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Visa Waiver Program

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Summary

The visa waiver program (VWP) allows nationals from certain countries to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States. Concerns have been raised about the ability of terrorists to enter the United States under the VWP, because the VWP bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. Nonetheless, the current economic recession has heightened interest in the VWP as a mechanism to promote tourism and commerce. In addition to increasing tourism, the inclusion of countries in the VWP may help foster positive relations between the United States and those countries, facilitate information sharing, and ease consular office workloads abroad. As of January 2011, 36 countries participate in the VWP.

In FY2010, 17.8 million visitors entered the United States under this program, constituting 44% of all overseas visitors. To qualify for the VWP, statute specifies that a country must offer reciprocal privileges to U.S. citizens; have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%; issue their nationals machine-readable passports that incorporate *biometric identifiers;* certify that it is developing a program to issue tamper-resident, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if an emergency occurs that threatens the United States' security interests.

All aliens entering under the VWP must present machine-readable passports. In addition, passports issued between October 26, 2005, and October 25, 2006, must have a digitized photo on the data page, while passports issued after October 25, 2006, must contained electronic data chips (e-passports). Under DHS regulations, travelers who seek to enter the United States through the VWP are subject to the biometric requirements of the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. In addition, aliens entering under the VWP must get an approval from the Electronic System for Travel Authorization (ESTA), a web-based system that checks the alien's information against relevant law enforcement and security databases, before they can board a plane to the United States. ESTA became operational for all VWP countries on January 12, 2009.

P.L. 110-53 added new requirements to participate in the VWP and provided the Secretary of the Department of Homeland Security (DHS) with the authority to waive the nonimmigrant refusal rate requirement. The waiver became available in October 2008; however, it was suspended on July 1, 2009. In 2008, eight new countries were added to the VWP who needed the nonimmigrant refusal rate waiver to be part of the program. There are other countries (e.g., Poland, Romania, Taiwan) that have expressed interest in being a part of the VWP. The nonimmigrant refusal rate waiver authority was suspended on June 30, 2009, because DHS did not implement an air-exit system that incorporates biometric identifiers. It is unknown when a biometric exit system will be implemented.

In the 112th Congress, legislation has been introduced to use the overstay rate rather than the refusal rate as the criteria for admission into the VWP (H.R. 959/S. 497) and to make Taiwan a program country (H.R. 2918 and S. 1545).

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Current Policy

Under the visa waiver program (VWP), the Secretary of Homeland Security,[1] in consultation with the Secretary of State, may waive the "B" nonimmigrant visa requirement for aliens traveling from certain countries as temporary visitors for business or pleasure (tourists).[2] Nationals from participating countries must use the web-based Electronic System for Travel Authorization (ESTA) to get an approved electronic travel authorization before embarking to the United States, and are admitted into the United States for up to 90 days.[3] The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa. As of October 2010, 36 countries participate in the VWP.[4]

Temporary foreign visitors for business or pleasure from most countries must obtain a visa from Department of State (DOS) offices at a consular post abroad before coming to the United States.[5] Personal interviews are generally required, and consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may make the alien ineligible for a visa under the so-called "grounds for inadmissibility" of the INA, which include criminal, terrorist, and public health grounds for exclusion. Consular officers are required to check the background of all aliens in the "lookout" databases, including the Consular Lookout and Support System (CLASS) and TIPOFF databases.[6]

Although the VWP greatly eases the documentary requirements for nationals from participating countries, it has important restrictions. Aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status. Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.[7] Additionally, with some limited exceptions, aliens entering through VWP are not permitted to adjust their immigration status. An alien

[1] The Secretary of Homeland Security administers the VWP program. Section 402 of the Homeland Security Act of 2002 (HSA; P.L. 107-296), signed into law on November 25, 2002, states: "The Secretary [of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States."

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

[3] ESTA became operational for all VWP countries on January 12, 2009.

[4] These countries are Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungry, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Malta, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

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

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

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

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entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).[8]

VWP Qualifying Criteria

Currently, to qualify for the VWP a country must

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%;
- issue machine-readable passports (all aliens entering under the VWP must possess a machine-readable passport);
- certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier (all passports issued after October 26, 2006, presented by aliens entering under the VWP have to be machine-readable and contain a biometric identifier);
- certify that it is developing a program to issue tamper-resident, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry;
- enter into an agreement with the United States to report or make available through International Criminal Police Organization (INTERPOL)[9] information about the theft or loss of passports;[10]
- accept the repatriation of any citizen, former citizen, or national against whom a final order of removal is issued no later than three weeks after the order is issued;
- enter into an agreement with the United States to share information regarding whether a national of that country traveling to the United States represents a threat to U.S. security or welfare; and
- be determined, by the Secretary of Homeland Security, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program.

Countries can be immediately terminated from the VWP if an emergency occurs in the country that the Secretary of Homeland Security in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.[11] For example, because of

[8] Foreign nationals seeking asylum must demonstrate a well-founded fear that if returned home they will be persecuted based on one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. For more on asylum, see CRS Report R41753, CRS Report R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, by Ruth Ellen Wasem.

[9] INTERPOL is the world's largest international police organization, with 188 member countries. For more information on INTERPOL see, http://www.interpol.int/public/icpo/default.asp, visited September 28, 2010.

[10] Prior to P.L. 110-53 (signed into law on August 3, 2007), VWP countries only had to certify that they were reporting thefts of blank passports.

[11] An emergency is defined as (1) the overthrow of a democratically elected government; (2) war; (3) a severe breakdown in law and order in the country; (4) a severe economic collapse; and (5) any other extraordinary event in the (continued...)

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Argentina's economic collapse in December 2001,[12] and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission,[13] that country was removed from the VWP in February 2002.[14] Similarly, on April 15, 2003, Uruguay was terminated from the VWP because Uruguay's participation in the VWP was determined to be inconsistent with the U.S. interest in enforcing immigration laws.[15]

Additionally, there is a probationary status for VWP countries that do not maintain a low visa refusal rate. Countries on probation are determined by a formula based on a disqualification rate of 2%-3.5%.[16] Probationary countries with a disqualification rate less than 2% over a period not to exceed three years may remain VWP countries.[17] Countries may also be placed on probation if more time is necessary to determine whether the continued participation of the country in the VWP is in the security interest of the United States. For example, in April 2003, Belgium was placed on provisional status because of concerns about the integrity of non-machine-readable Belgian passports and the reporting of lost or stolen passports.[18] DHS completed another country review of Belgium in 2005, and removed the country from probationary status.

Nonimmigrant Refusal Rate Waiver

Section 711 of the Implementing the 9/11 Commission Recommendations Act of 2007 (P.L. 110-53)[19] allows the Secretary of DHS, in consultation with the Secretary of DOS, to waive the

(...continued)

program country where that country's participation could threaten the law enforcement or security interests of the United States. INA §217(c)(5)(B).

[12] Beginning in December 2001, Argentina experienced a serious economic crisis, including defaulting on loans by foreign creditors, devaluation of its currency, and increased levels of unemployment and poverty. For more information on the financial collapse in Argentina see CRS Report RS21072, *The Financial Crisis in Argentina*, by J. F. Hornbeck.

