

Visa Waiver Program Oversight:
Risks and Benefits of the Program

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Chairman Gallegly, Ranking Member Lofgren, and other subcommittee members, thank you for the opportunity to be here today to discuss the risks and benefits of the Visa Waiver Program (VWP), which are important to consider in light of proposals to modify the eligibility criteria and expand the number of participating countries. In my view, such proposals are very premature. The Department of Homeland Security has yet to implement the Congressional mandates for systems that can produce metrics that would permit a proper evaluation of countries' eligibility – most importantly, an effective visitor exit recording system. DHS also has failed to fully implement and properly manage the security enhancements that were used to justify the last VWP expansion. In addition, we currently lack a robust interior immigration enforcement capability to address the inevitable abuses of the program. Finally, there are legitimate law enforcement concerns about visitors from some of the countries on the short list for consideration. If the program were to be expanded before better visitor tracking and enforcement is in place, Americans will be more vulnerable to terrorist attack and more exposed to organized criminal enterprises, and country will experience even more illegal immigration, all of which comes at enormous fiscal and social cost to the nation.

Besides, what is the hurry to expand the VWP? The U.S. travel industry, which is one of the organized interests that is perennially pushing for VWP expansion, is not an industry in crisis. Furthermore, lawmakers and agency leaders have yet to determine if the global economic problems that unfolded just as we were undertaking the last VWP expansion have affected the eligibility of some of the more marginal participating countries, such as Greece, Ireland and Portugal. It is important that Congress vigilantly exercise its oversight authority to ensure that DHS provides the missing security and enforcement pieces to minimize the inherent risk in the VWP, so that the benefits can be fully realized.

What are the Benefits of the Visa Waiver Program?

The main benefits to the United States are:

- Encourages legitimate travel, which benefits the U.S. economy.
- Helps focus consular resources on higher-risk travelers.
- Negotiations over participation have increased information-sharing to identify travelers who are a threat to national security and public safety.
- Reciprocity for U.S. travelers.

What are the Risks of the Visa Waiver Program?

Immigration policymakers on the Hill and in the Executive Branch have understood for well over a decade that visa overstayers represent a significant share of the illegal alien population, estimated to be

11 million in 2010. The most recent overstay estimate ranges from one-third to one-half of the illegal alien population, or between four to six million illegal aliens. These illegal settlers present a possible national security risk -- several of the 9/11 hijackers were visa overstayers, and others have been caught working in critical infrastructure facilities or other sensitive locations. They commit crimes. For example, among the most violent criminal gangsters that ICE has arrested under its anti-gang program known as Operation Community Shield are several murderers who originally entered on non-immigrant visas or the VWP. In addition, like other illegal immigrants, visa overstayers are costly to taxpayers. The total net cost of illegal immigration runs about \$10 billion per year at the federal level, after taxes are accounted for, so the share of that cost attributable to visa overstayers is likely between three to five billion dollars per year.

Rudimentary Exit Recording, But Still No Reliable Overstay Reporting.

Most observers agree that collecting and analyzing information on visa overstayers is key to maintaining the integrity of the immigration system. Congress first mandated the development of an entry-exit system in 1996, after the first World Trade center bombing. In addition to producing actionable enforcement leads, a true entry-exit recording system would enable policymakers to see which travelers are not complying with the law. Visa overstay data would provide information on how travelers actually behave, and would be less speculative than refusal rates, which reflect the aggregate of consular officers' assessment of possible behavior.

This data is also important to the State Department, which needs better information to use in making visa policy and issuance decisions. It is especially important in making an objective and sound determination of which countries might qualify for the Visa Waiver Program.

As a condition for granting DHS the sole authority and discretion for determining membership in the Visa Waiver Program, in 2007 Congress directed the agency to establish a biometric exit recording system for air travelers that can account for at least 97% of those who depart by air. This was in addition to long-standing requirements for DHS to implement an exit recording system as part of US-VISIT, and long-ignored requirements for DHS to produce annual estimates of how many travelers have overstayed visas and the nationality of visa overstayers (the Data Management Improvement Act of 2000 and the Visa Waiver Permanent Program Act).

