

# CRS Report for Congress

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## Immigration: Terrorist Grounds for Exclusion of Aliens

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# Immigration: Terrorist Grounds for Exclusion of Aliens

## Summary

The Immigration and Nationality Act (INA) spells out a strict set of admissions criteria and exclusion rules for all foreign nationals, whether coming permanently as immigrants (i.e., legal permanent residents) or temporarily as nonimmigrants. Notably, any alien who has engaged in or incited terrorist activity, is reasonably believed to be carrying out a terrorist activity, or is a representative or member of a designated foreign terrorist organization is inadmissible.

After the September 11, 2001, terrorist attacks, the INA was broadened to deny entry to representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and spouses and children of aliens who are removable on terrorism grounds (on the basis of activities occurring within the previous five years). The INA also contains grounds for inadmissibility based on foreign policy concerns.

The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) concluded that the key officials responsible for determining alien admissions (consular officers abroad and immigration inspectors in the United States) were not considered full partners in counterterrorism efforts prior to September 11, 2001, and as a result, opportunities to intercept the September 11 terrorists were missed. The 9/11 Commission's monograph, *9/11 and Terrorist Travel*, underscored the importance of the border security functions of immigration law and policy.

This report opens with an overview of the grounds for inadmissibility and summarizes key legislation enacted in recent years. The section on current law explains the legal definitions of "terrorist activity," "terrorist organization," and other security-related grounds for inadmissibility and analyzes the legal implications of these provisions. The report then discusses the alien screening process to identify possible terrorists during the visa issuance process abroad and the inspections process at U.S. ports of entry. Where relevant, the report also discusses how recently enacted legislation — the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) — affects these matters. Provisions in the Real ID Act (H.R. 418), introduced in the 109<sup>th</sup> Congress by House Committee on the Judiciary Chairman James Sensenbrenner and passed by the House on February 10, 2005, and passed on March 12, 2005 as part of the FY2005 supplemental appropriations for military operations in Iraq and Afghanistan, reconstruction in Afghanistan and other foreign aid (H.R. 1268) are also discussed.

For legislative analysis of related issues, see CRS Report RL32754, *Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005*; CRS Report RL32616, *9/11 Commission: Legislative Action Concerning U.S. Immigration Law and Policy in the 108th Congress*; CRS Report RL32399, *Border Security: Inspections Practices, Policies and Issues*; CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*; CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*; and CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*. This report will be updated as events require.

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# Immigration: Terrorist Grounds for Exclusion of Aliens

## Introduction

In the years following the September 11, 2001 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens (i.e., noncitizens or foreign nationals) who apparently entered the United States on temporary visas despite provisions in immigration law that bar the admission of suspected terrorists. The report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) contended that “(t)here were opportunities for intelligence and law enforcement to exploit al Qaeda’s travel vulnerabilities.” The 9/11 Commission maintained that border security was not considered a national security matter prior to September 11, and as a result the consular and immigration officers were not treated as full partners in counterterrorism efforts.<sup>1</sup> The 9/11 Commission’s monograph, *9/11 and Terrorist Travel*, underscored the importance of the border security functions of immigration law and policy.<sup>2</sup>

Several proposals in the 108<sup>th</sup> Congress to implement the recommendations of the 9/11 Commission had notable implications for U.S. counterterrorism efforts and border security.<sup>3</sup> The most significant of these proposals were H.R. 10, the 9/11 Recommendations Implementation Act, as amended, introduced by the Speaker of the House of Representatives Dennis Hastert and passed by the House as S. 2845 on October 8, 2004, and S. 2845, the National Intelligence Reform Act of 2004, as amended, introduced by Senators Susan Collins and Joseph Lieberman and passed by the Senate on October 8, 2004. The conference report on S. 2845 passed the House on December 7 and the Senate on December 8, 2004.<sup>4</sup> The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458), a compromise bill signed on December 17, 2004 includes some — but not all — of the immigration provisions that were originally under consideration.

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<sup>1</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Executive Summary, at 14 (Jul. 2004).

<sup>2</sup> National Commission on Terrorist Attacks Upon the United States, *9/11 and Terrorist Travel* (Aug. 2004).

<sup>3</sup> For further analysis, see CRS Report RL32616, *9/11 Commission: Current Legislative Proposals for U.S. Immigration Law and Policy*, by Michael John Garcia and Ruth Ellen Wasem.

<sup>4</sup> 108<sup>th</sup> Congress, 2<sup>nd</sup> Session, House of Representatives, *Conference report to accompany S. 2845*, H.Rept. 108-796, Dec. 7, 2004.

Provisions on expanding the terrorist grounds for inadmissibility that are in the Real ID Act (H.R. 418), introduced in the 109<sup>th</sup> Congress by House Committee on the Judiciary Chairman James Sensenbrenner, are comparable to those in House-passed H.R. 10. These provisions were dropped from what ultimately was enacted as the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>5</sup> Action on H.R. 418 is expected in the 109<sup>th</sup> Congress.

