

# CRS Report for Congress

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## **Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005**

**Updated May 25, 2005**

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# Immigration: Analysis of the Major Provisions the REAL ID Act of 2005

## Summary

During the 108<sup>th</sup> Congress, a number of proposals related to immigration and identification-document security were introduced, some of which were considered in the context of implementing recommendations made by the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) and enacted pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). At the time that the Intelligence Reform and Terrorism Prevention Act was adopted, some congressional leaders reportedly agreed to revisit certain immigration and document-security issues in the 109<sup>th</sup> Congress that had been dropped from the final version of the act.

The REAL ID Act of 2005 was first introduced as H.R. 418 by Representative James Sensenbrenner on January 26, 2005, and passed the House, as amended, on February 10, 2005. The text of House-passed H.R. 418 was subsequently added to H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, which was introduced by Representative Jerry Lewis on March 11, 2005, and passed the House, as amended, on March 16, 2005. H.R. 1268 passed the Senate on April 21, 2005, as amended, on a vote of 99-0, but did not include the REAL ID Act provisions. A conference report resolving differences between the two versions of the bill, H.Rept. 109-72, passed the House on May 5, 2005 and the Senate on May 10, 2005, before being enacted into law on May 11, 2005. The version of the REAL ID Act (P.L. 109-13, Division B) ultimately enacted includes most of the provisions of the REAL ID Act that initially passed the House (though not those relating to the bond of aliens in removal proceedings), though some changes were made to certain REAL ID Act provisions.

This report analyzes the major provisions of the REAL ID Act, as enacted, which, *inter alia*, (1) modifies the eligibility criteria for asylum and withholding of removal; (2) limits judicial review of certain immigration decisions; (3) provides additional waiver authority over laws that might impede the expeditious construction of barriers and roads along land borders, including a 14-mile wide fence near San Diego; (4) expands the scope of terror-related activity making an alien inadmissible or deportable, as well as ineligible for certain forms of relief from removal; (5) requires states to meet certain minimum security standards in order for the drivers' licenses and personal identification cards they issue to be accepted for federal purposes; (6) requires the Secretary of Homeland Security to enter into the appropriate aviation security screening database the appropriate background information of any person convicted of using a false driver's license for the purpose of boarding an airplane; and (7) requires the Department of Homeland Security to study and plan ways to improve U.S. security and improve inter-agency communications and information sharing, as well as establish a ground surveillance pilot program.

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# Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005

The 109<sup>th</sup> Congress has considered several immigration issues carried over from the 108<sup>th</sup> Congress, providing the impetus for the REAL ID Act of 2005.<sup>1</sup> During the 108<sup>th</sup> Congress, a number of proposals were made to strengthen identification-document security and make more stringent requirements for alien admissibility and continuing presence within the United States.<sup>2</sup> Immigration and identification-document security proposals were considered in the context of implementing recommendations of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) to improve homeland security, and some of these were enacted under the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>3</sup> However, Congress did not include all discussed proposals, certain document-security provisions being notable among them. At the time that the Intelligence Reform and Terrorism Prevention Act was enacted, some congressional leaders reportedly agreed to revisit some of the dropped immigration and document-security proposals in the 109th Congress.<sup>4</sup>

The REAL ID Act of 2005 was first introduced as H.R. 418 by Representative James Sensenbrenner on January 26, 2005, and passed the House, as amended, on February 10, 2005, on a vote of 261-161. House-passed H.R. 418 contained a number of provisions related to immigration reform and document security that were considered during congressional deliberations on the Intelligence Reform and Terrorism Prevention Act, but which were ultimately not included in the act's final version. House-passed H.R. 418 also included some new proposals.

The text of House-passed H.R. 418 was subsequently added to H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, which was introduced by Representative Jerry Lewis on March 11, 2005, and passed the House, as amended, on March 16, 2005 on a vote of 388-43. H.R. 1268 passed the Senate on April 21, 2005, as amended, on a vote of 99-0, but did not include the REAL ID Act provisions, and a conference was held to

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<sup>1</sup> P.L. 109-13, Division B (hereafter cited as "REAL ID Act").

<sup>2</sup> See generally CRS Report RL32169, *Immigration Legislation and Issues in the 108<sup>th</sup> Congress*, Andorra Bruno, Coordinator.

<sup>3</sup> P.L. 108-458, 118 Stat. 3638 (2004). For further background, see CRS Report RL32616, *9/11 Commission: Legislative Action Concerning U.S. Immigration Law and Policy in the 108th Congress*, by Michael John Garcia and Ruth Ellen Wasem.

<sup>4</sup> See Mary Curtius, "The Nation; GOP Congressman Renews Push for Immigration Curbs," *L.A. TIMES*, Jan. 27, 2005, at A18.

resolve differences between the House- and Senate-passed versions of H.R. 1268. The conference report, H.Rept. 109-72, passed the House on a vote of 368-58 on May 5, 2005, and the Senate on a vote of 100-0 on May 10, 2005. The REAL ID Act, as amended, was enacted into law on May 11, 2005 as P.L. 109-13, Division B.

The version of the REAL ID Act enacted into law contains most of the provisions found in House-passed version of H.R. 418 and the version of H.R. 1268 that originally passed the House. However, some notable changes were made, including, *inter alia*, (1) removing provisions relating to the release of aliens in removal proceedings on bond; (2) making asylum and withholding of removal eligibility and credibility standards less stringent than those proposed in earlier versions of the REAL ID Act; (3) providing for limited judicial review of Secretary of Homeland Security decisions to waive certain legal requirements to facilitate the construction of barriers at the borders; (4) providing broader waiver authority to the Secretary of State and Secretary of Homeland Security regarding terrorist-related grounds for inadmissibility and removal; and (5) modifying, and in some cases making more stringent, REAL ID Act provisions concerning minimum security standards for state-issued drivers' licenses and personal identification cards accepted for federal purposes

This report analyzes the major provisions of the REAL ID Act of 2005, as enacted. It describes relevant law prior to passage of the REAL ID Act relating to immigration and document-security matters, and discusses how the REAL ID Act altered preexisting law.

## **I. Preventing Terrorists from Obtaining Asylum or Relief from Removal<sup>5</sup>**

The 9/11 Commission Report<sup>6</sup> documented instances where terrorists had exploited the availability of humanitarian relief under immigration law.<sup>7</sup> Although the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>8</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>9</sup> amended asylum procedures to reduce fraudulent claims and limited judicial review of removal orders, provisions in the REAL ID Act again amend the Immigration and Nationality Act (INA)<sup>10</sup> to further diminish the prospect of terrorists using the immigration system to their advantage.

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<sup>5</sup> Discussion of this topic was prepared by Margaret Mikyung Lee, Legislative Attorney.

<sup>6</sup> FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, July 2004.

<sup>7</sup> *Id.* at 72. Ramzi Yousef, one of the terrorists involved in the 1993 World Trade Center bombing, entered the United States on a political asylum claim.

<sup>8</sup> P.L. 104-132, 110 Stat. 1214 (1996).

<sup>9</sup> Division C of P.L. 104-208, 110 Stat. 3009-546 (1996).

<sup>10</sup> 8 U.S.C. §§ 1101 *et seq.*

## Standards for Granting Asylum

**Background.** Section 208(b) of the INA<sup>11</sup> provides that the Attorney General may grant asylum to an alien whom he determines is a refugee as defined in § 101(a)(42)(A) of the INA. That section defines a refugee as a person who is persecuted or who has a well-founded fear of persecution because of race, religion, nationality, membership in a particular social group, or political opinion.<sup>12</sup> An alien who is physically present or arrives in the United States, regardless of the alien's immigration status, may apply for asylum. Although the burden of proof had not been explicitly described in the INA prior to the enactment of the REAL ID Act, regulations at 8 C.F.R. § 208.13(a) and (b) placed the burden of proof on the asylum applicant, as did previous statutory provisions.<sup>13</sup> Also, case law had placed the burden of proof on the asylum applicant.<sup>14</sup> The grant of asylum is discretionary, and even if an applicant meets the burden of proof for asylum eligibility, asylum may be denied on discretionary grounds.