In December, 2009 testimony before the Senate Judiciary Committee, DHS Secretary Janet Napolitano signaled that the agency would not be moving forward to establish a biometric exit recording system.¹ In September, 2011, Napolitano told the Senate Homeland Security Committee that the agency was moving on a "fast track" to create a different system, presumably based on the tracking of air and sea passenger information from passenger manifests. This biographic matching system, known as the Arrival Departure Information System (ADIS), has been in place since the beginning of 2004.

Although ADIS is helpful, it does not fulfill the Congressional requirements for a true exit system and can produce only limited data for program evaluation metrics. Currently it is used by ICE to identify overstayers who might present security or safety risks and by consular officers to verify an applicant's record of compliance on prior visits. But the ADIS system has a number of limitations:

- ADIS is maintained by the airlines, so there is no way to verify the accuracy of the information or ensure that all travelers comply with a departure reporting requirement.
- It is a biographic system, not the Congressionally-mandated biometric system, so it cannot authenticate the identity of departing passengers. This means it would be easy for someone to

¹ <http://cis.org/vaughan/napolitanoexittracking>.

create a record of leaving the country without actually leaving. In addition, the lack of biometrics makes it less useful for law enforcement, when it is preferable to have the most reliable identity match possible.

- Because it is biographic, the system can have difficulty producing matches, and inexact matches can produce either too many records for review or none at all. If an alien has changed names, such as through marriage, the system cannot match the records.
- ADIS checks are neither automatic nor required as part of the visa adjudication process. They are performed only at the discretion of individual consular offices; some may use the system diligently, others may never bother. At this time, lawmakers cannot not assume that ADIS is playing a large role in preventing or deterring overstayers just because it is available.

Moreover, while DHS has been using the information generated by ADIS for operational purposes – to identify possible overstayers, to create lookouts for ICE and for consular officers, it resisted and tried to avoid, and twisted congressional requirements to produce regular reports on the total number of overstays, their citizenship, visa categories, and other key data.

Is There a Magic or Acceptable Overstay Rate?

While I would argue that (once we have credible data) the overstay rates are superior to refusal rates for determining likely compliance for foreign visitors, I would caution that they should not be considered rigidly or in isolation from refusal rates or other key metrics. It is certainly pre-mature to speculate about what the acceptable overstay rate should be, since we have little reliable information on what is happening now.

For enforcement purposes, ICE needs flexibility to determine when a subject raises concerns. A grandmother who overstays by one month to help take care of a sickly new baby in the family is obviously of less concern than a young man from a country associated with terrorism, who has gone missing one week after the start of an English language or airplane mechanic training program that allegedly was the reason for his visit.

For VWP evaluation purposes, a low overstay rate might be an indication of an appropriately high refusal rate; it does not necessarily mean that the country should participate in the VWP. DHS should also consider the number and type of adjustment of status applications from citizens of candidate countries – not only those that are approved, but those that are denied. These figures could indicate if visitors are using temporary visas or visa waiver admissions to bypass the regular legal immigration rules.

In general, I suspect that the three percent overstay rate proposed in H.R. 959 is probably too high to serve as a good indicator of VWP eligibility. The most recent study of overstays that I am aware of, from the Pew Hispanic Center² estimated that the overstay rate for Mexican holders of Border Crossing Cards (a type of short-term visitor visa) was 1.7 percent. This seemingly-low overstay rate, at least by the standards of H.R. 959 supporters, produces hundreds of thousands of illegal immigrants per year, and of course no one in their right mind would suggest that the United States should offer Mexican nationals visa-free travel.

