, 185,000 who were born in the United States and another 154,000 who were naturalized U.S. citizens. According to Congressional Research Service estimates based on the 2006-2008 American Community Survey (a 1% sample of the U.S. population conducted by the Bureau of the Census), there were approximately 757,000 persons reporting Haitian ancestry in the United States (margin of error is 15,233). Of these, an estimated 523,000 were born in Haiti and migrated to the United States.[6] These data do not

[5] Manuel Roig-Franzia, "20 Haitian Migrants Die at Sea; 58 Missing," *The Washington Post*, May 5, 2007, A12.

[6] CRS congressional distribution memorandum, *Estimating the U.S. Haitian Population by State*, by William Kandel, January 22, 2010. (available by request)

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indicate the immigration status of the Haitians, and a portion of these Haitians may have become naturalized U.S. citizens.[7]

During the period 2001-2008, there were 166,281 Haitians who became legal permanent residents (LPRs) in the United States, according to the Office of Immigration Statistics (OIS) in the Department of Homeland Security (DHS).[8] OIS estimates that approximately 230,000 Haitians were LPRs as of 2008.[9] Many of these Haitians adjusted to LPR status as a result of the Haitian Refugee Immigration Fairness Act of 1998, which is discussed more fully below.

There are currently no reliable estimates of Haitians residing in the United States without authorization (i.e., unauthorized aliens). The OIS estimates on unauthorized alien residents in 2008 do not include Haiti among the top 10 sending countries.[10] DHS has indicated that 35,110 Haitians have submitted petitions for Temporary Protected Status, as discussed below.[11]

Policy Evolution

Post-Mariel Policy

The Carter Administration labeled Haitians as well as Cubans who had come to the United States during the 1980 Mariel Boatlift as "Cuban-Haitian Entrants" and used the discretionary authority of the Attorney General (e.g., humanitarian parole) to admit them. It appeared that the vast majority of Haitians who arrived in South Florida did not qualify for asylum according to the newly enacted individualized definition of persecution in §207-208 of the Immigration and Nationality Act (INA, as amended by the Refugee Act of 1980).[12] Subsequently, an adjustment of status provision was included in the Immigration Reform and Control Act (IRCA) of 1986 that enabled Cuban-Haitian Entrants to become legal permanent residents (LPRs).[13]

Interdiction Agreement

In 1981, the Reagan Administration reacted to the mass migration of asylum seekers who arrived in boats from Haiti by establishing a program to interdict (i.e., stop and search certain vessels suspected of transporting undocumented Haitians). This agreement, made with then-dictator Jean-Claude Duvalier, authorized the U.S. Coast Guard to board and inspect private Haitian vessels on

[7] Using the 2008 ACS rather than the 2006-2008 pooled ACS, other researchers report an estimate of 535,000 Haitian-born residents. Aaron Terrazas, "Haitian Immigrants in the United States," *Migration Information Source*, January, 2010.

[8] Department of Homeland Security Office of Immigration Statistics, *2008 Yearbook of Immigration Statistics*, August 2009.

[9] Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Legal Permanent Resident Population in 2008*, by Nancy Rytina, 2009.

[10] Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker, 2009.

[11] Telephone conversation with USCIS Office of Legislative Affairs, March 30, 2010.

[12] Aliens must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.

[13] §202 of the Immigration Reform and Control Act of 1986 (P.L. 99-603).

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the high seas and to interrogate the passengers. At that time, the United States generally viewed Haitian boat people as economic migrants deserting one of the poorest countries in the world.

Under the original agreement, an inspector from the former Immigration and Naturalization Service (INS) and a Coast Guard official, working together, would check the immigration status of the passengers and return those passengers deemed to be undocumented Haitians. An alien in question must have volunteered information to the Coast Guard or INS inspector that she or he would be persecuted if returned to Haiti in order for the interdicted Haitian to be considered for asylum. Ultimately, INS would determine the immigration status of the alien in question. From 1981 through 1990, 22,940 Haitians were interdicted at sea. Of this number, INS considered 11 Haitians qualified to apply for asylum in the United States.

Crisis After the Coup

The 1991 military *coup d'etat* deposing Haiti's first democratically elected President, Jean Bertrand Aristide, however, challenged the assumption that all Haitian boat people were economic migrants. The State Department reportedly hesitated on whether the Haitians should be forced to return given the strong condemnation of the *coup* by the United States and the Organization of American States. By November 11, 1991, approximately 450 Haitians were being held on Coast Guard cutters while the Administration of then-President George H. W. Bush considered the options. The former Bush Administration lobbied for a regional solution to the outflow of Haitian boat people, and the United Nations High Commissioner for Refugees (UNHCR) arranged for several countries in the region—Belize, Honduras, Trinidad and Tobago, and Venezuela—to temporarily provide a safe haven for Haitians interdicted by the Coast Guard. Some of the other countries in the region were each willing to provide safe haven for only several hundred Haitians. Meanwhile, the Coast Guard cutters were becoming severely overcrowded, and on November 18, 1991, the United States forcibly returned 538 Haitians to Haiti.