Prior to the enactment of the REAL ID Act, there had been no explicit standards in the INA for determining the credibility of an asylum applicant and the necessity for corroborating evidence of applicant testimony. In the absence of explicit statutory guidelines, standards for determining credibility and sufficiency of evidence evolved through the case law of the Board of Immigration Appeals (BIA) and federal courts. However, these standards were not necessarily consistent across federal appellate courts, arguably yielding different results in otherwise apparently similar cases.<sup>15</sup> Generally, an asylum adjudicator could base an adverse credibility finding on factors such as the demeanor of the applicant or witness, inconsistencies both within a given testimony and between a given testimony and other testimony and evidence (which may include country conditions, news accounts, etc.), and a lack of detail or specificity in testimony. The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) had held that an adjudicator must make explicit the reasons for an adverse credibility finding or the court will accept the applicant's testimony as credible.<sup>16</sup>

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<sup>11</sup> 8 U.S.C. § 1158(b) (2004).

<sup>12</sup> 8 U.S.C. § 1101(A)(42)(A) (2004).

<sup>13</sup> See INA § 203(a)(7) between P.L. 89-236, 79 Stat. 911 (1965) and P.L. 96-212, 94 Stat. 109 (1980), [current version at 8 U.S.C. § 1153(a)(7)] and *Shubash v. District Director*, 450 F.2d 345 (9<sup>th</sup> Cir. 1971).

<sup>14</sup> C. Gordon, S. Mailman, & S. Yale-Loehrer, *IMMIGRATION LAW & PROCEDURE*, § 34.02 (2004) (hereinafter *IMMIGRATION LAW & PROCEDURE*).

<sup>15</sup> See *id.* § 34.02[9] for a discussion of the case law concerning evidentiary standards.

<sup>16</sup> “It is well established in this circuit that the BIA may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application.... It is also well settled that we must accept an applicant's testimony as true in the absence of an explicit adverse credibility finding.” *Kataria v. INS*, 232 F.3d 1107, 1113-14 (9<sup>th</sup> Cir. 2000) (citations omitted). “Even under the substantial evidence standard, an adverse credibility finding must be based on ‘specific cogent reasons,’ which are substantial and ‘bear a legitimate nexus to the finding.’” *Cordon-Garcia v. INS*, 204 F.3d 985, 993 (9<sup>th</sup> Cir. 2000).

An adverse credibility finding could be based in part but not solely on an applicant's failure to provide corroboration. The Ninth Circuit had held that where there is reason for an adjudicator to question the applicant's credibility and the applicant fails to provide easily obtainable corroborating evidence with no explanation for such failure, an adverse credibility finding will withstand judicial review.<sup>17</sup> With regard to sufficiency of the evidence, the BIA and the federal courts had agreed that credible testimony alone may suffice to sustain the applicant's burden of proof in some cases, but disagreed on when credible testimony alone meets the burden and when corroboration is needed. The BIA standard had been that where it would be reasonable to expect corroboration, it would have to be provided or an explanation for failure to provide it would have to be given.<sup>18</sup> However, some circuits criticized the BIA for failing to articulate what corroboration it expected in particular cases and why. The Ninth Circuit had adopted a standard that an applicant's credible testimony alone always sufficed to sustain the burden of proof of eligibility where it was unrefuted, direct, and specific.<sup>19</sup> One authority argued that the BIA's approach was contrary to international standards under which an asylum applicant should be given the benefit of the doubt, given the difficulties in obtaining corroborating evidence, although the applicant should try to provide any available corroborating evidence.<sup>20</sup> On the other hand, the U.S. Court of Appeals for the Second Circuit asserted that the BIA standards were consistent with international standards because an applicant is supposed to try to provide corroboration for his or her claim or satisfactorily explain its absence.<sup>21</sup>

Prior to the enactment of the REAL ID Act, an alien who was inadmissible on certain terrorist grounds or who was removable for engaging or having engaged in terrorist activities was not eligible for asylum. Not foreclosed from relief was a person who was inadmissible as a member of a terrorist organization, the spouse or child of a person inadmissible on terrorist grounds, or a person who was a representative of a terrorist organization when the Attorney General determined that there were not reasonable grounds for regarding the representative as a danger to the security of the United States.<sup>22</sup> As discussed below, however, changes made elsewhere in the REAL ID Act more broadly restrict the availability of asylum to those with terrorist ties.

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<sup>17</sup> *Sidhu v. INS*, 220 F.3d 1085, 1092 (9<sup>th</sup> Cir. 2000).

<sup>18</sup> *In re S-M-J-, Applicant*, 21 I. & N. Dec. 722, 1997 WL 80984 (B.I.A. 1997).

<sup>19</sup> *Ladha v. I.N.S.*, 215 F.3d 889 (9<sup>th</sup> Cir. 2000).

<sup>20</sup> See IMMIGRATION LAW & PROCEDURE § 34.02[9][c][ii][B], notes 288-292 and accompanying text.

<sup>21</sup> “[I]nternational standards do not conflict with the BIA’s expectation of corroborating evidence in certain cases. The Handbook of the United Nations High Commissioner for Refugees notes that applicants should ‘make an effort to support [their] statements by any available evidence and give a satisfactory explanation for any lack of evidence.’” *Diallo v. INS*, 232 F.3d 279, 286 (2<sup>nd</sup> Cir. 2000).

<sup>22</sup> While such a person may have applied for asylum, CRS has not found an instance in which such a person was granted asylum.



**Changes Made by the REAL ID Act.** Subsection 101(a) of the REAL ID Act amends § 208(b)(1) of the INA<sup>23</sup> by clarifying that the Secretary of Homeland Security and the Attorney General both have authority to grant asylum, and strengthens and codifies the standards for establishing a well-founded fear of persecution. These changes address the asylum process generally. Changes made by the REAL ID Act that specifically affect the eligibility for asylum of aliens associated with terrorist organizations are discussed elsewhere in this report.

**Authority of Secretary of Homeland Security.** Although the Homeland Security Act of 2002<sup>24</sup> and Reorganization Plan under that act<sup>25</sup> generally provided for the transfer of the functions of the defunct Immigration and Naturalization Service (INS) to the Department of Homeland Security, most provisions of the INA still refer to the Attorney General and/or Commissioner of the INS. Both the Secretary of Homeland Security and the Attorney General may now exercise authority over asylum depending on the context in which asylum issues arise, and § 101(a)(1) and (2) of the REAL ID Act accordingly amends § 208(b)(1) of the INA to insert references to both the Attorney General and the Secretary of Homeland Security. However, this amendment only addresses references for that particular subsection and does not amend the rest of § 208, which continues to refer only to the Attorney General. It is not clear whether this omission was intended to limit the authority of the Secretary with respect to changes in asylum status or procedures for considering asylum applications.

**Burden of Proof and Central Reason.** Subsection 101(a)(3) of the REAL ID Act codifies the existing regulatory and case law standard that the burden of proof is on the asylum applicant to establish eligibility as a refugee.

However, the subsection appears to create a new standard requiring that the applicant must establish that *at least one central reason* for persecution was or will be race, religion, nationality, membership in a particular social group, or political opinion. Neither § 208 nor § 101(a)(42)(A) of the INA, previously or as amended, nor the relevant regulations refer to or define the concept of a “central reason,” which appears to be a modification of established refugee/asylum laws, although possibly a slight one, since existing case precedents recognize similar standards. The conference report for the REAL ID Act noted that a past proposed change to asylum regulations would have required that a protected statutory ground be a central, not incidental or tangential, motive for persecution.<sup>26</sup>

Case law concerning asylum has addressed the concept of “mixed motives” for the persecution of an alien. Where there is more than one motive for persecution, a person may be granted asylum as long as *one* of the motives is a statutory ground of

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<sup>23</sup> 8 U.S.C. § 1158(b)(1) (2004).

<sup>24</sup> P.L. 107-296, §§ 1102, 1502, 116 Stat. 2135, 2273, 2308, as amended by P.L. 108-7, Div. L, § 105(a), 117 Stat. 11, 531 (2003).

<sup>25</sup> At [[http://www.whitehouse.gov/news/releases/2002/11/reorganization\\_plan.pdf](http://www.whitehouse.gov/news/releases/2002/11/reorganization_plan.pdf)], last visited Jan. 13, 2005.