Under current law, three departments — the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ) — play key roles in administering the law and policies on the admission of aliens.<sup>6</sup> DOS's Bureau of Consular Affairs (Consular Affairs) is the agency responsible for issuing visas, DHS's Citizenship and Immigration Services (USCIS) is charged with approving immigrant petitions, and DHS's Bureau of Customs and Border Protection (CBP) is tasked with inspecting all people who enter the United States. DOJ's Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.

This report focuses on the terrorism-related grounds for inadmissibility. It opens with an overview of the terror-related grounds as they evolved through key legislation enacted in recent years. The section on current law explains the legal definitions of “terrorist activity,” “terrorist organization,” and other security-related grounds for inadmissibility and analyzes the legal implications of these provisions. The report then discusses the alien screening process to determine admissibility and to identify possible terrorists, both during the visa issuance process abroad and the inspections process at U.S. ports of entry.

## Overview of Terrorist Exclusion

### Grounds for Inadmissibility

With certain exceptions,<sup>7</sup> aliens seeking admission to the United States must undergo separate reviews performed by DOS consular officers abroad and CBP

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<sup>5</sup> P.L. 108-458, 118 Stat. 3638 (2004).

<sup>6</sup> Other departments, notably the Department of Labor (DOL) and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (DHHS) sets policy on the health-related grounds for inadmissibility.

<sup>7</sup> Certain classes of aliens are not required to obtain a visa to enter the United States and are therefore exempt from the consular review process. For example, under the visa waiver program (VWP), nationals from certain countries are permitted to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. See INA § 217; 8 U.S.C. § 1187. For additional background on the VWP, see CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

inspectors upon entry to the United States.<sup>8</sup> These reviews are intended to ensure that applicants are not ineligible for visas or admission under the grounds for inadmissibility spelled out in the Immigration and Nationality Act (INA).<sup>9</sup> These criteria are:

- health-related grounds;
- criminal history;<sup>10</sup>
- security and terrorist concerns;
- public charge (e.g., indigence);
- seeking to work without proper labor certification;
- illegal entry and immigration law violations;
- ineligible for citizenship; and,
- aliens previously removed.

Some grounds for inadmissibility may be waived or are not applicable in the case of nonimmigrants, refugees (e.g., public charge),<sup>11</sup> and other aliens. For aliens seeking to enter temporarily as nonimmigrants, even the terrorism grounds for inadmissibility may possibly be waived for aliens who do not pose an immediate danger.<sup>12</sup> As the terrorism grounds broadened from active and former terrorists to representatives of terrorist organizations to members and supporters of terrorist organizations to those who may have endorsed or espoused terrorism at one time, many believed it was appropriate to at least leave open the possibility of a waiver to allow temporary admission for limited purposes and subject to strict controls.<sup>13</sup>

## Key Legislation

Prior to the Immigration Act of 1990 (P.L. 101-649), there was no express terrorism-related ground for exclusion. Congress added the terrorism ground in the 1990 Act as part of a broader effort to streamline and modernize the security and foreign policy grounds for inadmissibility and removal. Before 1990, certain terrorists were excludable under security grounds, but the 1990 Act opened the door

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<sup>8</sup> For background and analysis of alien screening and visa issuance policy, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

<sup>9</sup> INA § 212(a); 8 U.S.C. § 1182(a).

<sup>10</sup> For a full discussion of this ground, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia and Larry M. Eig.

<sup>11</sup> All family-based immigrants and employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.

<sup>12</sup> INA § 212(d)(3); 8 U.S.C. § 1182(d)(3).

<sup>13</sup> See, e.g., *International Terrorism: Threats and Responses, Hearings on H.R. 1710, the Comprehensive Antiterrorism Act of 1995, Before the House Comm. on the Judiciary*, 104<sup>th</sup> Cong. , 1st Sess., 243-244 (1995) (testimony of Jamie S. Gorelick, Deputy Attorney General) (while strongly endorsing greater antiterrorism authority, also observing that it might be in our interest to allow a member of a terrorist organization to enter in some circumstances). Controversy has especially arisen from time-to-time on whether to waive terrorism inadmissibility for certain Palestinians.

for broader elaboration of what associations and promotional activities could be deemed to be terrorist activities. In part as a response to the 1993 World Trade Center bombing, Congress strengthened the anti-terrorism provisions in the INA and passed provisions that many maintained would ramp up enforcement activities, notably in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208) and the Antiterrorism and Effective Death Penalty Act (P.L. 104-132). As part of the Violent Crime Control Act of 1994, Congress also amended the INA to establish temporary authority for an “S” nonimmigrant visa category for aliens who are witnesses and informants on criminal and terrorist activities. In September 2001, Congress enacted S. 1424 (P.L. 107-45) providing permanent authority for admission under the S visa.<sup>14</sup>

Enacted in October 2001, the USA PATRIOT Act (P.L. 107-56) is a broad anti-terrorism measure that includes several important changes to immigration law. Specifically in the context of this report, the USA PATRIOT Act amended the INA to expand the definition of “terrorism” and amend the criteria and process for designating “terrorist organizations.”