The case of Brazil illustrates another reason why visa overstay rates cannot be the sole measure of a country's readiness for VWP participation. Assuming for the moment that DHS can actually calculate a meaningful overstay rate, it easily can understate the problem of illegal migration from certain countries, if a substantial number of the illegal aliens from that country do not enter on temporary visas, as is the case with Brazil and other South American countries. A significant share of illegal immigrants from

² Pew Hispanic Center Fact Sheet, "Modes of Entry for the Unauthorized Migrant Population," May 22, 2006.

these countries do not seek visas, but instead travel to Mexico and enter illegally over the over the land border. Their numbers are reflected in the overall estimates of the illegal population, but they will not be reflected in the overstay calculations.

Electronic Travel Authorization of Limited Use in Detecting Unqualified Travelers.

The implementation of the Electronic System for Travel Authorization (ESTA) process has been touted as a major security enhancement to the Visa Waiver Program. It is important to recognize that while this process will provide the opportunity for advance database checks on travelers before they arrive, and may succeed in alerting officials to the pending arrival of people who may be of interest, the ESTA tool is really of very limited utility in determining the eligibility of travelers or screening out terrorists and criminals, and certainly no substitute for a consular interview. Much as a doctor can best make a diagnosis by seeing and talking with the patient, the consular interview is the best tool for evaluating the qualifications of prospective visitors. And qualifying for admission to the United States is not simply a matter of not being a known terrorist or criminal. To be admitted, visitors need to demonstrate that they have a legitimate reason for travel and that they are likely to return home. That determination simply cannot be done electronically.

Moreover, the GAO has reported that some passengers are being allowed to board planes for the US even if they have not obtained ESTA approval, in violation of program rules, and defeating one of the main purposes of the program, which is to prevent the travel of unqualified and/or potentially dangerous individuals. The same GAO report noted other security elements of the program centered on information sharing that have yet to be implemented.

Proposed Expansion Countries Raise Security and Law Enforcement Concerns.

The State Department once stated in a response to a GAO report, “The Department recognizes that a major reason for the [Visa Waiver] Program’s success lies in the strict standards for participation.”³ Because we currently lack the safeguards to prevent large numbers of inadmissible travelers from entering, and because we lack the ability to identify and remove those who overstay, the expansion of the program to include more than the clearly-qualified countries is risky. Among the countries that have been proposed for expansion: Brazil, Argentina, Chile, Croatia, Uruguay, Poland, and Taiwan. While some on the list appear to be closer to eligibility than others, none is an obvious candidate. A number of these countries are associated with serious law enforcement problems such as organized crime and visa fraud, and a number have huge visa demand, large numbers of visa applicants who are not qualified, large populations of settled illegal immigrants, and weak records of visa compliance.

Of the group, Taiwan is the only short-list country under discussion that has a per capita income and standard of living that is on par with that of the average VWP nation or the United States,⁴ meaning that, on paper at least, in general its citizens might have less economic motivation to overstay. The refusal rate for Taiwanese nationals seeking short-term visitor visas is also relatively low, averaging four percent in the last three years. On the other hand, Taiwan has a long tradition of immigration to the United States, a sizeable diaspora here, and significant pent-up visa demand, judging by the popularity of the visa lottery and investor visa categories, all of which suggests that there is some risk of VWP abuse. Like South Korea, Taiwan also has a history of its citizens manipulating U.S. visa rules in order to access

³ “Process for Admitting Additional Countries into the Visa Waiver Program,” GAO-06-835R, at www.gao.gov.

⁴ According to the International Monetary Fund’s scale measuring Gross National Product and Purchasing Power Parity per capita, the average national wealth of the United States is \$46,900. The GDP/PPP per capita of the average VWP country is \$34,400. Taiwan’s is \$35,600. The other proposed countries: Brazil - \$11,300, Argentina - \$15,900, Chile - \$15,000, Croatia - \$17,800, Uruguay - \$14,300, Poland, \$19,000.

the U.S. public educational system and establish a foothold for future permanent residence. In addition, the existence of sophisticated and violent organized crime syndicates and gangs with ties to Taiwan raises law enforcement concerns.

Argentina also has had a relatively low refusal rate of just over three percent in recent years. Argentina was a participant in VWP from 1996 to 2002, when an economic crisis prompted many of its citizens to attempt to settle illegally in the United States, causing it to be disqualified. This country might be a good candidate again once DHS has fully implemented Congressional requirements on exit tracking, shown satisfactory compliance based on reliable overstay figures, and passed muster with a full security evaluation.