<sup>26</sup> H.Rept. 109-72, at 163 (2005).

persecution.<sup>27</sup> For example, a person may be economically persecuted, e.g., he may receive an extortion demand. If the extortion is motivated by both a desire to obtain money and by a desire to punish the person for a political opinion, or being a member of a race, religion, nationality, or particular social group, then that person may be granted asylum. However, a person may be denied asylum where economic persecution is motivated solely by the desire to obtain money rather than for the motives enumerated in the statute. The standard for the importance of the statutory motive in asylum cases has ranged from being one of the motives to being a meaningful motive to being a principal motive. Thus, the statutory establishment of a central reason standard appears to be a modification to the mixed motives standard in some case precedents, but consistent with the operative standard in others.

**Corroboration and Credibility.** Subsection 101(a)(3) of the REAL ID Act attempts to bring some clarity and consistency to evidentiary determinations by codifying standards for sustaining the burden of proof, determining credibility of applicant testimony, and determining when corroborating evidence may be required.

Under the REAL ID Act, the testimony of the applicant may suffice to sustain the applicant's burden without corroboration, but only if the adjudicator determines that it is credible, persuasive and refers to specific facts demonstrating refugee status. The adjudicator is entitled to consider credible testimony along with other evidence. If the adjudicator determines in his/her discretion that the applicant should provide

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<sup>27</sup> IMMIGRATION LAW AND PROCEDURE § 33.04 (2004), comparing, e.g., *Fadul v. INS*, No. 99-2029, 2000 U.S. App. LEXIS 4952 (7<sup>th</sup> Cir. Mar. 20, 2000) (death threats by the New People's Army motivated by extortion efforts, not political opinion) *with* *Chen v. Ashcroft*, 289 F.3d 1113, 1116 (9<sup>th</sup> Cir. 2002) (vacated on grounds unrelated to the motive analysis, 314 F.3d 995 (9<sup>th</sup> Cir. 2002)) ("It is not necessary that persecution be solely on account of one of the forbidden grounds for an asylum applicant to secure asylum. It is enough that a principal reason for the persecution be on account of a statutory ground"). *See also* *Singh v. Ashcroft*, 2004 U.S. App. LEXIS 18925, at \*5 (9<sup>th</sup> Cir., Sept. 3, 2004); *Girma v. INS*, 283 F.3d 664, 668 (5<sup>th</sup> Cir. 2002) ("[under a mixed motive analysis] the predominant motive for the abuse is not determinative . . . an applicant for asylum must present evidence sufficient for one to reasonably believe that the harm suffered was motivated in meaningful part by a protected ground"); *Agbuya v. INS*, 241 F.3d 1224, 1228 (9<sup>th</sup> Cir. 2001); *Borja v. INS*, 175 F.3d 732, 734-36 (9<sup>th</sup> Cir. 1999) (en banc) (" . . . 'the plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution solely on account of the victim's political opinion. That is, the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution.' As the *United Nations' Handbook on Procedures and Criteria for Determining Refugee Status* says, 'What appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.' (quoting U.N. Handbook at §§ 62-64). To quote the Board's decision in this case, 'An applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, *at least in part*, by an actual or implied protected ground.'" (other cites omitted, emphasis added)); *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9<sup>th</sup> Cir. 1995) ("Persecutory conduct may have more than one motive, and so long as one motive is one of the statutory grounds, the requirements have been satisfied."). *See also* CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

corroborating evidence for otherwise credible testimony, such corroborating evidence must be provided unless the applicant does not have it and cannot reasonably obtain it.<sup>28</sup> Considering the totality of circumstances and all relevant factors, the adjudicator may base an applicant or witness credibility determination on, among other relevant factors, demeanor, candor, responsiveness, inherent plausibility of the account, consistency between the written and oral statements (regardless of when they were made, whether they were under oath, and considering the circumstances under which the statements were made), internal consistency of a statement, consistency of statements with other evidence of record (including the Department of State reports on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of an applicant's claim. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness has a rebuttable presumption of credibility on appeal.

Given the flexibility afforded the adjudicator, it is not clear that the REAL ID Act represents either a significant departure from case law standards for credibility and corroboration or a clear resolution of inconsistencies among case precedents in different federal appellate courts and also the BIA. The INA § 208(b)(1)(B)(ii), as amended by the REAL ID Act, appears to permit an adjudicator to make an adverse credibility finding based on the applicant's failure to provide corroborating evidence for otherwise credible testimony, unless the applicant does not have it or cannot reasonably obtain it. This provision appears to be intended primarily to resolve the difference between the BIA and the Ninth Circuit with regard to credibility and sufficiency of evidence by adopting the BIA position with some modification (specifying what circumstances excuse an applicant's failure to provide corroboration). On the other hand, the amended version of INA § 208(b)(1)(B)(iii) generally appears to be a codification of, but not a significant change from, existing case law permitting an asylum adjudicator to consider the totality of circumstances including relevant factors such as demeanor, inconsistencies, and the like in making credibility determinations, as long as they are not actually speculation or conjecture, rather than factual observation. However, the clause providing that an adjudicator may consider an inconsistency, inaccuracy, or falsehood regardless of whether it goes to the crux of an asylum claim appears intended to supersede Ninth Circuit precedent that inconsistencies, inaccuracies, and falsehoods that do not go to the heart of a claim will not support an adverse credibility finding.<sup>29</sup> But any such consideration would have to take into account the totality of circumstances and relevant factors,

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<sup>28</sup> The enacted version of the REAL ID Act dropped earlier language that would have further required that the applicant could not reasonably obtain the evidence without leaving the United States and that the inability to obtain corroborating evidence would not excuse the applicant from sustaining the burden of proof.

<sup>29</sup> See, e.g., *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9<sup>th</sup> Cir. 2003) (“Minor inconsistencies in the record that do not relate to the basis of an applicant's alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant's fear for his safety are insufficient to support an adverse credibility finding”). This clause was not in the REAL ID Act as introduced.

even with the passing of the REAL ID Act.<sup>30</sup> The clause regarding no presumption of credibility appears to adopt Ninth Circuit precedent that presumes credibility on appeal where neither the immigration judge nor the BIA has made an explicit adverse credibility finding,<sup>31</sup> with the modification or clarification that the presumption is rebuttable.

***Terrorist Exceptions to Asylum Eligibility.*** Subsection 101(b) of the REAL ID Act amends § 208(b)(2)(A)(v) to provide that an alien *described in* the terrorism grounds for inadmissibility and removal is not eligible for asylum, with certain narrow exceptions noted above in preexisting law.

***Effective Dates.*** Subsection 101(h)(1) of the REAL ID Act provides that the references to the authority of the Secretary of Homeland Security took effect as if enacted on March 1, 2003, which was the official date of transfer of immigration enforcement functions from the INS to the Department of Homeland Security under the Reorganization Plan. Subsection 101(h)(2) provides that the asylum standards established in § 101(a)(3) and (b) of the REAL ID Act took effect on the date of enactment (May 11, 2005) and apply to applications for asylum made on or after such date. Therefore, the standards do not apply by statute to asylum applications filed before the enactment of the REAL ID Act; rather, standards in preexisting case law would apply to such claims.

## Standards for Granting Withholding of Removal

**Background.** Subsection 241(b)(3) of the INA places restrictions on removal to a country where an alien’s life or freedom would be threatened because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.<sup>32</sup> Although there are similarities between asylum and withholding of removal, there are also significant differences. Asylum is a discretionary form of relief, for which the standard is a “well-founded fear of persecution.” Withholding of removal is mandatory relief from removal for those who can satisfy the higher standard of a “clear probability of persecution,” also expressed as “more likely than not” that one would be persecuted.<sup>33</sup> A person who has been granted asylum has been admitted into the United States, although the status is not a right to reside permanently in the United States. A person who is granted withholding has not been

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<sup>30</sup> H.Rept. 109-72 at 167 (2005).

<sup>31</sup> See *Canjura-Flores v. INS*, 784 F.2d 885, 888-89 (9th Cir. 1985) (“We will continue to remand to the Board for credibility findings when we reverse a decision in which the Board has avoided the credibility issue by holding that a petitioner has failed to establish either a well-founded fear of persecution or a clear probability of persecution even if his testimony is assumed to be credible [cites omitted], or when the basis of the Board’s decision cannot be discerned from the record [cites omitted]. When the decisions of the Immigration Judge and the Board are silent on the question of credibility, however, we will presume that they found the petitioner credible”). This clause was not in the REAL ID Act as introduced.