[13] In addition, many Argentine nationals were trying to use the VWP to obtain entry to the United States solely for the purpose of proceeding to the Canadian border and pursuing an asylum claim in Canada. According to Citizenship and Immigration Canada, between 1999 and 2001, more than 2,500 Argentines filed refugee claims in Canada after transiting the United States under the VWP. *Federal Register*, February 21, 2002, vol. 67, no. 35, p. 7944.

[14] While the number of Argentine nonimmigrant travelers to the United States declined between 1998 and 2000, the number of Argentines denied admission at the border and the number of interior apprehensions increased. The Department of Justice (DOJ) in consultation with DOS determined that Argentina's participation in the VWP was inconsistent with the United States' interest in enforcing it's immigration laws. (The Department of Homeland Security did not exist in February 2002, and authority for the VWP resided with the Attorney General in the DOJ.) *Federal Register,* February 21, 2002, vol. 67, no. 35, pp. 7943-7945.

[15] Between 2000 and 2003, Uruguay experienced a recession causing its citizens to enter under the VWP to live and work illegally in the United States. In 2002, Uruguayan nationals were two to three times more likely than all nonimmigrants on average to have been denied admission at the border. Uruguayan air arrivals had an apparent overstay rate more than twice the rate of the average apparent overstay rate for all air arrival nonimmigrants. *Federal Register*, March 7, 2003, vol. 68, no. 45, pp. 10954-10957.

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

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

[18] *Federal Register*, March 7, 2003, vol. 68, no. 45, pp. 10954-10957.

[19] P.L. 110-53 (H.R. 1), signed into law on August 3, 2007. For more details on the changes to the VWP in this act, see **Appendix A**, "Legislative History."

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nonimmigrant refusal rate requirement for admission to the VWP after the Secretary of DHS certifies to Congress that

- an air exit system is in place that can verify the departure of not less than 97% of foreign nationals that exit through U.S. airports,[20] and
- the electronic travel authorization system (ESTA discussed below) is operational.[21]

The waiver became available in October 2008, and was suspended on July 1, 2009. Under statute, the Secretary of DHS's authority to waive the nonimmigrant refusal rate has been suspended until the air exit system is able to match an alien's biometric information with relevant watch lists and manifest information. It is unclear when DHS will implement an exit system with the specified biometric capacity.[22]

To participate in the program, a country that receives a refusal rate waiver also has to

- meet all the security requirements of the program;
- be determined by the Secretary of DHS to have a totality of security risk mitigation measures that provide assurances that the country's participation in the program would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws;
- have had a sustained reduction in visa refusal rates, and have existing conditions for the rates to continue to decline;
- have cooperated with the United States on counterterrorism initiatives and information sharing before the date of its designation, and be expected to continue such cooperation; and
- during the previous fiscal year, the nonimmigrant visas refusal rate was not more than 10%, or the overstay rate did not exceed the maximum overstay rate established by the Secretaries of DHS and DOS for countries receiving waivers of the nonimmigrant refusal rate to participate in the VWP the program.

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[20] There was some disagreement between some critics and DHS regarding exactly what needed to be verified. Some contend that Congressional intent was to have a functional entry-exit system that would be able to match arrival and departure records and know which aliens failed to depart from the United States rather than just matching the entry records with the records of those who were known to have departed from the United States. For example, see S. 203 introduced in the 111th Congress, which attempts to clarify the language in this provision. U.S. Congress, Senate Committee on Judiciary, Subcommittee on Terrorism, Technology and Homeland Security, *The Visa Waiver Program: Mitigating Risks to Ensure Safety to All Americans*, 110th Cong., 2nd sess., September 24, 2008.

[21] DHS determined that the law permitted it to utilize the waiver when ESTA was functional but before it was mandatory for all VWP travelers. Critics did not agree with this interpretation and thought that ESTA should have been mandatory for all VWP travelers before new countries were admitted to the program. When the new countries entered the program, their citizens were required to use ESTA before travelling to the United States. U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks,* GAO-08-967, September 2008. *(Hereafter GAO, Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks.)*

[22] U.S. Government Accountability Office, *Homeland Security: Key US-VISIT Components at Varying Stages of Completion, but Integrated and Reliable Schedule Needed*, GAO-10-13, November 19, 2009, p. 1, http://www.gao.gov/products/GAO-10-13.

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P.L. 110-53 also specified that in determining whether to waive the nonimmigrant refusal rate requirement, the Secretary of DHS, in consultation with the Secretary of DOS, may take into consideration other factors affecting U.S. security, such as the country's airport security and passport standards, whether the country has an effective air marshal program, and the estimated overstay rate for nationals from the country.

Electronic Travel Authorization System (ESTA)

As previously mentioned, P.L. 110-53 mandated that the Secretary of DHS, in consultation with the Secretary of DOS, develop and implement an electronic travel authorization system (ESTA), through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP.[23] ESTA became fully operational for all VWP visitors traveling to the United States by airplane or cruise ship on January 12, 2009.[24] There is a $14 fee for travelers who use ESTA.[25]

In advance of departing for the United States by airplane or cruise ship,[26] aliens traveling under the VWP are required to use ESTA to electronically provide biographical information to make the eligibility determinations.[27] Through the Treasury Enforcement Communications System (TECS),[28] ESTA applications are queried against law enforcement databases, including the greater set of watch lists integrated and consolidated in the Terrorist Screening Database, and against databases on lost and stolen passports (including Interpol's Stolen and Lost Travel Documents database), and visa revocations.[29]

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[23] Under law, ESTA became operational 60 days after the Secretary of DHS published a notice in the *Federal Register*. The interim final rule was published on June 9, 2008, and a final rule was published on November 13, 2008. Department of Homeland Security, "Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program," *Federal Register*, June 9, 2008, vol. 73, no. 11, pp. 32440-32453. . Department of Homeland Security, "Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program," 73 *Federal Register* 67354, November 13, 2008.

[24] Entrants under the VWP from VWP countries that receive a waiver of the nonimmigrant refusal rate (Czech Republic, Estonia, Hungry, Latvia, Lithuania, Malta, Slovakia, and South Korea) had to use to system starting on the date of their formal admission to the program. For all the countries except Malta, that date was November 17, 2008. Malta was formally admitted to the VWP on December 30, 2008. Department of Homeland Security, "Electronic System for Travel Authorization (ESTA) Advisory Statement," November 6, 2008. Department of Homeland Security, "Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program," 73 *Federal Register* 67354, November 13, 2008.

[25] The fee was instituted on September 8, 2010. The $14 fee includes $4 to cover the costs of administering ESTA and $10 for the travel promotion fee established by Congress in the Travel Promotion Act of 2009 (§9 of P.L. 111-145). Department of Homeland Security, Customs and Border Protection, "DHS, CBP Announce Interim Final Rule For ESTA Fee," press release, August 6, 2010, http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/08062010_2.xml#contacts.

[26] Absent of ESTA, the first time an alien traveling to the United States under the VWP was screened was at the airport after the alien checked in for the flight.