Pre-Screening and Repatriation

The options for safe havens in third countries in the region proved inadequate for the sheer numbers of Haitians fleeing their country, and the George H. W. Bush Administration began treating the Haitians fleeing by boat as asylum seekers. The Coast Guard took them to the U.S. naval base in Guantanamo, Cuba, where they were pre-screened for asylum in the United States. During this period, there were approximately 10,490 Haitians who were paroled into the United States after a pre-screening interview at Guantanamo determined that they had a credible fear of persecution if returned to Haiti. On May 24, 1992, citing the surge of Haitians that month, then-President Bush ordered the Coast Guard to intercept all Haitians in boats and immediately return them without interviews to determine whether they were at risk of persecution. The Administration offered those repatriated the option of in-country refugee processing.[14]

[14] CRS Report 93-233, *Asylum Seekers: Haitians in Comparative Context*, by Ruth Ellen Wasem. (Archived report available upon request.)

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Safe Haven and Refugee Processing

The repatriation policy continued for two years, until then-President Bill Clinton announced that interdicted Haitians would be taken to a location in the region where they would be processed as potential refugees. The refugee processing policy lasted only a few weeks—June 15 to July 5, 1994. Much like the George H. W. Bush Administration, the Clinton Administration cited the exodus of Haitian boat people as a reason for suspending refugee processing. Instead, the new policy became one of regional "safe havens" where interdicted Haitians who expressed a fear of persecution could stay, but they would not be allowed to come to the United States. In 1993, in-country refugee processing was further expanded to Les Cayes and Cape Haiten. In December 1997, President Clinton instructed the Attorney General to grant deferred enforced departure (DED) to Haitians for one year. Currently interdicted Haitians who expressed a fear of persecution are taken for a credible fear hearing at the Guantanamo Bay detention center. If deemed a refugee, they are resettled in the third country. In 2005, only nine of the 1,850 interdicted Haitians received a credible fear hearing and, of those, one man was granted refugee status.[15]

Haitian Refugee Immigration Fairness Act (HRIFA)

When Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA) in November 1997 that enabled Nicaraguans and Cubans to become legal permanent residents and permitted certain unsuccessful Central American and East European asylum applicants to seek another form of immigration relief, it opted not to include Haitian asylum seekers. The following year, Congress enacted the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998 (S. 1504/H.R. 3049) that enabled Haitians who filed asylum claims or who were paroled into the United States before December 31, 1995, to adjust to legal permanent residence. HRIFA was added to the FY1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277) at the close of the 105th Congress.[16] P.L. 110-161 deleted the requirement that the Comptroller General of the United States submit to Congress a status report on HRIFA applications every six months.

Mandatory Detention of Aliens in Expedited Removal

Since enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208), aliens arriving in the United States without proper immigration documents are immediately placed in expedited removal. If an alien expresses a fear of being forced to return home, the immigration inspector refers the alien to a asylum officer who determines whether the person has a "credible fear." IIRIRA requires that those aliens must be kept in detention while their "credible fear" cases are pending.[17] As a result, those Haitians who do make it to U.S. shores and do express a fear of repatriation are placed in detention. After the credible fear determination, the case is referred to an Executive Office for Immigration Review

[15] *Miami Herald*, "U.S. Policy Unjust to Haitians Fleeing Violence," January 9, 2006; data confirmed in telephone conversation with DHS officials, January 12, 2006.

[16] CRS Report 98-270, *Immigration: Haitian Relief Issues and Legislation*, by Ruth Ellen Wasem. (Archived report available upon request.)

[17] CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

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(EOIR) immigration judge for an asylum and removal hearing (during which there is no statutory requirement that aliens be detained).

EOIR granted asylum to 570 Haitians and denied asylum to 2,522 Haitians in FY2006.[18] In FY2007, EOIR granted asylum to 587 Haitians, and 510 Haitians were granted asylum in FY2008 (the most recent year for which data are available), an approval rate of 4.6% and 4.8%, respectively.[19] With respect to the number of Haitians in detention, according to Immigration and Customs Enforcement, as of January 19, 2010, there were 488 Haitians in detention, most of whom (415) were criminal aliens.[20]