<sup>32</sup> 8 U.S.C. § 1231(b)(3) (2004).

<sup>33</sup> Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) with *INS v. Stevic*, 467 U.S. 407 (1984).

granted legal entry into the United States and may be more readily removed to his country when there is no longer any threat to his life or freedom. Withholding of removal is only specific to a particular country and therefore does not preclude removal to another country under INA § 241(b)(1)(C). An alien granted withholding of removal may not adjust to the status of a lawful permanent resident and the alien's family members are not eligible to come to the United States via the alien's status in the United States. In contrast, within numerical limits for asylee adjustments existing prior to enactment of the REAL ID Act,<sup>34</sup> an alien granted asylum could adjust status under § 209(b) of the INA<sup>35</sup> after being present in the United States for one year after the grant of asylum if the alien still met the definition of refugee, was not firmly resettled in any other country and was otherwise admissible as an immigrant (with exemptions from certain grounds of inadmissibility). Additionally, under § 208(b)(3) of the INA the spouse and children of an alien granted asylum, if not otherwise eligible for asylum, may be granted asylum themselves if accompanying or following to join the alien.<sup>36</sup> Aside from the higher standard of proof, withholding of removal involves similar consideration of credibility and corroboration factors<sup>37</sup> and some of the same issues regarding Ninth Circuit jurisprudence.<sup>38</sup>

INA § 241(b)(3)(A) enumerates certain classes of aliens who are ineligible for withholding of removal, including aliens reasonably believed by the Attorney General to be a danger to the security of the United States. The statute further states that an alien who is removable for engaging in terrorist activities under § 237(a)(4)(B) of the INA<sup>39</sup> is considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

**Changes Made by the REAL ID Act.** Subsection 101(c) of the REAL ID Act amends § 241(b)(3) of the INA<sup>40</sup> by applying to and codifying for withholding of removal the same standards for sustaining the applicable burden of proof<sup>41</sup> and for assessing credibility that are used for asylum adjudications under INA § 208(b)(1)(B)(ii) and (iii), as added by REAL ID Act § 101(a)(3). The discussion above concerning specific changes with regard to central reason, credibility determinations, and corroborating evidence applies to this change as well. Changes made by the REAL ID Act that specifically affect the eligibility of aliens associated with terrorist organizations are discussed elsewhere in this report.

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<sup>34</sup> Section 101(f) of the REAL ID Act eliminates the cap for adjustment of status for asylees, which was previously set at 10,000 persons each fiscal year.

<sup>35</sup> 8 U.S.C. § 1159(b) (2004).

<sup>36</sup> 8 U.S.C. § 1158(b)(3) (2004).

<sup>37</sup> See IMMIGRATION LAW & PROCEDURE § 34.02[11][c].

<sup>38</sup> The Ninth Circuit has held that with regard to withholding of deportation/removal, administrative adjudicators improperly denied the application for lack of corroboration where the applicant gave credible testimony. E.g., *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655 (9<sup>th</sup> Cir. 2003); *Canjura-Flores v. INS*, 784 F.2d 885 (9<sup>th</sup> Cir. 1985).

<sup>39</sup> 8 U.S.C. § 1227(a)(4)(B) (2004).

<sup>40</sup> 8 U.S.C. § 1231(b)(3) (2004).

<sup>41</sup> Again, the standard is “clear probability of persecution” in withholding cases.

REAL ID Act § 101(h)(2) provides that the withholding of removal standards established in § 101(c) took effect on the date of enactment (May 11, 2005) and apply to withholding applications made on or after such date; therefore, the standards do not apply by statute to applications filed before the date of enactment. Only those standards in law prior to the enactment of the REAL ID Act would apply.

## Standards for Granting Other Forms of Removal Relief

**Background.** In addition to asylum and withholding of removal, there are other forms of relief from removal, including cancellation of removal, voluntary departure, withholding or deferral of removal under the United Nations Convention Against Torture [Torture Convention],<sup>42</sup> and suspension of deportation (for those eligible for such pre-IIRIRA relief). In addition, temporary protected status and any applicable waivers of inadmissibility or deportability might be construed as relief from removal. Different eligibility conditions apply to each of these forms of relief. Cancellation of removal itself has different conditions applicable to permanent residents, nonpermanent residents, battered spouses and children, and beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA).<sup>43</sup> The evidentiary standards have generally not been specified in statutes. However, section 240A(b)(2)(D) of the INA (8 U.S.C. § 1229b(b)(2)(D)) does provide that the Attorney General shall consider any credible evidence relevant to an application for cancellation of removal for a battered spouse or child and that the determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

Various regulations address burden of proof and evidentiary standards for some forms of removal relief. Generally, the applicant for removal relief has the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion.<sup>44</sup> If evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien has the burden of proving by a preponderance of the evidence that such grounds do not apply. The burden of proof is on the applicant for withholding or deferral of removal under the Torture Convention to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.<sup>45</sup> The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. Evidence to be considered includes but is not limited to certain factors enumerated in the regulations. The burden of proof is on the applicant for removal relief under NACARA to establish by a preponderance of the

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<sup>42</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). For a discussion of the Convention, 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.

<sup>43</sup> P.L. 105-100, § 203, 111 Stat. 2160 (Nov. 19, 1997), as amended.

<sup>44</sup> 8 C.F.R. § 1240.8(d) (2004).

<sup>45</sup> 8 C.F.R. §§ 208.16(c), 1208.16(c) (2004).

evidence that he or she is eligible for such relief.<sup>46</sup> In certain cases a presumption of extreme hardship applies, and in such cases, the burden of proof is on the government to establish that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were removed from the United States. In those cases where a presumption of extreme hardship applies, the burden of proof is on immigration authorities to establish that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States. For temporary protected status, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements to meet his or her burden of proof.<sup>47</sup> The applicant must submit documentary evidence required in the instructions and may be required to submit evidence of unsuccessful attempts to obtain required documents or alternative evidence.

The BIA has ruled that the general standards developed in case law for suspension of deportation, the pre-IIRAIRA form of relief analogous to cancellation of removal, should be applied to the newer form of relief.<sup>48</sup> Under suspension of deportation, the applicant had the burden of establishing his or her eligibility, and documents and other evidence presented during the proceedings would be considered in deciding his or her eligibility for relief.<sup>49</sup>

**Changes Made by the REAL ID Act.** The REAL ID Act as originally introduced did not establish standards for removal relief other than asylum and withholding of removal. However, section 101(d) of the enacted version of the REAL ID Act amends § 240(c) of the INA (8 U.S.C. § 1229a(c)) concerning the burden of proof in removal proceedings by establishing standards for the burden of proof and credibility determinations for removal relief in general that are similar to those specifically for asylum and withholding of removal. An alien will have the burden of proof to establish eligibility for relief and that he or she merits a favorable exercise of discretion for any discretionary relief. The alien must comply with requirements to submit supporting documents or other information for relief as provided by law, regulation, or instructions on the relief application form. The immigration judge *will* determine whether or not the testimony of an applicant or witness is credible and persuasive, and refers to specific facts demonstrating satisfaction of the burden of proof. The immigration judge *shall* weigh credible testimony along with other evidence of record. The standards established by REAL ID Act § 101(a) and (c) for asylum and withholding of removal provide that the adjudicator *may* weigh credible testimony with other evidence of record since credible testimony alone *may* satisfy the burden of proof. This difference appears to result from the special circumstances for asylum and withholding of removal, where persecution and flight from persecution may make corroboration difficult or impossible (so that credible testimony may be the only evidence obtainable), and where the removal may endanger the safety of the alien. Other forms of relief may

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<sup>46</sup> 8 C.F.R. §§ 240.64, 1240.64 (2004).

<sup>47</sup> 8 C.F.R. §§ 244.9, 1244.9 (2004).

<sup>48</sup> See IMMIGRATION LAW AND PROCEDURE § 64.04[3][b][v].