[27] A person is not required to apply for their own travel authorization under ESTA. Friends, relatives, personnel in the travel industry, and other third parties may apply for the traveler.

[28] TECS is a case management system maintained CBP. The system is used to keep a record of who and what enters the United States.

[29] Personal Conversation with Department of Homeland Security, Office of Congressional Affairs, November 7, 2008.

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ESTA alerts the alien that he or she has been approved to travel, and if not approved that the alien needs to obtain a visa prior to coming to the United States.[30] The information required by ESTA is the same that is currently required on the I-94W form, which aliens arriving in the United States under the VWP are required to complete to be admitted.[31] ESTA also screens applicant responses to the same VWP eligibility questions that are currently collected on the Form I-94W.[32] Eventually, ESTA will replace the I-94W form.[33]

Eligibility to travel, which is determined by ESTA, is valid for two years or until the person's passport expires, is valid for multiple entries, and can be revoked at any time. Notably, a determination under ESTA that an alien is eligible to travel to the United States does not constitute a determination that the alien is admissible. Admissibility determinations are made by Customs and Border Protection (CBP) inspectors at the ports of entry.

Arrival and Departure Inspections

Unlike other nonimmigrants, those entering under the VWP do not have to get a visa and thus, have no contact with U.S. governmental officials until they arrive at a port of entry and are inspected by CBP officers. Nonetheless, in addition to getting authorization through ESTA, prior to the alien's arrival, an electronic passenger manifest is sent from the airline or commercial vessel to immigration inspectors at the port of entry which is checked against security databases.

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

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[30] In most cases, the approval process is almost instantaneous. Under statute, ESTA determinations are not reviewable by the courts.

[31] The following information is required for ESTA and on the I-94W form:

- biographical information including name, birth date, country of citizenship, country of residence, telephone number;
- passport information including number, issuing country, issuance date, and expiration date; and
- travel information including city where departing from, flight number, and address while in the United States.

According to DHS, when developing ESTA, the department had to balance the need for biographic information with the requirement that the participating countries did not view applying for an approval under ESTA as equivalent to applying for a visa. If countries had interpreted applying for an authorization under ESTA as having the same burden as applying for a visa, these countries might have required that U.S. citizens traveling to their countries obtain a visa.

[32] These eligibility questions pertain to whether the alien would be inadmissible on health, criminal, or terrorist grounds, or because the alien had previously violated immigration law (e.g., been deported). Other eligibility questions include whether the alien has: (1) violated a child custody agreement with a U.S. citizen; (2) previously been denied a visa to travel to the United States; and (3) asserted immunity from prosecution.

[33] Department of Homeland Security, "Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program," *Federal Register*, June 9, 2008, vol. 73, no. 11, pp. 32440-32453.

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At ports of entry, immigration inspectors observe and question applicants, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States.[34] CBP inspects aliens who seek to enter the United States. Primary inspection consists of a brief interview with an immigration inspector, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS),[35] and entry of the traveler into the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) system. The US-VISIT system uses biographical (e.g., passport information) and biometric identification (finger scans) to check identity.[36] Inspectors at the border collect the following information on aliens entering under the VWP: name, date of birth, nationality, gender, passport number, country of issuance, a digital photograph, and prints for both index finders. Primary inspections are quick (usually lasting no longer than a minute); however, if the inspector is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.[37]

Additionally, the Implementing Recommendations of the 9/11 Commission Act (P.L. 110-53), required that the Secretary of DHS, no later than one year after enactment (i.e., by August 3, 2008), establish an exit system that records the departure of every alien who entered under the VWP and left the United States by air. The exit system is required to match the alien's biometric information against relevant watch lists and immigration information, and compare such biographical information against manifest information collected by airlines to confirm that the alien left the United States.

In April 2008, DHS published a Notice of Proposed Rulemaking in the *Federal Register* that would have created biometric exit procedures at airports and seaports for international visitors.[38] DHS was expected to publish the final rule for this system by October 15, 2008.[39] However, in legislation that became law on September 30, 2008,[40] Congress required DHS to complete and

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[34] All VWP applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

[35] ADIS feeds information to the Interagency Border Inspection System (IBIS). IBIS is a database of suspect individuals, businesses, vehicles, aircraft, and vessels that is used during inspections at the border. IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement. Department of Homeland Security, Customs and Border Protection, *IBIS- General Information*, Washington, DC, https://help.cbp.gov/app/answers/detail/a_id/151/related/1/~/ibis.

[36] For more information on US-VISIT, see archived CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Vina.

[37] Lookout databases such as TIPOFF, which is integrated with CLASS, contain information on aliens who are inadmissible for entry into the United States. The National Security Entry-Exit System (NSEERS) and the Student and Exchange Visitor Information System (SEVIS) are also used during secondary inspections. Immigration inspectors may access the National Automated Immigration Lookout System (NAILS II), which is a text-based system that interfaces with IBIS and CLASS. For more information, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[38] Department of Homeland Security, "Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure," 73 *Federal Register* 22065, April 24, 2008.

[39] Personal conversation with Department of Homeland Security Congressional Affairs, September 22, 2008.

[40] P.L. 110-329.

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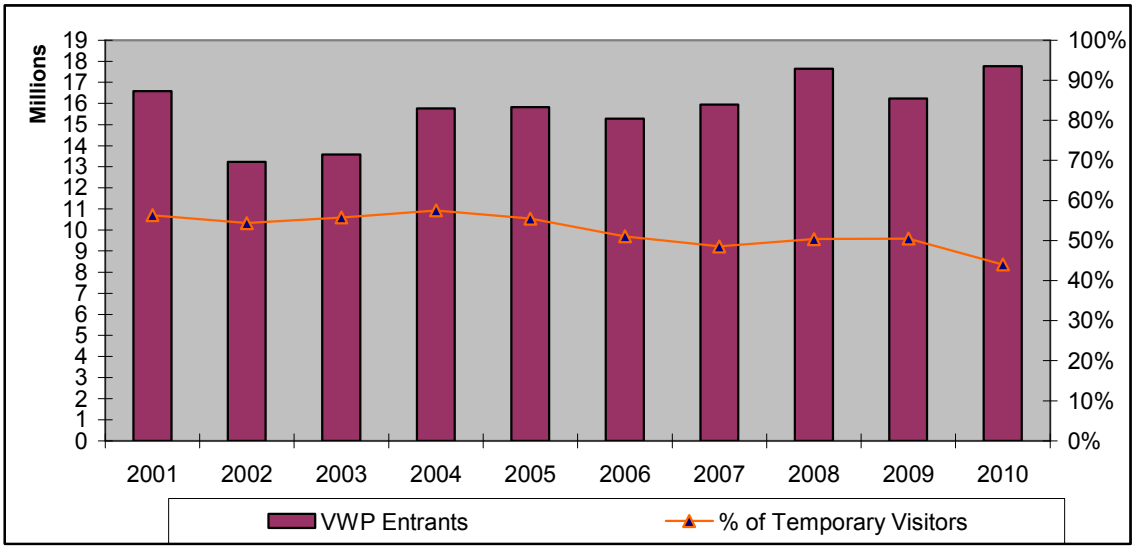
report on at least two pilots testing biometric exit procedures at airports.[41] DHS has completed the pilot programs, but according to the Government Accountability Office (GAO), "DHS cannot reliably commit to when and how the work will be accomplished to deliver a comprehensive exit solution to its almost 300 ports of entry."[42]

Figure 1. Number of Entrants under the VWP for FY2001-FY2010, Percentage of All Nonimmigrant Entrants Who Are VWP Entrants, and Percentage of Visitor Entrants Who Are VWP Entrants



Source: Department of Homeland Security, *Yearbook of Immigration Statistics*, multiple years.