Procedural Practices and Controversies

National Security

The former INS published a notice clarifying that certain aliens arriving by sea who are not admitted or paroled are to be placed in expedited removal proceedings and detained (subject to humanitarian parole) in November 2002.[21] This notice concluded that illegal mass migration by sea threatened national security because it diverts the Coast Guard and other resources from their homeland security duties. Then-Attorney General John Ashcroft expanded on this rationale in his April 17, 2003, ruling that instructs EOIR immigration judges to consider "national security interests implicated by the encouragement of further unlawful mass migrations" in making bond determinations regarding release from detention of unauthorized migrants who arrive in "the United States by sea seeking to evade inspection."[22] The case involved a Haitian who had come ashore in Biscayne Bay, FL, on October 29, 2002, and had been released on bond by an immigration judge. EOIR's Board of Immigration Appeals (BIA) had upheld his release, but the Attorney General vacated the BIA decision.[23]

Parole from Detention

In 2002, DOJ acknowledged that it instructed field operations "to adjust parole criteria with respect to all inadmissible Haitians arriving in South Florida after December 3, 2001, and that none of them should be paroled without the approval of headquarters."[24] The Administration of President George W. Bush maintained that paroling Haitians (as is typically done for aliens who meet the credible fear threshold) would encourage other Haitians to embark on the "risky sea travel" and "potentially trigger a mass asylum from Haiti to the United States." The Bush Administration further argued that all migrants who arrive by sea posed a risk to national security and warned that terrorists may pose as Haitian asylum seekers. Critics of the Bush

[18] U.S. Department of Justice, Executive Office for Immigration Review, *FY2006 Statistical Yearbook*.

[19] U.S. Department of Justice, Executive Office for Immigration Review, *FY2008 Statistical Yearbook*.

[20] Communication between DHS Immigration and Customs Enforcement and the Congressional Research Service, January 19, 2010.

[21] *Federal Register*, vol. 67, no. 219, pp. 68923-68926 (November 13, 2002).

[22] 23 I&N December 572 (A.G. 2003).

[23] CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Chad C. Haddal and Alison Siskin.

[24] Letter from Daniel J. Bryant, Assistant Attorney General, to Sens. Edward Kennedy and Sam Brownback, dated September 25, 2002.

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Administration's Haitian parole policy focused on the 167 Haitians detained after their boat ran aground in South Florida on December 3, 2001, a majority of whom reportedly passed the initial credible fear hearing. Critics maintained that the Haitians were being singled out for more restrictive treatment.[25] They challenged the view that Haitians posed a risk to national security and asserted that the term was being construed too broadly, being applied arbitrarily to Haitians, and wasting limited resources.[26] OIS has reported that Haitians made up 2% of the 378,582 foreign nationals detained by DHS Immigration and Customs Enforcement in 2008.

Access to Legal Counsel

Concern also arose that the detention of Haitians interferes with access to legal counsel to aid with their asylum cases. According to congressional testimony, attorneys in South Florida for the detained Haitians maintained that they face various obstacles, including restricted hours to meet with clients and a serious lack of adequate visitation space. Pro bono lawyers working with Haitians argued that they experienced long delays waiting to see clients.[27] Others pointed out that the expedited removal provisions in INA were enacted to do just that—*expedite removals*. Aliens without proper immigration documents who try to enter the United States, they argued, should not be afforded the same procedural and legal rights as aliens who enter legally.

Temporary Protected Status[28]

The issue of Haitian TPS has arisen several times in the past few years, most notably after the U.S. Ambassador declared Haiti a disaster in September 2004 due to the magnitude of the effects of Tropical Storm Jeanne. More recently, a series of tropical cyclones in 2008 resulted in hundreds of deaths and led some to label the city of Gonaives uninhabitable.[29] The Administration of President George W. Bush did not grant TPS or other forms of blanket relief to Haitians, nor was legislation that would have provided TPS to Haitians, such as H.R. 522 in the 110th Congress, enacted. Opponents of Haitian TPS traditionally argue that it would result in an immigration amnesty for unauthorized Haitians and foster illegal migration from the island.

The scale of the current humanitarian crisis—estimated thousands of Haitians dead and reported total collapse of the infrastructure in the capital city of Port au Prince—led DHS to announce on January 13, 2010, that it is temporarily halting the deportation of Haitians. "TPS is in the range of considerations we consider in a disaster," stated DHS Deputy Press Secretary Matthew Chandler, "but our focus remains on saving lives."[30] In the 111th Congress, Representative Alcee Hastings

[25] U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration, *Hearing on the Detention and Treatment of Haitian Asylum Seekers*, October 1, 2002. (Hereafter cited as Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*.)

[26] George Lardner Jr., "More Illegal Immigrants Can Be Held Ashcroft's Ruling Cites National Security Issues," *The Washington Post*, April 25, 2003, p. A6.

[27] Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*

[28] For additional information on Temporary Protected Status, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[29] Trenton Daniel and Jacqueline Charles, "Mud and Misery Rule Storm-Ravaged City," *Miami Herald*, November 2, 2008, p. A1.

[30] Toluse Olorunnipa and Alfonso Chardy, "U.S. Halts Deportation of Undocumented Haitians Due to Earthquake," *Miami Herald*, January 13, 2010.