<sup>49</sup> See *id.* § 74.07[7][a].

not entail such special consideration. If the immigration judge determines in his/her discretion that the applicant should provide corroborating evidence for otherwise credible testimony, such corroborating evidence must be provided unless the applicant does not have it and cannot reasonably obtain it without leaving the United States. The inability to obtain corroborating evidence does not relieve the applicant from sustaining the burden of proof.

Considering the totality of the circumstances and all relevant factors, the immigration judge may base an applicant or witness credibility determination on, among other factors, demeanor, candor, responsiveness, inherent plausibility of the account, consistency between the written and oral statements (regardless of when they were made, whether they were under oath, and considering the circumstances under which the statements were made), internal consistency of a statement, consistency of statements with other evidence of record (including the Department of State reports on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of an applicant's claim. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Subsection 101(h)(2) provides that the standards established in § 101(d) of the REAL ID Act took effect on the date of enactment (May 11, 2005) and apply to applications for removal relief made on or after such date. Accordingly, the standards do not apply by statute to applications filed before the date of enactment.

## **Standards of Judicial Review for Certain Determinations**

**Background.** Section 242(b)(4) of the INA limits the scope and standard for judicial review of removal orders.<sup>50</sup> A court of appeals can only base its decision on the administrative record on which the removal order was based; administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary; a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law; and the Attorney General's discretionary judgment whether to grant asylum is to be conclusive unless manifestly contrary to the law and an abuse of discretion. Case law also reflects these standards. The standard of judicial review for discretionary denial of an asylum claim is whether there has been an abuse of discretion. The standard of review for a denial of asylum based on a finding of fact (no persecution or well-founded fear of persecution) is whether the decision is supported by substantial evidence.<sup>51</sup> The standard of review for a denial of withholding of removal is whether the decision is supported by substantial evidence, since the relief is not discretionary.<sup>52</sup> For withholding of removal, a finding of fact that the applicant's testimony is not credible is also subject to the substantial evidence standard.

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<sup>50</sup> 8 U.S.C. § 1252(b)(4) (2004).

<sup>51</sup> IMMIGRATION LAW & PROCEDURE § 34.02[12][g].

<sup>52</sup> Id. § 33.06[8].



**Changes Made by the REAL ID Act.** REAL ID Act § 101(e) amends § 242(b)(4) of the INA<sup>53</sup> by establishing standards of judicial review for reversing certain evidentiary determinations of the adjudicator for asylum, withholding of removal, or other relief from removal. It limits judicial review by barring a court from reversing the decision of the adjudicator about the availability of corroborating evidence, unless it finds that a reasonable adjudicator is compelled to conclude that such evidence is unavailable.

It is unclear whether this amendment significantly changes existing law, since the previous statutory language already stated that administrative findings of fact — which apparently would include a conclusion about the availability of evidence — may not be reversed unless a reasonable adjudicator would be compelled to find otherwise. It appears that this provision, together with REAL ID Act provisions establishing standards for determining credibility and use of corroborating evidence, is intended to ensure uniformity of standards for judicial review of findings of fact on availability of corroboration, although even the Ninth Circuit had held that administrative findings of fact would not be reversed unless a reasonable adjudicator would be compelled to find otherwise under § 242(b)(4) of the INA.<sup>54</sup>

REAL ID Act, § 101(h)(3) provides that the judicial review standards established in § 101(e) took effect on the date of enactment (May 11, 2005) and apply to all cases in which the final administrative removal order was issued before, on, or after such date.

## Judicial Review of Denials of Discretionary Relief

**Background.** Section 242(a)(2)(B) of the INA limits judicial review of denials of discretionary relief.<sup>55</sup> Notwithstanding any other laws, it bars any court from jurisdiction to review any judgment on relief under various inadmissibility waivers, cancellation of removal, voluntary departure and adjustment of status, or any other discretionary decision or action of the Attorney General regarding title II of the INA (immigration laws for the admission and removal of aliens in the United States), other than the granting of asylum.

**Changes Made by the REAL ID Act.** REAL ID Act § 101(f)(1) amends § 242(a)(2)(B)(ii) of the INA<sup>56</sup> by adding a reference to the Secretary of Homeland Security, which helps to clarify the text and make it consistent with the aims of the Reorganization Plan for the Department of Homeland Security.

Subsection 101(f)(2) amends § 242(a)(2)(B) of the INA<sup>57</sup> by clarifying that jurisdiction is barred regardless of whether the discretionary judgment, decision, or

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<sup>53</sup> 8 U.S.C. § 1252(b)(4) (2004).

<sup>54</sup> E.g., *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003).

<sup>55</sup> 8 U.S.C. § 1252(a)(2) (2004).

<sup>56</sup> 8 U.S.C. § 1252(a)(2)(B)(ii) (2004).

<sup>57</sup> 8 U.S.C. § 1252(a)(2)(B) (2004).

action is made in removals proceedings. This language appears to be intended to supersede certain precedential federal district court decisions which have ruled that, considering that the title of § 242 is “judicial review of orders of removal” and that the context of § 242 as a whole concerns removal orders or actions, the bar on judicial review of discretionary decisions or actions of the Attorney General only applies to such decisions or actions made *in the context of removal proceedings*.<sup>58</sup> Although an affirmative asylum application may be made outside the context of a removal proceeding, such denials are not reviewable until they may be raised again in the context of a removal proceeding. In any case, the statute specifically exempts the granting of asylum relief from the jurisdictional bar, but § 101 of the REAL ID Act is intended to prevent terrorists from obtaining asylum.

REAL ID Act § 101(h)(4) provides that the judicial review standards established in REAL ID Act § 101(f) took effect on the date of enactment (May 11, 2005) and apply to all cases pending before any court on or after such date.

## Removal of Caps on Adjustment of Status for Asylees

**Background.** Prior to the enactment of the REAL ID Act, section 209 of the INA provided that the Attorney General could adjust the status of aliens granted asylum to lawful permanent residence if they satisfied certain conditions, subject to a cap of 10,000 persons per fiscal year (aside from certain groups of asylees who are or have been exempt from the cap or subject to limits set in other legislation). Section 207(a)(5) of the INA limited the number of refugees and asylees admitted pursuant to a determination of persecution for resistance to coercive population control methods to not more than a total of 1,000 for any fiscal year.

**Changes Made by the REAL ID Act.** Subsection 101(g)(1) of the REAL ID Act eliminates the cap for adjustment of status for asylees.<sup>59</sup> It also replaces references to the “Immigration and Naturalization Service” with references to the “Department of Homeland Security” and replaces references to the “Attorney General” with references to the “Secretary of Homeland Security or the Attorney General.” Subsection 101(g)(2) of the REAL ID Act eliminates the cap for refugees and asylees resisting coercive population control. These provisions were not in the REAL ID Act as introduced. REAL ID Act § 101(h)(5) provides that subsection 101(g) took effect on the date of enactment of the legislation (May 11, 2005).

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<sup>58</sup> See, e.g., *Mart v. Beebe*, 94 F. Supp. 2d 1120, 1123-4 (D. Or. 2000). On the other hand, other cases such as *CDI Information Services, Inc. v. Reno*, 278 F.3d 616, 618-20 (6<sup>th</sup> Cir. 2002), have held that the plain language of the statute bars judicial review of all discretionary decisions or actions of the Attorney General under title II of the INA regardless of whether they were made in the context of a removal proceeding and that the title of a statute or statutory section generally cannot be used to constrict the plain language of the statute.

<sup>59</sup> By the end of FY2003, there were nearly 160,000 cases pending for asylees to adjust to legal permanent resident status. For background, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

## Repeal of the Study and Report on Terrorists and Asylum

**Background.** Section 5403 of the Intelligence Reform and Terrorism Prevention Act of 2004 provided that “the Comptroller General of the United States shall conduct a study to evaluate the extent to which weaknesses in the United States asylum system and withholding of removal system have been or could be exploited by aliens connected to, charged in connection with, or tied to terrorist activity,” including the extent to which precedential court decisions may have affected the ability of the federal government to prove that an alien was a terrorist who should be denied asylum and/or removed.

**Changes Made by the REAL ID Act.** Subsection 101(i) of the REAL ID Act repeals the requirement for the study and report, apparently because the other provisions in REAL ID Act § 101 resolve, or at least are intended to resolve, the vulnerability of the asylum and withholding of removal systems to terrorists.