Note: Number of countries participating in the VWP at the end of the fiscal year: FY2001, 29; FY2002, 28; FY2003-FY2008, 27; FY2009, 35; and FY2010, 36. Visitor entrants are temporary visitors and include aliens who entered with B visas, those who entered under the Guam Visa Waiver Program, and those who entered under the VWP.

Trends in Use of the VWP

Figure 1 shows the number of entrants under the VWP, and the entrants as a percentage of all temporary visitors.[43] Over the previous 10 years, there is not one continuous trend in the number of entrants under the VWP. In FY2010, approximately 17.8 million people entered under the VWP, the largest number of people ever to enter under the program, and the number of program countries was also the highest in the history of the program (36 countries). The previous highest number of entrants under the program occurred in FY2000, when 17.7 million people from 29 countries entered under the VWP.

[41] One pilot will test DHS's recommended solution that carriers collect biometrics from passengers; the other pilot will test CBP officers collecting passenger biometrics at the boarding gate.

[42] U.S. Government Accountability Office, *Homeland Security: Key US-VISIT Components at Varying Stages of Completion, but Integrated and Reliable Schedule Needed*, GAO-10-13, November 19, 2009, p. 1, http://www.gao.gov/products/GAO-10-13.

[43] Temporary visitors include aliens who entered with B visas, those who entered under the Guam Visa Waiver Program, and those who entered under the VWP.

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Notably, in FY2010 40.3 million people entered as temporary visitors. In FY2010, visitors entering under the VWP constituted 44% of all temporary visitors, accounting for the lowest proportion of the temporary visitor population in the history of the program.

During the most recent years, the majority of the growth in temporary visitor admittances came from aliens from countries not in the VWP. Prior to FY2004, the percent increase of the number of aliens entering under the VWP was *larger* than the increase in the number of temporary visitor entrants. However, more recently the increase in the number of aliens entering under the VWP has been *smaller* than the increase in the number temporary visitor entrants. In FY2010, the number of people entering under the VWP grew by a much smaller percentage (9%) than the total number of visitors (25.3%) admitted.

Policy Issues

The VWP is supported by the U.S. travel and tourism industry, the business community, and DOS. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the United States.[44] DOS argues that by waiving the visa requirement for high-volume/low-risk countries, consular workloads are significantly reduced, allowing for streamlined operations, cost savings, and concentration of resources on greater-risk nations in the visa process. Additionally, some contend that currently DOS does not have the resources to resume issuing visas to all the visitors from VWP countries.[45]

Nonetheless, while the program has significantly reduced the consular workload and facilitated travel to the United States, it has increased the workload of immigration inspectors at ports of entry by shifting the noncitizen's first encounter with a U.S. official to ports of entry. Furthermore, others contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security. Immigration inspectors have stated that terrorists and criminals believed they would receive less scrutiny during the immigration inspection process if they applied for admission into the United States under the VWP.[46] Another concern has been the lack of information on aliens from VWP countries who overstay the terms of their admittance. Furthermore, some contend that since terrorism does not have national boundaries, the VWP should not be based on particular countries, but should allow visa-free travel for low-risk individuals (e.g., a trusted traveler program).[47]

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

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

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

[47] U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Implications of Transnational Terrorism for the Visa Waiver Program* , 107th Cong., 2nd sess., February 28, 2002.

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On September 6, 2006, the Senate Judiciary Committee's Terrorism, Technology, and Homeland Security Subcommittee held a hearing entitled "Keeping Terrorists Off The Plane: Strategies For Pre-Screening International Passengers Before Takeoff." During that hearing, testimony by Jess T. Ford of the Government Accountability Office (GAO) noted that the VWP has many benefits as well as some inherent risks. For example, GAO noted that stolen passports from VWP countries, especially since they are prized travel documents among those attempting to illegally enter the United States, were an issue of particular concern with the safety of the program.[48]

Security

There is debate about whether the VWP increases or decreases national security. As discussed above, travelers under the VWP do not undergo the screening required to receive a visa. While the ESTA system has increased the security of the VWP, it is a name-based system and cannot be used to run checks against databases that use biometrics such as DHS's Automated Biometric Identification System (IDENT) and FBI's Integrated Automated Fingerprint Identification System (IAFIS).[49] (Travelers are checked against these systems through US-VISIT when they enter the United States.)[50]

Nonetheless, others argue that the VWP enhances security by setting standards for travel documents and information sharing, and that the program promotes economic growth and cultural ties.[51] For example, travelers under the VWP have to present machine-readable passports or e-passports, and eventually, all travelers entering under the VWP will present e-passports, which tend to be more difficult to alter than other types of passports.[52] In addition, many B visas are valid for 10 years,[53] and it is possible that a person's circumstances or allegiances could change during that time.

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[48] Testimony of Jess T. Ford, Director International Affairs and Trade, General Accounting Office, in U.S. Congress, Senate Committee on the Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security, *Keeping Terrorists Off The Plane: Strategies For Pre-Screening International Passengers Before Takeoff,* hearings, 109th Cong., 2nd sess., September 7, 2006.

[49] IAFIS is a national fingerprint and criminal history system. IDENT is a DHS-wide system for the storage and processing of biometric and limited biographic information. IDENT is the primary DHS-wide system for the biometric identification and verification of individuals encountered in DHS mission-related processes. For more information on IAFIS, see Federal Bureau of Investigation, "The Integrated Automated Fingerprint Identification System (IAFIS)," press release, http://www.fbi.gov/hq/cjisd/iafis.htm. For more information on IDENT, see Department of Homeland Security, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)*, Washington, DC, July 31, 2006, p. 2, http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf.

[50] CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*.

[51] For an example of this argument, see Heritage Foundation, *The Visa Waiver Program: A Security Partnership*, Fact Sheet #66, Washington, DC, June 25, 2010.

[52] There is not a specific requirement to present an e-passport when entering under the VWP. As discussed above, any passports issued after October 26, 2006, and used by VWP travelers to enter the United States are required to have integrated chips with information from the data page (e-passports). Most passports are valid for 10 years, and thus, it is likely that by October 2016, all VWP entrants will have e-passports.

[53] The length of validity of a visa is mostly dependent on reciprocity with the United States (i.e., that visas from that country for U.S. citizens are valid for the same period of time). For a full list of reciprocity schedules, see Department of State, Reciprocity Schedules, at http://travel.state.gov/visa/fees/fees_3272.html.