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has introduced H.R. 144, which would make nationals from Haiti eligible for TPS status. H.R. 264, introduced by Representative Shelia Jackson-Lee, includes a sense of Congress that "the Secretary of Homeland Security should be more liberal with respect to Haiti in deciding whether to designate that country for temporary protected status."

On January 15, 2010, DHS Secretary Napolitano granted TPS for 18 months to Haitian nationals who were in the United States as of January 12, 2010. She stated: "Providing a temporary refuge for Haitian nationals who are currently in the United States and whose personal safety would be endangered by returning to Haiti is part of this Administration's continuing efforts to support Haiti's recovery."[31]

Federal Assistance to Haitian Migrants

Those Haitians who are deemed Cuban-Haitian Entrants are among the subset of foreign nationals who are eligible for federal benefits and cash assistance. Those Haitians who are newly arriving LPRs, however, are barred from the major federal benefits and cash assistance for the first five years after entry. Over a decade ago, Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) established comprehensive restrictions on the eligibility of noncitizens for means-tested public assistance and limited the eligibility of refugees and asylees to five years.[32] Foreign nationals who enter the United States on temporary visas (i.e., nonimmigrants) and those who enter the United States without authorization are barred from any federal public benefit except the emergency services and programs expressly listed in PRWORA.[33] Amendments in P.L. 105-33 and P.L. 105-185 extended the period of food stamp/Supplemental Security Income (SSI)/Medicaid (but not Temporary Assistance for Needy Families) eligibility for refugees and asylees from five to seven years and added Cuban and Haitian Entrants to those eligible for these benefits for seven years.

Cuban-Haitian Entrants

The term "Cuban-Haitian Entrant" is not defined in the INA, but its usage dates back to 1980. Many of the Cubans and the vast majority of the Haitians who arrived in South Florida during the 1980 Mariel Boatlift did not qualify for asylum according to the individualized definition of persecution in §§ 207-208 of the INA. The Carter Administration labeled Cubans and Haitians as "Cuban-Haitian Entrants" and used the discretionary parole authority of the Attorney General to admit them to the United States. Subsequently, an adjustment of status provision was included in the Immigration Reform and Control Act (IRCA) of 1986 (P.L. 99-603) that enabled the Cuban-Haitian Entrants who had arrived during the Mariel Boatlift to become LPRs.[34]

[31] U.S. Department of Homeland Security, "Statement from Secretary Janet Napolitano," press release, January 15, 2010.

[32] CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by Ruth Ellen Wasem.

[33] CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by Ruth Ellen Wasem.

[34] § 202 of the Immigration Reform and Control Act of 1986 (P.L. 99-603).

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While not a term of law in the INA, Congress did define Cuban-Haitian Entrant in the context of eligibility for federal assistance. Title V of the Refugee Education Assistance Act of 1980 (P.L. 96-422), commonly known as Fascell-Stone, defined Cuban and Haitian Entrants as:

> (1) any individual granted parole status as a Cuban/Haitian Entrant (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided; and
>
> (A) who—(i) was paroled into the United States and has not acquired any other status under the Immigration and Nationality Act [this chapter]; (ii) is the subject of removal proceedings under the Immigration and Nationality Act [this chapter]; or (iii) has an application for asylum pending with the Immigration and Naturalization Service; and
>
> (B) with respect to whom a final, nonappealable, and legally enforceable order of removal has not been entered.[35]

The intent and resulting effect of the Fascell-Stone provision was to treat Cubans and Haitians in the same manner as refugees and asylees for the purposes of the federal refugee resettlement program and most other federal benefits and assistance.[36] The Office of Refugee Resettlement (ORR) uses the term Cuban-Haitian Entrants for Haitians who meet the Fascell-Stone definition. It could be argued that Haitians who currently benefit from TPS meet the definition of Cuban-Haitian Entrant, as do those who are paroled into the United States after the January 12, 2010, earthquake. It remains to be seen, however, whether policy makers will attempt to narrow the applicability of the Cuban-Haitian Entrants classification for Haitians displaced by the earthquake.[37]

Major Federal Benefit Programs

Supplemental Security Income (SSI)

Under current law, asylees, refugees, and Cuban-Haitian entrants (as well as certain aliens whose deportation/removal is being withheld for humanitarian reasons and Vietnam-born Amerasians fathered by U.S. citizens) are among categories of aliens who may be eligible for SSI *for seven years* after entry/grant of such status.[38] In order to receive SSI benefits, these qualified aliens must meet all the requirements for eligibility as native-born citizens. SSI eligibility requirements include meeting the definitions for age, disability, or blindness and falling below established income and resource thresholds.[39] This SSI eligibility for Cuban-Haitian entrants as well as

[35] §501(e)(1) of the Refugee Education Assistance Act of 1980 (P.L. 96-422).