## II. Waiver of Laws to Facilitate Barriers at Border<sup>60</sup>

Section 102 of the IIRIRA generally provides for construction and strengthening of barriers along U.S. land borders to deter illegal crossings in areas of high illegal entry and specifically provides for 14 miles of barriers and roads along the border near San Diego, beginning at the Pacific Ocean and extending eastward. IIRIRA § 102(c) provides for a waiver of the Endangered Species Act of 1973 (ESA)<sup>61</sup> and the National Environmental Policy Act of 1969 (NEPA)<sup>62</sup> to the extent the Attorney General determines is necessary to ensure expeditious construction of barriers and roads. Despite the waiver of specific laws, construction of the San Diego area barriers has been delayed due to a dispute involving other laws.<sup>63</sup> California’s Coastal Commission has prevented completion of the San Diego barriers on the grounds that plans to fill a canyon in order to complete it are inconsistent with the California Coastal Management Program, a state program approved pursuant to the federal Coastal Zone Management Act (CZMA).<sup>64</sup> The Bureau of Customs and Border Protection (CBP) within the Department of Homeland Security believed that the requirements of § 102(c) of the IIRIRA and the CZMA could not be reconciled. Consequently, legislation was proposed and considered in the 108<sup>th</sup> Congress that would have waived either a broader range of specific environmental, conservation, and cultural laws or all laws. Also, reportedly the CBP has complied with a NEPA requirement despite the waiver available to it.<sup>65</sup>

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<sup>60</sup> Discussion of this topic was prepared by Margaret Mikyung Lee, Legislative Attorney.

<sup>61</sup> 16 U.S.C. §§ 1531 *et seq.* (2004).

<sup>62</sup> 42 U.S.C. §§ 4321 *et seq.* (2004).

<sup>63</sup> See CRS Report RS22026, *Border Security: Fences Along the U.S. International Border*, by Blas Nuñez-Neto and Stephen R. Viña.

<sup>64</sup> 16 U.S.C. §§ 1451-1464 (2004).

<sup>65</sup> See California Coastal Commission, *W8a Staff Report and Recommendation on Consistency Determination*, CD-063-03, October 2003, at 14.

The REAL ID Act provides additional waiver authority over laws that might impede the expeditious construction of barriers and roads along the border and also provides for limited judicial review of a waiver decision by the Secretary of Homeland Security.

**Background.** Section 102(c) of the IIRIRA provided for a waiver of the ESA and NEPA to the extent the Attorney General determined necessary to ensure expeditious construction of barriers and roads.

**Changes Made by the REAL ID Act.** Section 102 of the REAL ID Act amends the relevant IIRIRA provision to *authorize* (but not require, as in earlier versions) the Secretary of Homeland Security to waive all legal requirements as he determines necessary, in his sole discretion, to ensure the expeditious construction of barriers and roads under IIRIRA § 102. The term “legal requirements” refers to any local, state or federal statute, regulation, or administrative order.<sup>66</sup> Any waiver decision by the Secretary is effective upon publication in the Federal Register, thereby ensuring public notice of the action. Additionally, § 102 of the REAL ID Act provides for federal judicial review of a cause of action or claim alleging that a waiver decision or action taken by the Secretary of Homeland Security violates the U.S. Constitution. A claim may be brought in a federal district court not later than 60 days after the date of the challenged action or decision of the Secretary. Appellate review may only be sought by a petition for a writ of certiorari to the U.S. Supreme Court. Congress intends to prevent a flurry of lawsuits challenging waiver decisions from hindering construction of the barrier and defeating the purpose of the waiver,<sup>67</sup> while still complying with constitutional requirements.<sup>68</sup> Waivers of similar breadth do not appear to be common in federal law.<sup>69</sup> The judicial review and remedies provisions appear to bar state courts and also agencies or entities such as the California Coastal Commission, from exercising jurisdiction over waiver decisions and their consequences. This may also raise constitutional issues with regard to Congress’ power to restrict state court jurisdiction directly.<sup>70</sup>

As discussed above, preexisting statutes and the Reorganization Plan for the Department of Homeland Security have not been generally amended to clarify references to executive authority throughout the INA. Accordingly, the reference in preexisting law to the Attorney General with respect to the waiver of laws to

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<sup>66</sup> H.Rept. 109-72, at 171 (2005).

<sup>67</sup> H.Rept. 109-72, at 172 (2005). This provision appears to address concerns raised during debate in the House of Representatives that providing for a waiver of all laws would result in a spate of lawsuits challenging the provision that would further delay construction. 151 Cong. Rec. H8899 (daily edition Oct. 8, 2004) (statement of Rep. Farr).

<sup>68</sup> The waiver authority may not include a waiver of constitutional violations. For further discussion of the scope of the waiver and other legal issues regarding § 102, see CRS Congressional Distribution Memorandum, *Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Stephen R. Viña and Todd Tatelman (Feb. 9, 2005).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

facilitate barriers at border is replaced by a reference to the Secretary of Homeland Security.

### III. Judicial Review of Orders of Removal<sup>71</sup>

**Background.** In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>72</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>73</sup> Congress restricted the availability of judicial review of removal orders. Consequently, section 242(a)(2) of the INA restricts judicial review of decisions relating to expedited removal of arriving aliens, certain denials of discretionary relief, and removal orders for aliens removable for certain criminal offenses. In cases resulting from the 1996 restrictions on judicial review, the Supreme Court held that there is a strong presumption in favor of judicial review of administrative actions; therefore, in the absence of a clear statement of congressional intent to repeal habeas corpus jurisdiction over removal-related matters, such review was still available after the 1996 changes.<sup>74</sup> Furthermore, the Court also found that eliminating any judicial review, including habeas review, without any substitute for review of questions of law, including constitutional issues, would raise serious constitutional questions.<sup>75</sup> Therefore, it chose a statutory construction (habeas review was not eliminated) which would not raise serious constitutional questions.

**Changes Made by the REAL ID Act.** Section 106(a)(1) of the REAL ID Act, as enacted, restricts habeas review and certain other non-direct judicial review for certain removal matters under § 242(a)(2) of the INA, and clarifies that such restrictions (and other judicial review restrictions under the INA) do not preclude federal appellate court consideration of constitutional claims or other legal issues raised in accordance with review procedures under § 242 of the INA. The list of matters for which judicial review is limited is expanded to include claims under the Torture Convention; federal appellate review in accordance with procedures under

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<sup>71</sup> Discussion of this topic was prepared by Margaret Mikyung Lee, Legislative Attorney.

<sup>72</sup> 110 Stat. 1214 (1996).

<sup>73</sup> 110 Stat. 3009-546 (1996).

<sup>74</sup> *INS v. St. Cyr*, 533 U.S. 289 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001).

<sup>75</sup> According to the Court, the Suspension Clause, Article I, § 9, cl. 2, of the Federal Constitution, requires some judicial intervention in removal/deportation cases and at least protects the writ of habeas corpus as it existed in 1789. In light of ambiguities in the scope of the writ of habeas corpus at common law and Supreme Court decisions suggesting that judicial intervention can only be restricted to the extent consistent with the Constitution, the Court found that a serious Suspension Clause issue would arise if it were to accept the INS position that the 1996 acts eliminated habeas review without any substitute. To preclude review of a pure question of law by any court would give rise to substantial constitutional questions. The Court observed that traditionally the courts distinguished between ruling on eligibility for relief (a question of law) and ruling on the favorable exercise of discretion (a factual issue). Although a court could not rule on the validity of the actual granting of discretionary relief, which is not a matter of right, it could rule on the legality of an erroneous failure to exercise discretion at all.

§ 242 of the INA is to be the sole and exclusive avenue for judicial review of claims under the Torture Convention, except for the review procedure specified for expedited removal orders for arriving aliens under § 242(e) of the INA. Section 106 clarifies that in all immigration provisions restricting judicial review, “judicial review” and “jurisdiction to review” include habeas and other non-direct review and that federal appellate review in accordance with procedures under § 242 of the INA is the only avenue available for review of a removal order issued under any provision of the INA, except for the review procedure specified for expedited removal orders for arriving aliens under § 242(e) of the INA.