The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) aimed to improve the visa issuance process abroad as well as immigration inspections at the border. It expressly required the development of an interoperable electronic data system to share information relevant to alien admissibility and removability and the implementation of an integrated entry-exit data system. It also required that, beginning in October 2004, all newly issued visas have biometric identifiers. In addition to increasing consular officers’ access to electronic information needed for alien screening, it expanded the training requirements for consular officers who issue visas.<sup>15</sup>

## Current Law

### **“Terror-Related” Grounds for Inadmissibility or Deportability under Immigration Law**

Engaging in specified, terror-related activity has strict consequences upon an alien’s ability to lawfully enter or remain in the United States. The INA provides that aliens engaged in terror-related activities cannot legally enter the United States. If an alien is legally admitted into the United States and subsequently engages in terrorist activity, he is deportable.<sup>16</sup> Even if an alien does not fall under terror-related

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<sup>14</sup> CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*, by Karma Ester.

<sup>15</sup> CRS Report RS21438, *Immigration Legislation Enacted in the 107th Congress*, by Andorra Bruno.

<sup>16</sup> Pursuant to INA section 237, any alien who has engaged, is engaged, or at any time *after admission* engages in any terrorist activity is deportable. INA § 237(a)(4)(B); 8 U.S.C. § 1227(a)(4)(B). The scope of these grounds is considerably less broad than terror-related grounds for inadmissibility. Membership in or association with a terrorist organization, the (continued...)

categories making him inadmissible or deportable, he might still be denied entry or removed from the United States on separate, security-related grounds.

**Terror-Related Grounds for Inadmissibility under the INA.** The INA categorizes certain classes of aliens as inadmissible, making them “ineligible to receive visas and ineligible to be admitted to the United States.”<sup>17</sup> Pursuant to INA section 212(a)(3)(B), an alien is inadmissible if he:

- has engaged in terrorist activity;
- is known or reasonably believed by a consular officer or the Attorney General to be engaged in or likely to engage in terrorist activity upon entry into the United States;
- has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
- is a representative of (A) a foreign terrorist organization, as designated by the Secretary of State, or (B) a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities;
- is either a member of a foreign terrorist organization, as designated by the Secretary of State, or is an officer, official, representative, or spokesman of the Palestine Liberation Organization;
- has used his position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities; or
- is the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last five years, unless the spouse or child (A) did not and should not have reasonably known about the terrorist activity or (B) in the reasonable belief of the consular officer or

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<sup>16</sup> (...continued)

endorsement or espousal of terrorist activity, or being the spouse or child of an alien who was inadmissible to the United States on terror-related grounds would not appear to provide grounds for deporting an alien legally present in the United States, even if these grounds would make an alien seeking to enter the United States statutorily inadmissible. Compare INA § 237(a)(4)(B); 8 U.S.C. § 1227(a)(4)(B) (detailing terror-related grounds for deportability) with INA § 212(a)(3)(B); 8 U.S.C. § 1182(a)(3)(B) (detailing terror-related grounds for inadmissibility). House-passed H.R. 10 would have made the grounds for deportability for terror-related activity the same as the grounds for inadmissibility, but this provision was not included in the final version of the Intelligence Reform and Terrorism Prevention Act of 2004. However, the act does make the receipt of military-type training from or on behalf of a designated terrorist organization a ground for deportability. P.L. 108-458, § 5402.

<sup>17</sup> INA § 212(a); 8 U.S.C. § 1182(a).

Attorney General, has renounced the activity causing the alien to be found inadmissible under this section.<sup>18</sup>

An additional, catch-all provision of section 212(a) provides that association with terrorist organizations may also be grounds for inadmissibility. Any alien who either the Secretary of State or Attorney General, after consultation with the other, determines has been associated with a “terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.”<sup>19</sup>

## Definitions of Terror-Related Terms in the INA

Terms including “terrorist activity,” “engaged in terrorist activity,” and “terrorist organization” are specifically defined for INA purposes and refer to distinct concepts. This section will discuss the meaning of these terms as they relate to immigration matters.

**Definition of “Terrorist Activity” under the INA.** For purposes of immigration matters covered by the INA, “terrorist activity” is defined by INA section 212(a)(3)(B). In order for an action to constitute “terrorist activity,” it must be unlawful in the place where it was committed and involve:

- the hijacking or sabotage of an aircraft, vessel, or other vehicle;
- seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained;

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<sup>18</sup> INA § 212(a)(3)(B)(i); 8 U.S.C. § 1182(a)(3)(B)(i).