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Adding Countries to the VWP

As discussed above, while some view the VWP as a security risk, others contend that the inclusion of countries in the VWP actually increases U.S. security, and argue that increasing membership in the VWP could be used as an incentive to get other countries to share information with the United States.[54] DHS admitted eight new countries into the program in 2008 and one (Greece) in 2010, but there are other countries that have expressed a desire to be included in the VWP. These countries want to be in the VWP because of the possible economic benefits (e.g., increasing commerce and tourism), making it easier and cheaper for their populace to travel to the United States (i.e., since their citizens do not have to get a visa before traveling temporarily to the United States), and because membership in the program is often perceived as evidence of close ties with the United States. In 2005, the administration began providing countries interested in joining the VWP with "road maps" to aid the countries in meeting the program's criteria.[55] However, some of the countries have complained that since the "road maps" do not contain milestones or time tables, it is difficult to measure the amount of progress made towards fulfilling the criteria for VWP membership.[56] Moreover, others contend that since U.S. consular officers are the ones that approve or disapprove applications for visas, it is extremely difficult for countries to affect their visa refusal rates, limiting the ability of a country to follow a defined set of steps to meet the required VWP criteria.

EU Countries

Five of the current road map countries are members in the EU,[57] which may also raise another issue concerning the VWP. EU rules require that all member states be treated equally (solidarity clause). In addition, a visa is required for all citizens from non-VWP EU countries wishing to travel to the United States, whereas under EU law, these countries do not require visas of U.S. citizens for stays up to 90 days. Presently, any of the EU Member States not participating in the VWP could invoke the EU solidarity clause[58] and visa reciprocity clause,[59] with the result that the other EU countries may have to decline to be members of the VWP, or place visa requirements on United States citizens traveling to EU countries unless the other countries are allowed to enter the VWP.[60] Nonetheless, the other EU countries may put pressure on the non-VWP EU countries not to file a formal complaint which could strain EU-U.S. relations. Also, some of the countries may

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[54] For an example of this argument, see James Jay Carafano, *With a Little Help from Our Friends: Enhancing Security by Expanding the Visa Waiver Program*, Heritage Foundation, Executive Memorandum no. 991, February 3, 2006; and Jena Baker McNeill, *Time to Decouple Visa Waiver Program from Biometric Exit*, Heritage Foundation, Web Memorandum no. 2867, April 15, 2010.

[55] There were 13 "road map" countries. They were Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, South Korea, Latvia, Lithuania, Malta, Poland, Romania, and Slovakia. Eight of these countries have been admitted to the VWP.

[56] For example, on February 8, 2006, the Heritage Foundation held an event entitled *Fighting a More Effective War on Terrorism: Expanding the Visa Waiver Program.* The featured speakers were Ambassadors Petr Kolar of the Czech Republic, John Bruton of the EU, Janusz Reiter of Poland, and András Simonyi of Hungary. A recording of the event is available at http://www.heritage.org/Press/Events/ev020806a.cfm.

[57] Twelve of the 13 roadmap countries were EU countries, but seven of those countries have been admitted to the VWP.

[58] Non-VWP EU countries could contend that the fact that other countries in the EU are part of the VWP constitutes unequal treatment.

[59] The same visa rules do not apply to U.S. citizens traveling to the Non-VWP EU countries, and Non-VWP EU citizens traveling to the United States.

[60] Conversation with Telmo Baltazar, Justice and Home Affairs Counselor, European Union, April 18, 2005.

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not have raised this issue yet because they are not full members of the Schengen area.[61] Notably, Greece, a full member of the EU that only became a VWP country in 2010, did not file a complaint about unequal treatment.[62]

Moreover, the leaders and publics in many new EU members, such as Poland, are reportedly unhappy with their exclusion from the VWP given their support of controversial U.S. policies in Iraq and in the fight against terrorism. They bristle at the time-consuming and expensive requirements their citizens incur when seeking to obtain U.S. visas.[63] For example, there is a $140 nonrefundable application processing fee for tourist visas.[64] Analysts suggest that the VWP issue has contributed to a sense in some central and eastern European states that they have gotten little in return for their efforts to be U.S. allies, and that it is part of the reason for a decline in public support for the United States in some of these countries. Some U.S. officials acknowledge privately that the VWP is the biggest irritant in bilateral U.S. relations with the countries of central and eastern Europe.[65]

The Commission on European Communities has stated that it believes that the road map process could be "an adequate means for ensuring visa exemption for all EU citizens in the medium term." However, the Commission noted that to make the process fully effective there needs to be more consistency in setting the goals and measures for road map countries. The Commission also stated that the United States had not shown any willingness to consider interim facilitation measures such as providing a fee exemption for tourist visas, and that the EU should continue to press the United States to streamline at least some aspects of the visa application process.[66]

Reportedly, President Obama said in December 2010 that he was going to make it a priority to get Poland into the VWP.[67] Nonetheless, Poland's FY2010 nonimmigrant visa refusal rate was above 3%, and thus, Congress would have to amend the INA to allow Poland into the program.[68]

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[61] The Schengen area comprises the EU countries which have signed the convention implementing the Schengen Agreements of 1985 and 1990 on the free movement of persons and the standardization of border controls.

[62] DHS began its review of Greece for participation in the VWP in late 2007.

[63] For example, see "Poland Excluded from Visa-Waiver List," *Washington Times*, October 18, 2008, http://www.washingtontimes.com/news/2008/oct/18/poland-excluded-from-visa-waiver-list/; and Ewa Kern-Jedrychowska , "Polish-American Voters' Top Issues: the Visa Waiver Program and Missile Defense," *Feet in Two Worlds*, July 1, 2008, http://news.feetintwoworlds.org/2008/07/01/polish-american-voters-top-issues-the-visa-waiver-program-and-the-missile-defense-system/.

[64] All applicants pay the visa application fee, but depending on the person's nationality, there may also be a visa issuance fee because nonimmigrant visa fees are based on "reciprocity," (i.e., what another country charges a U.S. citizen for a similar type of visa). For a list of visa issuance fees by country, see Department of State, Reciprocity by Country, http://travel.state.gov/visa/fees/fees_3272.html.

[65] Craig Whitlock, "Poland's Leader Hopes To Gain from Support of U.S. Policies," *Washington Post*, February 7, 2006; Discussions with U.S. and European officials.

[66] Commission of the European Communities, *Report from the Commission to the Council on Visa Waiver Reciprocity with Certain Third Countries,* October 1, 2006, pp.11-12.

[67] Josh Rogin, "Obama: Poland will be admitted to the visa waiver program," http://thecable.foreignpolicy.com, December 8, 2010, http://thecable.foreignpolicy.com/posts/2010/12/08/ obama_poland_will_be_admitted_to_the_visa_waiver_program.

[68] Poland's FY2010 adjust B-visa refusal rate was 9.8%. Thus, Poland would meet the refusal rate requirement if the nonimmigrant refusal rate waiver was reinstated. Department of State, *Adjusted Refusal Rate- B-Visas Only by Nationality: Fiscal Year 2010*, http://www.travel.state.gov/pdf/FY10.pdf.