Poland has been lobbying incessantly to be included in VWP for the last several years, and unfortunately some who are associated with this campaign have tried to emotionalize the VWP eligibility issue and characterize it as a measure of bilateral friendship. In reality there are some serious hurdles for Poland to overcome before it can make a credible case to participate. More than 10 percent of the Polish visitor visa applicants over the last several years have not qualified, which no doubt reflects the substantial standard of living gap between our countries and the difficult economic conditions that have caused the noticeable migration of Polish young people to other countries. The Poles seem to have a poor record of visa compliance and visa fraud, sometimes linked to the Polish organized crime groups that are embedded in the sizeable illegal Polish population here. In addition, Poland sometimes has been uncooperative in accepting its citizens for deportation from the United States.

Like Poland and Taiwan, Brazil sends large numbers of immigrants to the United States, both legally and illegally. In fact, Brazil is one of the ten countries with the largest illegal alien populations (180,000), and in 2010 was number six on the list of countries with the most aliens removed. Few countries are the source of more illegal immigrants to the United States than Brazil. Like the Polish illegal population, the Brazilian illegal population is concentrated in certain parts of the United States, and therefore the impact is profound in a few localities, but largely unnoticed by the rest of the country. And, as noted above, this significant level of illegal immigration may not be captured by overstay estimates alone.

Interior Enforcement Is Lacking.

Besides lacking adequate screening to prevent the entry of terrorists, criminals and illegal immigrants, the federal government devotes relatively few resources to identifying and removing illegal immigrants, or to keeping them from becoming established here.

The immigration enforcement agency (ICE) has just a few thousand special agents and deportation officers to cope with an illegal alien population of 11 million, plus tens of thousands of criminal aliens who are not here illegally but are removable because they have committed serious crimes. ICE estimates that there are approximately 2.1 criminal aliens living in the United States, costing taxpayers about \$1.6 billion each year. The Obama administration is content to remove fewer than 400,000 illegal and criminal aliens per year, and a large share of these removals occur in the border zone, not the interior. In addition, it has relaxed certain USCIS policies that formerly discouraged visitors from using temporary admission to cut in front of the millions of applicants waiting to immigrate legally from outside the States. In general, the Obama administration has broadcast widely that only those who are convicted of serious crimes will be subject to immigration law enforcement.

Only a handful of states require employers to verify the immigration status of new workers, and workplace enforcement is not the top priority for ICE, so few employers feel any urgency to comply voluntarily with the laws forbidding the hiring of illegal workers. A couple of states still issue drivers

licenses to illegal aliens and temporary visitors. These documents can be used to obtain employment, bank accounts, and firearms, among other trappings of a legal existence. Even if DHS is able to determine which visitors overstay, there is little chance that ICE will act on the information.

So while the expansion of the Visa Waiver Program may serve foreign policy goals and benefit certain foreign travelers, any expansion comes at a price. This price will be paid by those Americans who become victims of crimes committed by people taking advantage of the lack of visa controls, by those who lose job opportunities to new illegal immigrants overstaying their welcome, and by taxpayers who must shoulder the burden of public services, criminal justice expenses, and increased immigration law enforcement that will be necessary as a result. Congress must do what it can to try to reduce the security and fiscal cost of the program by insisting that DHS fulfill its obligations to implement a genuine exit recording system, produce the best possible overstay estimates, and comply with the other security requirements in the authorizing legislation. In addition, while there is no statutory requirement for this, the pending expansion of the VWP should be accompanied by an infusion of additional resources for law enforcement as well as the implementation of measures, such as mandatory verification of immigration status in the workplace, that will discourage visa overstayers, and all prospective illegal immigrants, from settling here. Lastly, Congress should clarify regulations to limit more strictly any possibilities for adjusting status after entry under the VWP or with a regular non-immigrant visa.

Respectfully submitted by,

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