<sup>19</sup> INA § 212(a)(3)(F); 8 U.S.C. § 1182(a)(3)(F). House-passed H.R. 10 would have modified the terror-related grounds for admissibility. Pursuant to House-passed H.R. 10, an alien’s membership in a political, social or other similar group that endorsed or espoused terrorist activity would have been grounds for inadmissibility, without requiring the Secretary of State to first determine that such endorsements undermined U.S. efforts to reduce or eliminate terrorist activities. Membership in a terrorist organization would have been a ground for alien inadmissibility unless the alien could demonstrate by clear and convincing evidence that he or she did not know, or should not have reasonably known, that the organization was a terrorist organization. The endorsement or espousal of terrorist activity, or the persuasion of others to support terrorist activity or a terrorist organization, would also have been made sufficient grounds for inadmissibility regardless of whether the responsible alien (1) used his or her position of prominence to espouse or incite the terror-related activity or (2) had been determined by the Secretary of State to have acted in a manner that undermines U.S. efforts to reduce or eliminate terrorist activities. Receiving military-training on or behalf of a terrorist organization would also have made an alien inadmissible.

- a violent attack upon an internationally protected person (e.g., Head of State, Foreign Minister, ambassador),<sup>20</sup>
- an assassination;
- the use of any biological agent, chemical agent, or nuclear weapon or device;
- the use of any explosive, firearm, or other weapon or dangerous device (*other than for mere personal monetary gain*), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; or
- a threat, attempt, or conspiracy to commit any of the foregoing.<sup>21</sup>

**Definition of “Engaged in Terrorist Activity” under the INA.** The INA treats being “engaged in terrorist activity” as a separate concept from terrorist activity itself. Whereas “terrorist activity” includes direct acts of violence — for instance, hijacking a plane or threatening persons with bodily harm in order to compel third-party action — actions that constitute being “engaged in terrorist activity” include such acts *as well as* specified acts that facilitate terrorist activity, such as preparing, funding, or providing material support for terrorist activities. In order to be “engaged in terrorist activity,” an alien must, either as an individual or as part of an organization:

- commit or incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- prepare or plan a terrorist activity;
- gather information on potential targets for a terrorist activity;
- solicit funds or other things of value for a (1) terrorist activity, (2) a designated terrorist organization, or (3) a non-designated terrorist organization, unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the non-designated organization’s terrorist activity;
- solicit another individual to (1) engage in terrorist activity, (2) join a designated terrorist organization, or (3) join a non-designated terrorist organization, unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the non-designated organization’s terrorist activity; or
- commit an act that the alien knows, or reasonably should know, provides material support — including a safe house, transportation, communications, funds, transfer of funds or other material financial

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<sup>20</sup> “Internationally protected person” is defined under U.S. law as “(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.” 18 U.S.C. § 1116(b)(4).

<sup>21</sup> INA § 212(a)(3)(B)(iii); 8 U.S.C. § 1182(a)(3)(B)(iii).

benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training — to (1) the commission of a terrorist activity, (2) an individual or organization that the alien knows or should reasonably know has committed or plans to commit a terrorist activity, (3) a designated terrorist organization, or (4) a non-designated terrorist organization, unless the support provider can demonstrate that he did not know, and should not reasonably have known, that the support would further the non-designated organization's terrorist activity.<sup>22</sup>

An alien who has provided material support to an individual or organization engaging in terrorist activity will not himself be considered to have “engaged in terrorist activity” for purposes of the INA if the Secretary of State or Attorney General, following consultation with the other, concludes in his sole, unreviewable discretion that the definition of “terrorist activity” does not apply.<sup>23</sup>

**Definition of “Terrorist Organization” under the INA.** For purposes of the INA, a “terrorist organization” includes any organization:

- designated by the Secretary of State as a terrorist organization pursuant to INA § 219;<sup>24</sup>
- otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization commits, incites, plans, prepares, gathers information, or provides material support for terrorist activities; or
- is a group of two or more individuals, whether organized or not, which commits, incites, plans, prepares, or gathers information for terrorist activities.<sup>25</sup>

## **Security-Related and Foreign Policy Grounds for Deeming an Alien Inadmissible**

Even if an alien is not found inadmissible or deportable on terror-related grounds, he may nevertheless be removed from the United States or denied entry on separate, security-related grounds. An alien may be deemed inadmissible or deportable if he has engaged, is engaged, or (in the case of an alien not yet admitted into the United States) intends to engage in “any activity a purpose of which is the

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<sup>22</sup> INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv).

<sup>23</sup> INA § 212(a)(3)(B); 8 U.S.C. § 1182(a)(3)(B).

<sup>24</sup> For further discussion, see CRS Report RL32120, *The ‘FTO List’ and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Cronin.