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GAO Report

A September 2008 report by the Government Accountability Office (GAO) noted that the executive branch moved aggressively to expand the VWP by the end of 2008, but that the process was not transparent leading to confusion among interagency partners and aspiring program countries. The Department of State reported difficulties explaining to certain countries with FY2007 refusal rates below 10% and that have interest in joining the program (e.g., Croatia, Israel, and Tawain) why DHS had not negotiated Memorandums of Understanding (MOUs) with them, but had negotiated MOUs with several countries with refusal rates over 10% (e.g., Hungary, Latvia, Lithuania, and Slovakia).[69] GAO also found that DHS had achieved some security enhancements to the program during the negotiations with aspiring VWP countries (e.g., sharing of information on lost and stolen passports), but concluded that DHS had not fully developed the tools to access and mitigate the risks of the VWP.[70]

Lost and Stolen Passports

Currently, all VWP countries provide data on lost and stolen passports (LASP) to the United States. However, concerns have been raised about information sharing on LASP: both the mechanism for sharing the information and whether countries are reporting data in a timely manner.[71] The mechanisms to secure data on LASP have differed over time (e.g., reporting to the U.S. Embassy, access to a common database) and by country (e.g., MOUs, Diplomatic Notes).[72] While DHS receives a few countries' LASP data via direct links to those countries' databases, most data on LASP comes from the International Criminal Police Organization's (INTERPOL's) Stolen and Lost Travel Documents database[73]—DHS' preferred method of data sharing.[74] Notably, ESTA screens passport information using the INTERPOL database. CBP also accesses

[69] In a meeting with CRS, DHS said that the countries who had previously been "road map" countries were given priority, since in some respects, they were "first in line." Also, DHS expected, and was correct, that the countries with FY2007 refusal rates above 10% with whom DHS signed MOUs would have FY2008 refusal rates below the 10% threshold.

[70] U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks,* GAO-08-967, September 2008. *(Hereafter GAO, Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks.)*

[71] The issue of LASP has been ongoing. VWP passports are supposedly highly valued since the bearer does not need a visa to enter the United States. For examples of past issues, see U.S. Government Accountability Office, *Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program,* GAO-06-854, July 2006; and U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, OIG-05-07, December 2004.

[72] The United States has signed MOUs with the nine newest VWP entrants (those who received a waiver of the nonimmigrant refusal rate before it was suspended in July 2009, and Greece). All but four of the other VWP countries share LASP data via an exchange of Diplomatic Notes. Personal Conversations with Department of Homeland Security, Office of Congressional Affairs, July 20, 2010.

[73] The United States began providing information on LASP to the U.S. National Central Bureau of the International Criminal Police Organization (INTERPOL) in May 2004. The INTERPOL LASP database is available to law enforcement and immigration authorities worldwide. U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, OIG-05-07, December 2004, pp. 7-8.

[74] In the past, before access to, and the content of, the INTERPOL database was reliable, DHS required countries to submit LASP data to the U.S. Embassies in those countries.

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LASP data via INTERPOL, but it is unclear if this information is checked during primary inspection.[75]

Overstays

Some maintain that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers rather than the actual behavior of nonimmigrants. In addition, refusal rates are calculated by application, not by person, so if a person applies for the same visa multiple times and is refused, all the refusals are calculated in the refusal rate.[76] When the program was conceived, it was expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation. Reportedly, using biographic departure information from passenger manifests, DHS can calculate overstay rates and has done so for all VWP countries (as well as other countries).[77] Nonetheless, this system has limitations because persons entering by air or sea but exiting at a land port of entry may be mischaracterized as overstays.

Importantly, although the refusal rate was seen as a proxy for the overstay rate when the program was conceived, people are denied visas for reasons other than being unable to prove that they will not remain illegally in the United States (i.e., they are "intending immigrants").[78] During the visa application process, consular officers[79] must confirm that an alien is not ineligible for a visa under any of the so-called "grounds for inadmissibility" of the INA, such as having a criminal history, engaging in terrorist activity, or having previously violated U.S. immigration law.[80] Although most B visa denials are because the alien cannot prove that they are not an "intending immigrant," there are other reasons a person could be denied a visa that are captured as part of a country's visa refusal rate.

[75] U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks,* GAO-08-967, September 2008, p.5.

[76] If a person submits five visa applications in a year and all are denied, they are all counted toward the refusal rate. However, if such a person submits five applications that are denied and then a sixth application that is approved, none of the previous applications are counted as refusals in the calculation of the adjusted refusal rate that is used in the determination of VWP eligibility. Personal Communication with the Department of State, Office of Congressional Affairs, July 19, 2010.

[77] Telephone conversation with DHS Congressional Affairs, December 1, 2011.

[78] §214(b) of the INA generally presumes that all aliens seeking admission to the United States are coming to live permanently; as a result, aliens seeking to qualify for a B visa (and most other nonimmigrant visas) must demonstrate that they are not coming to reside permanently in the United States. CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

[79] Determinations of inadmissibility are also made by CBP officers at ports of entry.

[80] The so-called grounds of inadmissibility under INA §212(a) include health-related grounds; criminal history; security and terrorist concerns; public charge (e.g., indigence); seeking to work without proper labor certification; illegal entrants and immigration law violations; ineligibility for citizenship; and aliens who are illegally present or have previously been removed.

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Legislation in the 112th Congress

H.R. 959/S. 497

S. 497, introduced by Senator Barbara Mikulski on March 7, 2011, and the companion bill, H.R. 959, introduced by Representative Mike Quigley on March 8, 2011, would mandate the use of overstay rates instead of refusal rates for participation in the VWP. Countries would have to have an overstay rate of no more than 3% to participate in the VWP. H.R. 959 and S. 497 would also allow the Secretary of DHS, in consultation with the Secretary of State, to waive the overstay rate requirement if the country: (1) meets all the security requirements of the VWP; (2) has security risk mitigation measures that mean that its participation in the VWP would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws; and (3) cooperates and is expected to continue to cooperate on counterterrorism initiatives, information sharing, and preventing terrorist travel.

The bills would also create a probationary period for countries in the program if they do not maintain an overstay rate under 3% or fail to comply with any of the other program requirements. The probationary status would last for the full fiscal year after the fiscal year in which the country is placed on probation. After the probationary status expires, the Secretary of DHS may reinstate the country to full status if the country meets the program requirements; terminate the country's participation if the country fails to meet the requirements; or place the country on probation for an addition year if the Secretary of DHS in consultation with the Director of National Intelligence certifies that the county's continued participation in the VWP does not threaten U.S. law enforcement, security, or immigration interests.

Moreover, H.R. 959 and S. 497 would specify that a country whose participation in the VWP was terminated due to an emergency in the country could be reinstated if at least six months had passed since the emergency, the emergency that caused the termination had ended, and the overstay rate during the period of termination was not more than 3%. Both bills would also require the U.S. Comptroller General, within 180 days of enactment, to conduct a review of DHS' methodology to track aliens entering and exiting the United States, and to detect aliens who overstay their period of admissions.