[36] §501(a)(1) of P.L. 96-422 states: "The President shall exercise authorities with respect to Cuban and Haitian entrants which are identical to the authorities which are exercised under chapter 2 of title IV of the Immigration and Nationality Act."

[37] For a discussion of how the classification of Cuban-Haitian Entrant is applied to Cubans in the United States, see CRS Report R40566, *Cuban Migration to the United States: Policy and Trends*, by Ruth Ellen Wasem.

[38] In most cases, an officer of the U.S. Citizenship and Immigration Services from DHS determines if a non-citizen is granted status in one of the qualified alien categories.

[39] Countable resource limit for SSI eligibility is $2,000 for individuals and $3,000 for couples. See CRS Report RS20294, *SSI Income and Resource Limits: A Fact Sheet*, by Scott Szymendera for additional information on income and resource limits and exclusions.

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refugees, asylees, and aliens in other specified humanitarian categories was extended to nine years (during FY2009 through FY2011) by P.L. 110-328. If qualified aliens are eligible for SSI, they are likely to be eligible for enrollment in their state's Medicaid Program.[40]

Medicaid

Haitians deemed to be Cuban-Haitian Entrants are eligible for Medicaid until they have been in the United States for seven years. After the initial seven years, states have the option to continue to provide Medicaid. After five years in the United States, Haitians who are LPRs may become eligible for Medicaid at the state's option. Those Haitian LPRs with a substantial work history—generally 10 years (40 quarters) of work documented by Social Security or other employment records—or a military connection (active duty military personnel, veterans, and their families) are also eligible.[41] As noted above, Medicaid coverage is required for all otherwise qualified SSI recipients, so long as they meet SSI noncitizen eligibility tests.

Temporary Assistance for Needy Families (TANF)

Cuban-Haitian Entrants are treated as refugees, and thus those families with children under 18 may be eligible for time-limited cash assistance through a state's Temporary Assistance for Needy Families (TANF) program. PRWORA restricted receipt of federal TANF benefits to a 60-month lifetime limit. States may exempt up to 20% of the caseload from the time limit due to state-defined hardship, and states have the option to continue TANF benefits under special circumstances. Like other federal welfare programs, the TANF program is means-tested; however, unlike SSI, the TANF program is state-administered and payment levels can vary widely by state.[42] Refugees and entrants participating in job training programs sponsored by the Office of Refugee Resettlement (ORR) are considered to be working toward self-sufficiency and may be exempt from certain state TANF program requirements. TANF beneficiaries may be eligible for their state's Medicaid program; however SSI beneficiaries are generally ineligible to receive TANF in addition to SSI.

Refugee Resettlement Assistance[43]

As noted above, those Haitians deemed to be Cuban-Haitian entrants are eligible for the federal resettlement assistance program for refugees and entrants, which is partially funded through the ORR. In addition to providing a range of social services, primarily administered by states, the ORR provides funding to states for transitional cash and medical assistance through the Transition and Medical Services program.[44] ORR resettlement assistance and services are

[40] Thirty-two states link federal eligibility for SSI with state-administered Medicaid eligibility by automatically qualifying SSI recipients for Medicaid. Other states either follow the Social Security Administration's (SSA) SSI eligibility rules and require a separate Medicaid application, or they establish their own Medicaid eligibility rules outside of the SSA. For more information, see the Social Security Administration's Medicaid Information at http://www.socialsecurity.gov/disabilityresearch/wi/medicaid.htm.

[41] CRS Report R40144, *State Medicaid and CHIP Coverage of Noncitizens*, by Ruth Ellen Wasem.

[42] In some states, TANF applications are filed at the county level and benefit levels can vary by county.

[43] For a fuller discussion of refugee resettlement, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[44] ORR cannot reimburse states for TANF, SSI, or Medicaid programs.

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designed to help refugees and entrants obtain self-sufficiency and social adjustment as quickly as possible. Refugees and entrants are expected to become self-sufficient within six months of arrival, and Refugee Cash Assistance (RCA) and Refugee Medical Assistance (RMA) are limited to eight months.

Refugees and entrants who meet the income and resource eligibility requirements for SSI, TANF or Medicaid, but are not otherwise eligible (e.g., single males or childless females and couples), may receive benefits under the ORR-funded RCA and RMA programs.[45] Under Title V of the Refugee Education Assistance Act, participating states are fully reimbursed for cash and medical assistance to Cuban and Haitian entrants under the same conditions and to the same extent as such assistance and services for refugees under the refugee program.

Refugee Cash Assistance (RCA)

States have the option of choosing either a publicly administered or public/private RCA program.[46] Most states publicly administer their RCA program. By doing so, the state agency must operate its RCA program consistent with the provisions of their TANF program.[47] In publicly administered RCA programs, payment levels to refugees or entrants are equivalent to a state's TANF payment levels, and thus vary across the country.