<sup>25</sup> INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv). The USA PATRIOT ACT amended INA section 212 to expand the definition of “terrorist organization” to potentially include terrorist organizations not designated pursuant to INA section 219. House-passed H.R. 10 would have expanded the definition of “terrorist organization” to include any organization with a subgroup that engages in terrorist activity.

opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means.”<sup>26</sup> In the case of aliens not yet admitted into the United States, either a consular officer or relevant immigration authority may designate an alien inadmissible if he has reasonable grounds to believe that the alien seeks to enter the United States to engage in such conduct.<sup>27</sup>

Further, if the Secretary of State has reasonable grounds to believe an alien’s entry, presence, or activities in the United States would have potentially serious adverse foreign policy consequences for the United States, that alien may be deemed inadmissible or deportable.<sup>28</sup> However, an alien may not be deported or denied entry into the United States on account of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.<sup>29</sup>

## Screening Aliens for Admissibility

### Visa Issuance

Personal interviews are required for all prospective legal permanent residents and are generally required for foreign nationals seeking nonimmigrant visas.<sup>30</sup> The recently enacted Intelligence Reform and Terrorist Prevention Act of 2004 requires an in-person consular interview of most applicants for nonimmigrant visas between the ages of 14 and 79. Consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. Over 82 million records of visa applications are now automated in the CCD, with some records dating back to the mid-1990s.<sup>31</sup> Since February 2001, the CCD has stored photographs of all visa applicants in electronic form, and more recently the CCD has begun storing finger prints of the right and left index fingers. 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

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<sup>26</sup> INA §§ 212(a)(3)(A), 237(a)(3)(A), 8 U.S.C. §§ 1182(a)(3)(A), 1227(a)(3)(A).

<sup>27</sup> INA § 212(a)(3)(A); 8 U.S.C. § 1182(a)(3)(A).

<sup>28</sup> INA § 212(a)(3)(C); 8 U.S.C. § 1182(a)(3)(C).

<sup>29</sup> INA §§ 212(a)(3)(C)(iii), 237(a)(3)(C)(ii); 8 U.S.C. §§ 1182(a)(3)(C)(iii), 1227(a)(3)(C)(ii).

<sup>30</sup> 22 C.F.R. §42.62. Personal interview waivers may be granted only to children under age 16, persons 60 years or older, diplomats and representatives of international organizations, aliens who are renewing a visa they obtained within the prior 12 months, and individual cases for whom a waiver is warranted for national security or unusual circumstances. 68 Fed. Reg. 40127-40129 (Jul. 7, 2003).

<sup>31</sup> According to the Department of State’s Office of Legislative Affairs, consular officers have stored photographs of nonimmigrant visa applicants in an electronic database for over ten years. These data are now in the CCD.

affect the issuance of the visa. The CCD is the nexus for screening aliens for admissibility, notably screening on terrorist security and criminal grounds.<sup>32</sup>

**Terrorist Screening.** For some years, consular officers have been required to check the background of all aliens in the “lookout” databases, specifically the Consular Lookout and Support System (CLASS) and TIPOFF databases. CLASS contains about 19.6 million records on people ineligible to receive visas, and TIPOFF reportedly has 130,000 records of people who are suspected or known terrorists or are associated with suspected or known terrorist organizations.<sup>33</sup> Last year, the Administration announced the creation of the Terrorist Screening Center (TSC) to consolidate the various watchlists into a single terrorist screening database.<sup>34</sup> There is also the “Terrorist Exclusion List” (TEL) which lists organizations designated as terrorist-supporting and includes the names of individuals associated with these organizations.<sup>35</sup>

Consular officers also send suspect names to the FBI for a name check program called Visa Condor. Visa Condor is part of the broader Security Advisory Opinion (SAO) system that requires a consular officer abroad to refer selected visa cases, identified by law enforcement and intelligence information (originally certain visa applicants from 26 predominantly Muslim countries), for greater review by intelligence and law enforcement agencies.<sup>36</sup>

**Controlled Technologies.** With procedures distinct from the terrorist watch lists, consular officers screen visa applicants for employment or study that would

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<sup>32</sup> For more on alien screening procedures and policy, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem, pp. 7-12.

<sup>33</sup> CLASS and TIPOFF information provided by Department of State Bureau of Legislative Affairs, e-mail dated Sept. 7, 2004. The State Department’s CLASS and TIPOFF terrorist databases interface with the Interagency Border Inspection System (IBIS) used by the DHS immigration inspectors. For more background, see Testimony of Maura Harty, Assistant Secretary of State for Consular Affairs, National Commission on Terrorist Attacks Upon the United States, *U.S. Government Agencies Aimed at Improving Border Security*, hearing, Jan. 26, 2004.

<sup>34</sup> Homeland Security Presidential Directive 6 (HSPD-6) ordered the creation of the Terrorist Screening Center (TSC) to consolidate terrorist watch lists. It was issued on September 16, 2003, and directed the operations to begin on December 1, 2003. The TSC is a multi-agency entity, including participants from the FBI, DOS, CBP, Immigration and Customs Enforcement (ICE), Secret Service, Coast Guard, Transportation Security Administration, and the Office of Foreign Assets Control. Its stated goal is “to consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful use of terrorist information in screening processes.” For more on the TSC, see CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse.