H.R. 2918

H.R. 2918 was introduced by Representative Illeana Ros-Lehtinen and ordered reported by the House Committee on Foreign Affairs on November 17, 2011. Section 301 of the bill would make it the policy of the United States to include Taiwan as a VWP country as soon as it meets all the requirements of the program. H.R. 2918 would also require that the Secretary of State report within 180 days of enactment to the House Homeland Security and Foreign Affairs Committees and the Senate Homeland Security and Governmental Affairs and Foreign Relations Committees on the extent to which Taiwan satisfies the requirements of the VWP and what additional steps, if any, are necessary for Taiwan to qualify for the program.

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S. 1545

S. 1545, introduced by Senator James Inhofe on September 13, 2011, would designate Taiwan as a VWP country.

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Appendix A. Legislative History

Visa Waiver Pilot Program

The Visa Waiver Program was established as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). Participation in the pilot program was originally limited to eight countries. Congress periodically passed legislation to extend the program's authorization, expand the number of countries allowed to participate in the program, and modify the qualifying criteria. Between 1986 and 1997, Congress passed the following five laws that made changes to the Visa Waiver Pilot Program:

- the Immigration Technical Corrections Act of 1988 (P.L. 100-525);
- the Immigration Act of 1990 (P.L. 101-649), which inserted further requirements for the program and removed the limit on the number of countries that could participate in the program;
- the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (P.L. 102-232);
- the Immigration and Nationality Technical Corrections Act of 1994 (P.L. 103-416), which created a probationary status to allow countries whose nonimmigrant visa refusal rates were higher than 2% but less than 3.5% to enter the program on a probationary basis; and
- the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), which created a new type of probationary status for countries in the program that failed to meet certain criteria, and removed the probationary status that had allowed countries with nonimmigrant visa refusal rates higher than 2% but less than 3.5% to enter the program.

The pilot program was scheduled to expire on September 30, 1997, but temporary extensions were included in the Continuing Resolutions passed in the 105th Congress.[81] The Commerce, Justice, State, and Judiciary (CJS) FY1998 Appropriations Act (P.L. 105-119) also contained an extension through April 30, 1998. In 1998, Congress passed legislation (P.L. 105-173) that not only extended the program through April 30, 2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.[82] By 1999, program participation had grown to include 29 countries.[83]

[81] An extension of the pilot program was included in the first Continuing Resolution (P.L. 105-56 §117) for FY1998. The five subsequent Continuing Resolutions—P.L. 105-64, P.L. 105-68, P.L. 105-69, P.L. 105-71, and P.L. 105-84—simply extended the expiration date of the provisions in the first Continuing Resolution for FY1998 (P.L. 105-56).

[82] Originally, to qualify for the Visa Waiver Pilot Program countries needed to have had an average nonimmigrant refusal rate of no more than 2% over the past two fiscal years with neither year going above 2.5%. P.L. 105-173 added the criteria that a country could have a nonimmigrant refusal rate of less than 3% for the previous year and qualify for the program.

[83] The 29 countries were: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay. Argentina was removed from the VWP in February 2002, and Uruguay was removed in April 2003. From April 2003 until November 2008, the VWP included 27 countries. As of October 2010, there are 36 countries participating in the VWP.

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Visa Waiver Permanent Program Act

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the Commissioner of the former Immigration and Naturalization Service (INS)[84] exercised the Attorney General's parole authority to extend the program temporarily.[85] Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that

- mandate that by October 1, 2007 all entrants under the VWP must have machine-readable passports;
- require that all visa waiver program applicants be checked against lookout systems;
- require ongoing evaluations of participating countries (not less than once every five years);
- require the collection of visa waiver program arrival/departure data at air and sea ports of entry; and
- require that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.[86]

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

USA Patriot Act of 2001

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

On September 24, 2003, the Secretary of State extended the deadline for visitors from 21 VWP countries to present a machine-readable passport at the ports of entry until October 26, 2004.[87] At

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

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

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

[87] The 21 countries granted a postponement were: Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. On November 11, 2003, Luxembourg was granted an extension of the deadline.

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this time, an entrant under the VWP with a passport which is not machine-readable must obtain a visa to travel to the United States.

Enhanced Border Security and Visa Entry Reform Act of 2002

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act),[88] signed into law on May 14, 2002, required all VWP countries to certify that they report in a timely manner the theft of blank passports, and required, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system. The Border Security Act also mandated that by October 26, 2004, the government of each VWP country needed to certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier.[89] The Border Security Act specified that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier unless the passport was issued prior to October 26, 2004. The USA Patriot Act established the deadline for all foreign nationals entering under the VWP to have machine-readable, tamper-resistant passports, and the new requirement of biometrics in the passports did not change the deadline in the USA Patriot Act for the presentation of machine-readable, tamper-resistant passports. The biometric passport requirement deadline was extended to October 27, 2005, by P.L. 108-299.[90] Thus, as of October 27, 2005 (the day after the new deadline), all entrants under the VWP were required to present machine-readable, tamper-resistant passports (as required by the USA Patriot Act, and P.L. 108-299), but only passports issued after October 26, 2005, were required to have a biometric identifier.

Although Congress extended the deadline for VWP countries to certify that they had a program to issue machine-readable passports with biometric identifiers, most VWP countries would have been unable to meet the new, October 26, 2005, deadline, especially if the biometric requirement could only have been fulfilled by countries who had electronic data chips in their passports (e-passports). In addition, there was resistance in Congress to grant another extension of the biometric deadline.[91] As a result, the U.S. government clarified that a digitized photograph printed on a data page in the passport would count as a biometric for the October 26, 2005, requirement. Thus, only France and Italy were unable to meet the new deadline, but have since come into compliance. In addition, any passports used by VWP travelers issued after October 26, 2006, requires integrated chips with information from the data page (e-passports).

The Intelligence Reform and Terrorism Prevention Act of 2004

P.L. 108-458,[92] the Intelligence Reform and Terrorism Prevention Act of 2004, added the requirement that by October 26, 2006, as a condition of being in the VWP, each VWP country must certify that it is developing a program to issue tamper-resistant, machine-readable visa

[88] P.L. 107-173. The original bill, H.R. 3525, was sponsored by Representative F. James Sensenbrenner.

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

[90] Signed into law on August 9, 2004.

[91] For example, see letter from Rep. F. James Sensenbrenner, Jr., to Luc Frieden, President of the European Counsel of Ministers, and Franco Frattini, Vice-President of the European Commission, April 7, 2005.

[92] The original bill, H.R. 2845, was sponsored by Senator Susan M. Collins and signed into law on December 17, 2004.

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documents that incorporate biometric identifiers which are verifiable at the country's port of entry.