REAL ID Act § 106(a)(2) amends INA § 242(b)(9), concerning consolidation of issues for judicial review, to clarify that, except as otherwise provided in § 242 of the INA, no court has jurisdiction for habeas review or other non-direct judicial review of a removal order or questions of law or fact arising from such an order. Subsection 242(g) of the INA concerning exclusive jurisdiction is also amended to clarify that no habeas review or other non-direct judicial review is available for any claim arising from a decision or action by the Attorney General regarding the initiation and adjudication of removal proceedings or the execution of removal orders against any alien.

The effective date of these amendments was the date of enactment of the legislation (May 11, 2005) and the amendments made to the INA apply to cases in which the final administrative order of removal, deportation or exclusion was issued before, on, or after the date of enactment. Subsection 106(c) of the REAL ID Act provides for the transfer of pending habeas cases from district courts to federal appellate courts in which they could have been properly filed under § 242(b)(2) of the INA or the transitional rules of the IIRIRA. Subsection 106(d) of the REAL ID Act further provides that IIRIRA transition-rule cases filed under former § 106(a) of the INA, concerning judicial review of deportation and exclusion cases and repealed by the IIRIRA, shall be treated as if they had been filed under § 242 of the INA and that such petitions are the sole avenue for judicial review of deportation or exclusion orders, notwithstanding any other provisions of law, including habeas review or other non-direct judicial review.

While eliminating habeas and other non-direct judicial review, REAL ID Act § 106 provides that questions of law, including constitutional issues, still have a forum for review. This appears intended to resolve the constitutional concerns raised previously by the Supreme Court.

#### **IV. Inadmissibility and Deportability Due to Terrorist and Terrorist-Related Activities<sup>76</sup>**

Engaging in terror-related activity has strict consequences relative to an alien’s ability to lawfully enter or remain in the United States.<sup>77</sup> The INA provides that

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<sup>76</sup> Discussion of this topic was prepared by Michael John Garcia, Legislative Attorney.

<sup>77</sup> For further background, see CRS Report RL32564, *Immigration: Terrorist Grounds for* (continued...)

aliens at any time engaged in specified terror-related activities, or indirectly supporting them in specified ways, cannot legally enter the United States. Also, aliens at any time engaged in terrorist activities are deportable if in the U.S., but the terrorism grounds for deportation do not now extend to certain indirect support, such as representation of or membership in a terrorist organization. The REAL ID Act, *inter alia*, (1) broadens the INA’s definitions of “terrorist organization” and “engage in terrorist activity”; (2) expands the grounds for inadmissibility based on support of terror-related activity; and (3) makes the terror-related grounds for deportability identical to those for inadmissibility.

## Definition of “Engage in Terrorist Activity”

Under the INA, to “engage in terrorist activity” is a separate concept from terrorist activity itself. Whereas “terrorist activity” includes direct acts of violence<sup>78</sup> — for instance, hijacking a plane or threatening persons with bodily harm in order to compel third-party action — actions that constitute being “engage[d] in terrorist activity” include both these types of acts and other, specified acts that facilitate terrorist activity, such as preparing, funding, or providing material support for terrorist activities. Aliens who engage in terrorist activity are inadmissible and deportable.<sup>79</sup>

Again, and as elaborated upon below, the term “engage in terrorist activity,” while including certain actions in direct support of terrorist acts or organizations, is not an essential element of all terrorism-based grounds for inadmissibility (as opposed to deportation, prior to the enactment of the REAL ID Act). Distinct from support activities that amount to “engaging in terrorist activities” are actions that support terrorism more indirectly through group membership or advocacy, some of which render an alien inadmissible but, until recently, not deportable.

**Background.** Prior to the enactment of the REAL ID Act, in order to “engage in terrorist activity” for purposes of the INA, an alien must have either as an individual or as part of an organization:

- committed or incited to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- prepared or planned a terrorist activity;
- gathered information on potential targets for a terrorist activity;
- solicited 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 could demonstrate that he did not

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<sup>77</sup> (...continued)

*Exclusion of Aliens*, by Michael John Garcia.

<sup>78</sup> INA § 212(a)(3)(B)(iii); 8 U.S.C. § 1182(a)(3)(B)(iii) (2004) (defining “terrorist activity”).

<sup>79</sup> INA §§ 212(a)(3)(B)(i)(I), 237(a)(4)(B); 8 U.S.C. §§ 1182(a)(3)(B)(i)(I), 1227(a)(4)(B) (2004).

- know, and should not reasonably have known, that the solicitation would further the non-designated organization's terrorist activity;
- solicited 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 could 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
  - committed an act that the alien knew, or reasonably should have known, provided material support — including a safe house, transportation, communications, funds, transfer of funds or other material financial 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 knew or should reasonably have known committed or planned to commit a terrorist activity, (3) a designated terrorist organization, or (4) a non-designated terrorist organization, unless the support provider could 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>80</sup>

With respect to acts related to a “terrorist organization,” acts through or on behalf of an organization formally designated by the government as terrorist are covered regardless of an individual's knowledge of the organization's terrorist connections. However, at least prior to enactment of the REAL ID Act, if an alien had acted as a solicitor or provided material support for an organization that had not been formally designated as a terrorist organization by the United States, but which had nevertheless committed, incited, planned, prepared, or gathered information for a terrorist activity, the alien could be deemed not to have engaged in terrorist activity himself if he could demonstrate that he did not and should not have reasonably known that his solicitation or material support would further the organization's terrorist activities.<sup>81</sup>

The material support clause within the INA's definition of “engage in terrorist activity” could be waived in application to a specific alien if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concluded in his sole unreviewable discretion that this clause should not apply.<sup>82</sup>

**Changes Made by the REAL ID Act.** Section 103(b) of the REAL ID Act replaces the definition of “engage in terrorist activity” found in INA

<sup>80</sup> INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B)(iv) (2004).

<sup>81</sup> INA § 212(a)(3)(B)(iv)(IV)-(VI); 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)-(VI) (2004). If an alien provides material support for, or solicits funding or participation in, a terrorist activity or a group designated as a terrorist organization by the United States, he is deemed to have engaged in terrorist activity.

<sup>82</sup> INA § 212(a)(3)(B)(iv)(VI); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2004).



§ 212(a)(3)(B)(iv) with a new definition. For the most part, this definition is identical to the previous version. However, a few significant changes are also made.

**More Stringent Provisions Relating to Material Support, Solicitation of Funds or Participation in Nondesignated Terrorist .** The REAL ID Act makes it more difficult for an alien who has provided material support or acted as a solicitor for either a person engaged in terrorist activity or a non-designated terrorist organization to avoid being found to have engaged in terrorist activity himself. Previously, an alien could avoid being found to have engaged in terrorist activity if he could demonstrate that he did not and should not have reasonably known that his solicitation or material support to an individual or non-designated terrorist organization would further terrorist activities.<sup>83</sup> Pursuant to the amendments made by REAL ID Act § 103(b), an alien must demonstrate *by clear and convincing evidence* (a higher standard) that he did not and should not have reasonably known that his solicitation or material support would further a terrorist activity or organization in order to be found not to have engaged in terrorist activity himself.<sup>84</sup> The REAL ID Act permits the material support clause of the definition of “engage in terrorist activity” to be waived in application to a specific alien if the Secretary of State or Secretary of Homeland Security, after consultation with the other and the Attorney General, concludes in his sole unreviewable discretion that this clause should not apply.<sup>85</sup>

**Material Support to Members of Designated Terrorist Organizations.** The REAL ID Act expands the definition of “engage in terrorist activity” to include providing material support to a *member* of a designated terrorist organization. Under prior law, a person who provided material support to a member of a terrorist organization, but not to the organization directly, might not be considered to have engaged in terrorist activity himself unless he knew or should have known that his support was going to a person that had committed or planned to commit a terrorist activity.

**Effective Date of Changes to the Definition of “Engage in Terrorist Activity”.** Pursuant to § 103(c) of the REAL ID Act, the changes to the INA’s definition of “engage in terrorist activity” became effective on the date of the REAL ID Act’s enactment (May 11, 2005), and apply to removal proceedings instituted before or after the REAL ID Act’s enactment, as well as to acts and conditions constituting a ground for inadmissibility occurring or existing before or after the REAL ID Act’s enactment.