<sup>35</sup> For background and analysis, see CRS Report RL32120, *The ‘FTO List’ and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Cronin.

<sup>36</sup> U.S. Congress, Senate Committee on Foreign Relations, Subcommittee on International Operations and Terrorism, *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, hearing, Oct. 23, 2003.

give the foreign national access to controlled technologies, i.e., those that could be used to upgrade military capabilities, and refer foreign nationals from countries of concern (e.g., China, India, Iran, Iraq, North Korea, Pakistan, Sudan, and Syria) to the FBI and other key federal agencies.<sup>37</sup> This screening is part of a name-check procedure known as Visa Mantis, which has the following stated objectives: (1) stem the proliferation of weapons of mass destruction and missile delivery systems; (2) restrain the development of destabilizing conventional military capabilities in certain regions of the world; (3) prevent the transfer of arms and sensitive dual-use items to terrorist states; and (4) maintain U.S. advantages in certain militarily critical technologies.

**Biometric Visas.** Aliens who are successful in their request for a visa are then issued the actual travel document.<sup>38</sup> For the past several years, Consular Affairs has been issuing machine-readable visas. By October 2004, all visas issued by the United States must use biometric identifiers (e.g., scans of the right and left index fingers) in addition to the digitized photograph that has been collected for some time.<sup>39</sup> According to the DOS, all of the over 200 visa-issuing consular posts met the October 2004 deadline for biometric visas.<sup>40</sup> These biometric data are available through the CCD to CBP officers at ports of entry as well as to consular officers abroad.

**Terrorist Travel.** The Intelligence Reform and Terrorist Prevention Act of 2004 establishes an Office of Visa and Passport Security in the Bureau of Diplomatic Security of the Department of State, headed by a person with the rank of Deputy Assistant Secretary of State for Diplomatic Security. The Deputy Assistant Secretary, in coordination with the appropriate officials of the Department of Homeland Security, are tasked with preparing a strategic plan to target and disrupt individuals and organizations at home and in foreign countries that are involved in the fraudulent production, distribution, or use of visas, passports and other documents used to gain entry to the United States. This strategic plan is to emphasize individuals and organizations that may have links to domestic terrorist organizations or foreign terrorist organizations as defined by INA. This office also analyzes methods used by terrorists to travel internationally, particularly the use of false or altered travel documents to illegally enter foreign countries and the United States, and it advises

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<sup>37</sup> U.S. General Accounting Office, *Export Controls: Department of Commerce Controls Over Transfers of Technology to Foreign Nationals Needs Improvement*, GAO-02-972 (Sept. 2002).

<sup>38</sup> For a full discussion of biometric visas, see congressional distribution memorandum, *Biometric and Laser Visas: Background and Current Policy*, by Ruth Ellen Wasem, Aug. 19, 2004.

<sup>39</sup> Section 414 of the USA PATRIOT ACT (PL. 107-56) and Section 303 of the Enhanced Border Security and Visa Reform Act (P.L. 107-173) require that visas and other travel documents contain a biometric identifier and are tamper-resistant.

<sup>40</sup> Testimony of Colin L. Powell, Secretary of State, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Border Security and Claims, *Should Congress Extend the October 2004 Statutory Deadline for Requiring Foreign Visitors to Present Biometric Passports?* hearing, Apr. 21, 2004.

the Bureau of Consular Affairs on changes to the visa issuance process that could combat such methods, including the introduction of new technologies.

The Intelligence Reform and Terrorist Prevention Act of 2004 requires the Secretary of DHS, in consultation with the Secretary of State, to submit to Congress a plan to ensure that DHS and DOS acquire and deploy to all consulates, ports of entry, and immigration services offices, technologies that facilitate document authentication and the detection of potential terrorist indicators on travel documents. The law further requires that the plan address the feasibility of using such technologies to screen passports submitted for identification purposes to a United States consular, border, or immigration official.

## Admissibility at Ports of Entry

**Border Inspections.** The INA requires the inspection of all aliens who seek entry into the United States; possession of a visa or another form of travel document does not guarantee admission into the United States.<sup>41</sup> Border inspections are extremely important because many foreign nationals enter the United States without visas. Perhaps the most notable exception to the visa is through the Visa Waiver Program (VWP), a provision of the INA that allows the visa requirements to be waived for aliens coming as visitors from 27 countries that meet certain standards (e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland).<sup>42</sup> In addition to the VWP, there are exceptions to documentary requirements for a visa that have been established by law, treaty, or regulation — most notably for citizens of Canada.<sup>43</sup>

Primary inspection at the port of entry consists of a brief interview with a CBP officer, a cursory check of the traveler's documents and a query of the Interagency Border Inspection System (IBIS).<sup>44</sup> 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. During secondary inspections, travelers are

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<sup>41</sup> For a comprehensive analysis, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, coordinated by Ruth Ellen Wasem with Jennifer Lake, James Monk, Lisa Seghetti, and Stephen Viña.