Implementing the 9/11 Commission Recommendations Act of 2007

Signed into law on August 3, 2007, Section 711 of P.L. 110-53 (H.R. 1) allowed the Secretary of DHS, in consultation with the Secretary of DOS, to waive the nonimmigrant refusal rate requirement for admission to the VWP on the date on which the Secretary of DHS certified to Congress that an air exit system is in place that can verify the departure of not less than 97% of foreign nationals that exit through U.S. airports. In addition, the Secretary of DHS also had to certify to Congress that the electronic travel authorization system (discussed below) is operational, prior to being able to waive the nonimmigrant refusal rate requirement. Until June 30, 2009, the air exit system did not need to incorporate biometric identifiers; however, after that date, if the air exit system is unable to match an alien's biometric information with relevant watch lists and manifest information, the Secretary of DHS's authority to waive the nonimmigrant refusal rate is suspended until the air exit system has the specified biometric capacity.

For admission to the VWP, a country who receives a refusal rate waiver also has to

- meet all the security requirements of the program;
- be determined by the Secretary of DHS to have a totality of security risk mitigation measures which provide assurances that the country's participation in the program would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws;
- have had a sustained reduction in visa refusal rates, and have existing conditions for the rates to continue to decline;
- have cooperated with the United States on counterterrorism initiatives and information sharing before the date of its designation, and be expected to continue such cooperation; and
- have, during the previous fiscal year, a nonimmigrant visas refusal rate of not more than 10%, or an overstay rate that did not exceed the maximum overstay rate established by the Secretaries of DHS and DOS for countries receiving waivers of the nonimmigrant refusal rate to participate in the VWP the program.

P.L. 110-53 also specified that in determining whether to waive the nonimmigrant refusal rate requirement, the Secretary of DHS, in consultation with the Secretary of DOS, may take into consideration other factors affecting U.S. security, such as the country's airport security and passport standards, whether the country has an effective air marshal program, and the estimated overstay rate for nationals from the country.

In addition, P.L. 110-53 made several changes to the criteria to qualify as a VWP country, which were intended to enhance the security of the program. As previously mentioned, the act mandated that the Secretary of DHS, in consultation with the Secretary of State, develop and implement an electronic travel authorization system (the system),[93] through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the

[93] The system as implemented is known as the Electronic System for Travel Authorization (ESTA).

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alien is eligible to travel to the United States and enter under the VWP. Aliens using the system are charged a fee that is required to be set at a level so that the cost of creating and administering the system is covered by the fees.

P.L. 110-53 also required the Secretary of DHS, no later than one year after enactment, to establish an exit system that records the departure of every alien who entered under the VWP and left the United States by air. The exit system is required to match the alien's biometric information against relevant watch lists and immigration information, and compare such biographical information against manifest information collected by airlines to confirm that the alien left the United States.[94]

Furthermore, under P.L. 110-53, to participate in the VWP, countries are required to enter into an agreement with the United States to report or make available through INTERPOL information about the theft or loss of passports. The agreements have to specify strict time limits for the reporting of this information. In addition, to be part of the VWP, countries have to accept the repatriation of any citizen, former citizen, or national against whom a final order of removal is issued no later than three weeks after the order is issued. Also, the countries are required to enter into an agreement with the United States to share information regarding whether a national of that country traveling to the United States represents a threat to U.S. security or welfare. The act requires the Secretary of DHS to provide technical assistance to VWP countries to assist the countries in fulfilling the requirements of the program.

In addition, P.L. 110-53 requires the Director of National Intelligence to conduct intelligence assessments of countries. For new VWP countries, the reviews must occur prior to their admittance into the VWP. For existing VWP countries, the reviews should be done in conjunction with the biannual country reviews.

The act also requires the Director of National Intelligence to immediately inform the Secretary of DHS of any current and credible threat of imminent danger to the United States or its citizens that originates from a VWP country. Upon receiving such notification, the Secretary of DHS, in consultation with the Secretary of DHS, may suspend a country from the VWP without any prior notice. Once the country's participation in the VWP no longer poses a security threat, the Secretary of DHS shall reinstate the country in the VWP.

[94] This exit system is not necessarily the same as the exit system required for the nonimmigrant refusal rate waiver authority. DHS appears to have incorporated this requirement as part of the exit portion of automated entry and exit data system known as US-VISIT.

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Appendix B. Legislation in the 111th Congress

S. 16

Introduced by Senator George Voinovich on September 29, 2010, S. 16 would have reinstated the nonimmigrant refusal rate waiver by removing the requirement that DHS implement a biometric air exit system before the waiver is reinstituted.

S. 203

Senators Diane Feinstein and Jon Kyl introduced S. 203 on January 12, 2009. S. 203 contained several provisions that aimed to increase the security of the VWP. The bill would have required that within 180 days of enactment every country in the VWP have in effect an agreement to share data on lost and stolen passports. (The requirement to enter into these agreements was included in P.L. 110-53.) Countries that refused to enter into the agreement within the specified time period would have been suspended from the program until an agreement was reached. In addition, S. 203 would have prohibited new countries from being admitted to the VWP until all current countries had agreements. The bill also would have required within a year after enactment that DHS evaluate every country admitted to the VWP prior to January 1, 2009, including calculating the country's overstay rate.[95] Furthermore, S. 203 would have established the maximum overstay rate as 2%, and required that countries with higher overstay rates be suspended from the VWP.

S. 203 also would have changed the language regarding the exit system requirement for the nonimmigrant refusal waiver. In order to have the nonimmigrant refusal rate authority, DHS would have had to certify to Congress that an air entry and exit system was in place that verified the arrival and departure of 97% of all foreign nationals who exit through airports.[96] Once the Secretary of DHS made such a certification, the U.S. Comptroller would have been required within 180 days to conduct a study of the entry-exit system.

H.R. 1439/S. 1704

Representative Steve Israel introduced H.R. 1439 on March 11, 2009, and Senator Bill Nelson introduced S. 1704 on September 24, 2009. The bills would have required the Attorney General to consider as a part of a country's evaluation for continuation in the VWP the country's cooperation in the extradition and prosecution of Nazi war criminals.

S. 3544

S. 3544, which was introduced by Senator Barbara Mikulski on June 29, 2010, would have mandated the use of overstay rates instead of refusal rates for participation in the VWP. Countries would have had to have an overstay rate of no more than 3% to participate in the VWP. The bill also would have created a probationary period for countries in the program if they did not

[95] Under current statute, country evaluations must be completed every two years.

[96] Under current law, the refusal rate waiver became available on the day that an air exit system is in place that could verify the departure of at least 97% of foreign nationals departing from the United States.

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maintain an overstay rate under 3% or failed to comply with any of the other program requirements. In addition, S. 3544 would have required DHS to report annually to Congress on countries' compliance with the program's requirements. Like S. 203, the bill would have required that within 180 days of enactment, every country in the VWP have in effect an agreement to share data on lost and stolen passports. Moreover, S. 3544 would have required the Secretary of DHS to make information on any aliens who overstayed the term of their admission to the United States available to state and local law enforcement agencies.

H.R. 2954/H.R. 4321

Introduced by Representative Mike Quigley, H.R. 2954 would have delayed from June 30, 2009, to June 30, 2011, the requirement that the air exit system incorporate biometric identifiers as a condition of the Secretary of DHS's authority to waive the nonimmigrant refusal rate. The same provision was included in H.R. 4321 (§306), which was introduced by Representative Solomon Ortiz on December 15, 2009.

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