Refugee Medical Assistance (RMA)

Like RCA benefits, states administer their own RMA program from ORR funds which pay for 100% of RMA costs for eligible refugees and entrants. Refugees or entrants who are not eligible for their state's Medicaid program may be eligible for RMA benefits for up to eight months. In many states, covered services under RMA are the same as covered services under their state Medicaid plan. Costs of RMA per refugee vary due to variables such as age, health of the beneficiary, and services provided.

Issues in 111th Congress

Haitian Families with Approved Petitions

Some U.S. citizens and legal permanent residents (LPRs) have family in Haiti for whom they have petitioned for visas to become LPRs in the United States.[48] According to the DOS, there are

[45] U.S. Department of Health and Human Services, Administration for Children and Families, *Annual ORR Reports to Congress-2005*, at http://www.acf.hhs.gov/programs/orr/data/arc.htm, accessed on February 24, 2008.

[46] In 2000, ORR published a final rule amending the requirements governing RCA. States were given a choice in how RCA services would be administered in their states. Codified at 45 CFR Part 400.

[47] *Annual ORR Reports to Congress-2005*.

[48] Petitions for LPR status are first filed with USCIS by the sponsoring relative or employer in the United States. If the prospective immigrant is already residing in the United States, the USCIS handles the entire process, which is called "adjustment of status" because the alien is moving from a temporary category to LPR status. If the prospective LPR does not have legal residence in the United States, the petition is forwarded to the DOS Bureau of Consular Affairs in their home country after USCIS has reviewed it. CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

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54,716 Haitians who have approved petitions to immigrate to the United States and who are waiting for one of these numerically limited visas to become available.[49] The INA provides for a permanent annual worldwide level of 675,000 legal permanent residents (LPRs), but this level is flexible and certain categories of LPRs are permitted to exceed the limits. The INA establishes per-country levels at 7% of the worldwide level for other family-sponsored LPRs.[50] Immediate relatives of U.S. citizens are among those exempt from direct numerical limits.[51]

According to the INA, family-sponsored (and employment-based) preference visas are issued to eligible immigrants in the order in which a petition has been filed. Spouses and children of prospective LPRs are entitled to the same status, and the same order of consideration as the person qualifying as principal LPR, if accompanying or following to join (referred to as derivative status). When visa demand exceeds the per-country limit, visas are prorated according to the preference system allocations for the oversubscribed foreign state or dependent area. Relatives of U.S. citizens and LPRs are waiting in backlogs for a visa to become available, with the brothers and sisters of U.S. citizens now waiting about 11 years, with even longer waits for siblings from Mexico and the Philippines. Married adult sons and daughters of U.S. citizens who filed petitions almost nine years ago (May 22, 2001) are now being processed for visas. Haitians with family in the United States are in this worldwide backlog for visas.

Advocates for Haitians are asking Secretary Napolitano to give humanitarian parole to those Haitians with approved petitions for visas. In the context of immigration law, parole means that the foreign national has been granted temporary permission to be present in the United States. Parole does not constitute formal admission to the United States, and parolees are required to leave when the terms of their parole expire, or if otherwise eligible, to be admitted in a lawful status.[52] Options to expedite the immigration of Haitians with approved petitions that would require legislative actions would include enacting an amendment to the INA that exempts certain Haitians for the numerical limits, and amending a transitional nonimmigrant visa—the V visa—for immediate relatives (spouse and children) of LPRs who have had petitions to also become LPRs pending for three years to include certain Haitians.[53]

Proponents of expediting the admission of Haitians with family in the United States maintain that it would relieve at least some of the humanitarian burden in Haiti. “Unless our government does something to make sure loved ones can join families quickly,” argues Cheryl Little of the Florida Immigrant Advocacy Center, “it could have devastating consequences for those in Haiti waiting for these visas.”[54] Other supporters assert that it would increase the remittances sent back to Haiti to provide critical help as the nation tries to rebuild.[55] “A larger Haitian diaspora would be a far

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[49] 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, 2009*, http://www.travel.state.gov/pdf/WaitingListItem.pdf.

[50] The numerically limited family preference categories are (1) unmarried sons and daughters of citizens, (2) spouses and children of LPRs, (3) unmarried sons and daughters of LPRs, (4) married sons and daughters of citizens, and (5) siblings of citizens age 21 and over.

[51] “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.

[52] §212(d)(5)(A) of the INA.

[53] For further information on the V visas and other nonimmigrant visa categories, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

[54] William Gibson, "Clinton: More immigrants from Haiti may be allowed," *Sun Sentinel* , January 28, 2010.

[55] Michael Clemons, “To help Haiti's earthquake victims, change U.S. immigration laws,” *Washington Post*, January (continued...)