<sup>42</sup> See CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

<sup>43</sup> See CRS Congressional Distribution Memorandum, *Waiving the Documentary Requirements for Visas and Passports to Enter the United States*, by Ruth Ellen Wasem and Andorra Bruno, Oct. 27, 2003.

<sup>44</sup> IBIS is a broad system that interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Department's Enforcement and Communications System (TECS II), the former INS's National Automated Immigration Lookout System (NAILS) and Non-immigrant Information System (NIIS) and the DOS's Consular Consolidated Database (CCD), Consular Lookout And Support System (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.

questioned extensively and travel documents are further examined. Several immigration databases are queried as well, including lookout databases.<sup>45</sup>

**US-VISIT.** Many nonimmigrants are entered into the US-VISIT system that uses biometric identification (i.e., finger scans and digital photographs) to check identity and track presence in the United States. It collects biometric information that is entered into an existing system called Automated Biometric Fingerprint Identification System (IDENT).<sup>46</sup> On January 5, 2004, US-VISIT was implemented at 115 airports and 14 seaports, and pilot programs were established at one airport and one seaport for the collection of biometric information of aliens leaving the United States.<sup>47</sup> “Exit pilot programs” are now in place at 15 air or sea ports. On August 20, 2004, DHS added six new entry ports and deleted two entry ports that had inadvertently been listed on the January 5, 2004 roster of ports that were part of the US-VISIT system.<sup>48</sup> The Intelligence Reform and Terrorist Prevention Act of 2004 calls for a more accelerated implementation of a comprehensive entry and exit data system.

**Pre-inspection.** To keep inadmissible aliens from departing for the United States, IIRIRA required the implementation of a pre-inspection program at selected locations overseas. At these foreign airports, U.S. immigration officers inspect aliens before their final departure to the United States. IIRIRA also authorized assistance to air carriers at selected foreign airports to help in the detection of fraudulent documents. The Intelligence Reform and Terrorist Prevention Act of 2004 directs DHS to expand the pre-inspection program at foreign airports to at least 15 and up to 25 airports, and submit a report on the progress of the expansion by June 30, 2006. The act also directs DHS to expand the Immigration Security Initiative, which places CBP inspectors at foreign airports to prevent people identified as national security threats from entering the country. The new law requires that at least 50 airports participate in the Immigration Security Initiative by December 31, 2006.

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<sup>45</sup> The Terrorist Screening Center (TSC) is developing a consolidated lookout database that is not yet fully operational. For more on lookout and terrorist screening databases of the TSC, see CRS Report RL32366, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, by William J. Krouse. The National Security Entry-Exit Registry System (NSEERS) and the Student and Exchange Visitor Information System (SEVIS) are also used during secondary inspections. For more on NSEERS, see CRS Report RL31570, *Immigration: Alien Registration*, by Andorra Bruno. For more on SEVIS, see CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by Alison Siskin.

<sup>46</sup> The US-VISIT program was established to respond to statutory provisions that require DHS to create an integrated, automated entry and exit data system that (1) uses available data to produce reports on alien arrivals and departures; (2) deploys equipment at all ports of entry to allow for the verification of aliens’ identities and the authentication of their travel documents through the comparison of biometric identifiers; and (3) records alien arrival and departure information from biometrically authenticated documents. See CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT)*, for a complete legislative history of the requirements.

<sup>47</sup> 69 Fed. Reg. 482 (Jan. 5, 2004).

<sup>48</sup> 69 Fed. Reg. 51695 (Aug. 20, 2004), amended by 69 Fed. Reg. 52516 (Aug. 26, 2004).

**Expedited Removal under INA § 235(c).** Pursuant to INA section 235(c), in cases where the arriving alien is *suspected* of being inadmissible on security or related grounds, including terror-related activity, the alien may be summarily excluded by the regional director with no further administrative right to appeal. The Attorney General shall review such orders of removal.<sup>49</sup> If the Attorney General concludes on the basis of confidential information that the alien is inadmissible on security or related grounds under section 212(a)(3) of the INA, and determines after consulting with appropriate U.S. security agencies that disclosure of such information would be prejudicial to the public interest, safety, or security, the regional director of the CBP is authorized to deny any further inquiry as to the alien's status and either order the alien removed or order disposal of the case as the director deems appropriate.<sup>50</sup>

Generally, an alien's removal to a particular country is withheld upon a showing that his life or freedom would be threatened in that country because of his race, religion, nationality, membership in a particular social group, or political opinion.<sup>51</sup> However, an alien is, with limited exception, ineligible for this remedy if, *inter alia*, he has been convicted of an aggravated felony or "there are reasonable grounds to believe that the alien is a danger to the security of the United States."<sup>52</sup> Pursuant to U.S. legislation implementing the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), all aliens—including those otherwise ineligible for withholding of removal and/or subject to expedited removal on security or related grounds such as terror-related activity—may not be removed to a country where they are "more likely than not to be tortured."<sup>53</sup>

## Legislation in the 109<sup>th</sup> Congress

It was widely reported that the immigration provisions in House-passed H.R. 10 that were dropped from the Intelligence Reform and Terrorist Prevention Act of 2004 (P.L. 108-458) would be re-introduced in the 109<sup>th</sup> Congress and taken up early in the first session. Many (but not necessarily all) of the immigration provisions that the conferees dropped from the Intelligence Reform and Terrorist Prevention Act of 2004

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<sup>49</sup> INA § 235(c)(2)(A); 8 U.S.C. § 1225(c)(2)(A).

<sup>50</sup> See 8 C.F.R. § 235.8(b)(1).

<sup>51</sup> INA § 241(b)(3); 8 U.S.C. § 1231(b)(3).

<sup>52</sup> INA § 241(b)(3)(B); 8 U.S.C. § 1231(b)(3)(B).

<sup>53</sup> Foreign Affairs Reform and Restructuring Act, P.L. 105-277, § 2242. For further discussion, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia, pp. 10-11. House-passed H.R. 10 would have expanded the class of aliens generally ineligible for withholding of removal to include aliens described by the terror-related grounds for inadmissibility or deportability, unless the Secretary of DHS determines that there are not reasonable grounds for believing that the alien is a danger to the security of the United States. However, it would not have limited relief under regulations implementing the Torture Convention.

have been included in H.R. 418, introduced by House Committee on the Judiciary Chairman James Sensenbrenner as the Real ID Act of 2005.<sup>54</sup>

## The Real ID Act (H.R. 418)

The provisions of H.R. 418 (§§ 103-104) relating to inadmissibility on terror-related grounds mirror those found in § 3034 of House-passed H.R. 10, except that H.R. 418 would also repeal certain overlapping and potentially conflicting provisions of the Intelligence Reform and Terrorist Prevention Act of 2004. Some of the key revisions H.R. 418 would make are:

- would expand the applicable definition of the term “engage in terrorist activity.” Thus, under H.R. 418, an alien who solicited on behalf of or provided material support for a non-designated terrorist organization would be inadmissible unless he demonstrated by clear and convincing evidence that he did not and should not have reasonably known that he was soliciting on behalf of or providing material support for a group that met the definition of “terrorist organization” found in INA § 212(a)(3)(B)(vi)(III);
- would retain the authorities that allow a consular officer, the Secretary of Homeland Security, or the Attorney General to declare an alien inadmissible if the alien is known to be engaged in terrorist activity or is likely to engage in such activity upon entry into the United States;
- would expand this ground for inadmissibility to deny admission to a representative of any group that constituted a “terrorist organization,” as defined under INA § 212(a)(3)(B)(vi);
- would also make inadmissible any representative of a political, social or other similar group that endorses or espouses terrorist;
- would substantially increase the grounds for inadmissibility on account of membership in a terrorist organization;
- would make inadmissible any alien who espouses or endorses terrorist activity, or persuades others to support terrorist activity or a terrorist organization, regardless of whether the alien has a position of prominence and his espousal undermines U.S. efforts to reduce terrorism in the opinion of the Secretary of State; and
- would make inadmissible any alien who has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization, a term defined under INA § 212(a)(3)(B)(vi) (and amended by H.R. 418 § 103(c)).

Opponents of H.R. 418 argue that it would impose “guilt by association,” rendering people deportable for wholly lawful and peaceful activity if such activity supports any group that has engaged in the use of weapons or has threatened to use weapons. Some maintain that anyone who has given money to entities such as a

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<sup>54</sup> For a legal analysis of H.R. 418, see CRS Report RL32754, *Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005*, by Michael Garcia, Margaret Mikyung Lee, and Todd Tatelman.

hospital or school that has an association in any way with a group that uses guns (or threatens to use guns) would be deportable if H.R. 418 were enacted.

Proponents of H.R. 418 state that it seeks to prevent another 9/11-type terrorist attack by disrupting terrorist travel and argue that these reforms to inadmissibility (and removal) are essential. Supporters maintain that these provisions close avenues that terrorists might otherwise use to gain entry to the United States and bring consistency to the treatment of aliens who are inadmissible as well as those who are removable on terrorist grounds.

After two days of debate, H.R. 418 as amended passed the House on February 10, 2005, by a vote of 261-161. The Real ID Act also passed the House on March 12, 2005 as part of the FY2005 supplemental appropriations for military operations in Iraq and Afghanistan, reconstruction in Afghanistan and other foreign aid (H.R. 1268).