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better base for the country's economic future than aid pledges that may or may not be met," according to Elliot Abrams of the Council on Foreign Relations.[56] Those opposed to expediting the admission of Haitians assert that it would not be in the national interest, nor would it be fair to other foreign nationals waiting to reunite with their families. The Center for Immigration Studies' Mark Krikorian has gone on record saying that "poverty and underdevelopment can't be criteria we use to pick immigrants," and concludes that the "place to help Haitians is in Haiti, not the United States."[57]

The Haitian Emergency Life Protection Act of 2010 (S. 2998/H.R. 4616) would amend the INA to allow Haitian nationals whose petition for a family-sponsored immigrant visa was approved on or before January 12, 2010, to obtain nonimmigrant visas under §101(a)(15)(V). As noted earlier, this nonimmigrant visa—known as the V visa—is a transitional visa category for immediate relatives (spouse and children) of LPRs who have had petitions to also become LPRs pending for three years.

Adoption of Haitian Orphans

Haitian children who were legally confirmed as orphans eligible for intercountry adoption by the government of Haiti and who were in the process of being adopted by U.S. residents prior to the earthquake have been given humanitarian parole to come to the United States. DHS Secretary Napolitano's announcement of the policy on January 18, 2010, indicated that the Haitian orphans must meet one of following criteria to be eligible:

> Evidence of availability for adoption, which includes at least a full and final Haitian adoption decree, a Government of Haiti custody grant to prospective adoptive parents for emigration and adoption, or secondary evidence in lieu of the first two criteria.
>
> Evidence of suitability for adoption, which includes at least a Notice of Approval of Form I-600A, *Application for Advance Processing of an Orphan Petition*, a current FBI fingerprints and background security check clearances, or physical custody in Haiti plus a security background check.

Other Haitian orphans potentially eligible for humanitarian parole include children who were identified by an adoption service provider or facilitator as eligible for intercountry adoption and who were matched to prospective American adoptive parents prior to January 12, 2010. When it announced the humanitarian parole for Haitian orphans, DHS acknowledged, "Given the severity of the disaster in Haiti, we understand that there are additional children that have been orphaned and/or separated from relatives and may also be in varying stages of the adoption process. DHS and the U.S. Department of State continue to evaluate additional eligibility criteria and will provide additional information as soon as it is available."[58] No policy or procedures, however,

(...continued)

24, 2010.

[56] Elliot Abrams, "What Haiti Needs—A Haitian Diaspora," *Washington Post*, January 22, 2010.

[57] Amy Goldstein and Peter Whoriskey, "Debate grows in aftermath of quake: Should U.S. let more Haitians immigrate?," *Washington Post*, January 25, 2010; and Mark Krikorian , "Help Haitians—in Haiti," *National Review Online*, January 22, 2010.

[58] U.S. Department of Homeland Security, " Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans," fact sheet, January 18, 2010.

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have been announced regarding prospective adoptions of Haitian children orphaned as a result of the earthquake. [59] As of March 29, 2010, the United States has given humanitarian parole to 1,050 Haitian orphans, and 902 of those have already arrived in the United States.[60]

Haitian Orphan Placement Effort Act of 2010 (H.R. 4603) would direct the DHS Secretary to expand the humanitarian parole policy for certain Haitian orphans announced on January 18, 2010, so it would apply on a case-by-case basis to children who were legally confirmed as orphans eligible for intercountry adoption by the government of Haiti before January 12, 2010. The bill also would authorize the placement of Haitian children granted humanitarian parole into the United States in an unaccompanied refugee minor program if a suitable family member is not available to provide care.

Supplemental FY2010 Funding

President Barack Obama has requested that the Congress consider supplemental FY2010 funding to provide for costs associated with relief and reconstruction support for Haiti, including reimbursement of obligations that have already been incurred by federal agencies after the January 12, 2010, earthquake.[61] Only a small portion of the $2.8 billion requested would pertain to Haitian evacuees and migrants in the United States. Specifically, the President has requested $220.0 million for the Department of Health and Human Services (HHS) to fund four types of activities, of which two are directly related to Haitians brought to the United States after the earthquake. [62] These two are the state share of Medicaid and Children's Health Insurance Program (CHIP) costs for eligible Haitians; and cash, medical, and repatriation assistance for eligible Haitians.[63] The request does not specify how much funding would be allocated to each of these activities. The President's request does not propose any changes or expansions in eligibility for assistance or benefits as described above.[64]

The President's supplemental request also includes $15 million for the USCIS Examinations Fee Account.[65] USCIS funds the processing and adjudication of immigrant, nonimmigrant, refugee, asylum, and citizenship benefits almost entirely through monies generated by the Examinations

[59] International adoption is a two-step process. First, the parents' eligibility to adopt must be verified, and then once the child is identified and the parents have complied with the laws of the sending country, the adoptive parents apply for a visa for the child so that the child can legally immigrate to the United States. The application for the visa triggers an investigation into the child's background to confirm that the child has not been bought or stolen, and meets the definition of orphan in the INA. USCIS verifies the eligibility to adopt while the DOS processes the visa application for the child. Once the prospective parents have been deemed eligible to adopt, USCIS policy states they have 18 months to complete the adoption. CRS Report RL31769, *Immigration: International Child Adoption*, by Alison Siskin

[60] Telephone conversation with USCIS Office of Legislative Affairs, March 30, 2010.

[61] Letter from Barack H. Obama, President of the United States, to Nancy Pelosi, Speaker of the United States House of Representatives, March 24, 2010, http://www.whitehouse.gov/omb/assets/budget_amendments/ amendment_03_24_10.pdf.

[62] The other two activities included in $220 million request for HHS would cover costs associated with medical evacuations and costs for HHS public health activities in Haiti.

[63] In a telephone conversation March 30, 2010, the USCIS Office of Legislative Affairs reported that 215 Haitians had been granted humanitarian parole as of March 29, 2010 (in addition to the Haitian orphans who had received parole).

[64] Letter from Peter R. Orszag, Office of Management and Budget Director, to Barack Obama, President of the United States, March 24, 2010, http://www.whitehouse.gov/omb/assets/budget_amendments/amendment_03_24_10.pdf.

[65] Letter from Peter R. Orszag, Office of Management and Budget Director, to Barack Obama, President of the United States, March 24, 2010, http://www.whitehouse.gov/omb/assets/budget_amendments/amendment_03_24_10.pdf.

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Fee Account.[66] USCIS charges fees for almost all adjudications and services; however, the agency traditionally has not charged the Examination Fee for refugees and asylum seekers. The Administration proposes to use funds for reception and settlement services provided to designated Haitians; fee waivers for eligible Haitians granted TPS; humanitarian parole to bring medical evacuees and certain categories of Haitians into the United States; and costs associated with adoptions and orphans.

Possible Mass Migration

There are growing concerns that the crisis conditions in Haiti may result in mass migration from the country. Not only has there been massive displacement of people caused by the earthquake, but observers of the situation warn of potential and widespread lawlessness as well as outbreaks of disease. These health, safety, and security factors—individually or in combination—could trigger an exodus of Haitians seeking refuge in nearby countries, including the United States. At least five federal agencies now handle Haitian migrants: DHS's Coast Guard (interdiction); Customs and Border Protection (apprehensions and inspections); Immigration and Customs Enforcement (detention); U.S. Citizenship and Immigration Services (credible fear determination); and DOJ's EOIR (asylum and removal hearings). DHS would take the lead in handling a potential mass migration and has long had a set of operational plans in place to respond to such a situation. In her TPS announcement, Secretary Napolitano warned of the consequences of Haitians fleeing to the United States:

> At this moment of tragedy in Haiti it is tempting for people suffering in the aftermath of the earthquake to seek refuge elsewhere. But attempting to leave Haiti now will only bring more hardship to the Haitian people and nation.... It is important to note that TPS will apply only to those individuals who were in the United States as of January 12, 2010. Those who attempt to travel to the United States after January 12, 2010 will not be eligible for TPS and will be repatriated.[67]

The balancing of DHS's border security and immigration control responsibilities in the midst of a humanitarian disaster poses a unique challenge.

Status Adjustment

Several versions of the legislation on comprehensive immigration reform that stalled in the Senate in June 2007 (e.g., S. 1348 and S. 1639) included provisions that would have enabled many of the Haitians in the United States without authorization to adjust to LPR status under certain circumstances and with some penalties. In the 110th Congress, H.R. 1645 also included provisions that would have allowed HRIFA adjustments to encompass a child of an applicant based on the child's age and status on October 21, 1998. H.R. 750 would have, among other things, authorized the adjustment of status for certain nationals or citizens of Haiti who are present in the United States. H.R. 454 would have amended HRIFA to provide that determinations with respect to children be made according to their age and status as of October 21, 1998; would have permitted an application based upon child status to be filed by a parent or guardian if the

[66] CRS Report RL34040, *U.S. Citizenship and Immigration Services' Immigration Fees and Adjudication Costs: The FY2008 Adjustments and Historical Context*, by Chad C. Haddal.

[67] U.S. Department of Homeland Security, "Statement from Secretary Janet Napolitano," press release, January 15, 2010.

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child is present in the United States on such filing date; and would have included document fraud among the grounds of inadmissibility, which would not have precluded an otherwise qualifying Haitian alien from permanent resident status adjustment. Many of these elements are included in a comprehensive immigration reform piece of legislation in the 111th Congress (H.R. 4321).

During the 110th Congress, §105 of the FY2008 Consolidated Appropriations Act (P.L. 110-161) continued the prohibition of the use of funds to provide visas to certain aliens who were involved in political violence in Haiti.

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