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<sup>83</sup> INA § 212(a)(3)(B)(iv)(IV)-(VI); 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)-(VI) (2004).

<sup>84</sup> Under the REAL ID Act, if an alien solicits funding or participation or material support for either a terrorist activity or a group designated as a terrorist organization by the United States, he is deemed to have engaged in terrorist activity. *See* REAL ID Act § 103(b). This standard is the same as that found in prior law.

<sup>85</sup> REAL ID Act § 104.

## Definition of “Terrorist Organization”

The INA defines “terrorist organization” to include two general categories of groups. The first category are those groups that are designated as terrorist organizations by the U.S., thereby providing the public with notice of these organizations’ involvement in terrorism. The second category includes other groups that carry out specified terror-related activities, but have not been designated as terrorist groups.<sup>86</sup> For simplicity, this report refers to groups falling within this second category as *nondesignated* terrorist organizations. Certain forms of assistance to a “terrorist organization” are grounds for inadmissibility and deportability because they amount to “engaging in a terrorist activity.” Furthermore, certain memberships in or associations with a “terrorist organization” are grounds for inadmissibility even though until recently such membership or association, *vel non*, did not make an alien deportable.<sup>87</sup> Accordingly, amending the definition of “terrorist organization” might have a considerable impact on the reach of other terrorism-related provisions of the INA.

**Background.** Prior to the enactment of the REAL ID Act, INA § 212(a)(3)(B)(vi) presently defined “terrorist organization” as including:

- any group designated by the Secretary of State as a terrorist organization pursuant to INA § 219;<sup>88</sup>
- upon publication in the Federal Register, any group designated as a terrorist organization by the Secretary of State in consultation with or upon the request of the Attorney General, after finding that the organization committed, incited, planned, prepared, gathered information, or provided material support for terrorist activities; or
- a group of two or more individuals, whether organized or not, that committed, incited, planned, prepared, or gathered information for terrorist activities.<sup>89</sup>

**Changes Made by the REAL ID Act.** Section 103(c) of the REAL ID Act amends the definition of “terrorist organization” found in INA § 212(a)(3)(B)(vi). The amendments, discussed below, are significant and, in combination with the REAL ID Act’s expansion of the types of associations with a terrorist organization

<sup>86</sup> The USA PATRIOT Act amended INA § 212 to expand the definition of “terrorist organization” to potentially include terrorist organizations not designated by the Secretary of State pursuant to INA § 219. A group that is engaged in terrorist activities might not be designated as a terrorist organization because, *inter alia*, the group’s activities escape the notice of U.S. officials responsible for designated organizations as terrorist; the group has shifting alliances; or designating the group as a terrorist organization would jeopardize ongoing U.S. criminal or military operations.

<sup>87</sup> See INA §§ 212(a)(3)(B)(i)(IV)-(V), 212(a)(3)(F); 8 U.S.C. §§ 1182 (a)(3)(B)(i)(IV)-(V), 1182(a)(3)(F) (2004).

<sup>88</sup> For further discussion of this provision, see CRS Report RL32120; *The ‘FTO List’ and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Cronin.

<sup>89</sup> INA § 212(a)(3)(B)(vi); 8 U.S.C. § 1182 (a)(3)(B)(vi) (2004).

that can lead to an alien’s inadmissibility/deportation, may greatly amplify the reach of the terrorism provisions of the INA generally. Among other contexts, the changes could especially impact aliens associated with groups that are part of a web of fund-raising that is found to support a terrorist activity in some measure.

***Retention of Attorney General’s Role in the Designation of Terrorist Organizations.*** Most of the authority to administer immigration law that formerly was held by the Attorney General has been transferred to the Secretary of Homeland Security, though some authorities have been retained. Section 103(c) of the REAL ID Act provides both the Secretary of Homeland Security and the Attorney General with an express role in the designation of groups as terrorist organizations that are not otherwise designated as such by the Secretary of State pursuant to INA § 219. The REAL ID Act amends the INA’s definition of “terrorist organization” to include any group designated as such by the Secretary of State, in consultation with or upon the request of the Attorney General *or* the Secretary of Homeland Security, after finding that the organization “engages in terrorist activity,” as defined under INA § 212(a)(3)(B)(iv).

***Expanding the Activities Qualifying a Nondesignated Group as a Terrorist Organization.*** The REAL ID Act’s amendments to the INA’s definition of “terrorist organization” could significantly increase the number of groups that, despite not being designated as such by the Secretary of State, constitute terrorist organizations.

First, under prior law, a group not otherwise designated by the Secretary of State could only be deemed a terrorist organization if the group committed, incited, planned, prepared, or gathered information for terrorist activity.<sup>90</sup> Under the REAL ID Act, a group not otherwise designated as a terrorist organization could also be considered such if it solicits funds or membership for a terrorist activity or terrorist organization or otherwise provides material support for a terrorist activity or organization. The reach of this extension may not be altogether clear: it appears uncertain as to whether or how a group could escape coverage by showing that it could not reasonably have known that an organization for which it solicited or provided material support was itself involved in conducting terrorist acts or supporting a “terrorist organization” (as redefined), and so on down the chain.

Second, REAL ID Act § 103(c) further amends “terrorist organization” to include any non-designated group that has a subgroup that “engages in terrorist activity,” as expanded by the REAL ID Act in this context to include either (1) direct participation in or support of a terrorist activity or organization, or (2) indirect support through solicitation, recruitment, etc. The upshot of the inclusion of subgroups may be to further lower the threshold for how substantial, apparent, and immediate a group’s support must be for a terrorist activity or organization for the group to be considered “terrorist” and for its members to potentially fall within the terrorism provisions of the INA. For example, if organization A has a subgroup A1 that raises funds for organization B (among other groups), and organization B distributes funds to organization C (among other groups), which has a subgroup C1

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<sup>90</sup> See INA § 212(a)(3)(B)(vi)(III); 8 U.S.C. § 1182 (a)(3)(B)(vi)(III) (2004).

that at some point provided support to a terrorist activity or organization, organization A apparently would qualify as a terrorist organization (and its members would fall under the grounds of inadmissibility/deportability discussed below) absent the group's ability to somehow extricate itself by showing it could not have reasonably drawn the connection between its subgroup's fund raising and subgroup C1.

Pursuant to § 104 of the REAL ID Act, the Secretary of State or the Secretary of Homeland Security, in consultation with the other and the Attorney General, may waive the INA provision defining certain non-designated groups as "terrorist organizations" with respect to a particular group when the provision's applicability is based solely on the group having a subgroup that has engaged in terrorist activity.

***Effective Date of Changes to the Definition of "Terrorist Organization"***. Pursuant to § 103(c) of the REAL ID Act, the changes to the INA's definition of "terrorist organization" made by the REAL ID Act were effective on the date of enactment (May 11, 2005), and apply to removal proceedings instituted before or after the REAL ID Act's enactment, as well as to acts and conditions constituting a ground for inadmissibility occurring or existing before or after the REAL ID Act's enactment.

## **Terror-Related Grounds for Inadmissibility of Aliens**

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>91</sup> Aliens who "engage in terrorist activity," as defined by INA § 212(a)(3)(B)(iv), are inadmissible. In addition, several other terror-related activities are grounds for inadmissibility.

**Background.** Prior to the enactment of the REAL ID Act, INA § 212(a)(3)(B)(i)<sup>92</sup> provided that an alien was inadmissible on terror-related grounds if the alien:

- had engaged in terrorist activity;
- was 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;
- had, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
- was a representative of (1) a foreign terrorist organization, as designated by the Secretary of State, or (2) a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State had determined undermined United States efforts to reduce or eliminate terrorist activities;

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<sup>91</sup> INA § 212(a); 8 U.S.C. § 1182(a) (2004).

<sup>92</sup> 8 U.S.C. § 1182(a)(3)(B)(i) (2004).

- was a member of a foreign terrorist organization as designated by the Secretary of State under INA § 219, or an organization which the alien knew or should have known was a terrorist organization;
- was an officer, official, representative, or spokesman of the Palestine Liberation Organization (PLO);
- had 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 had determined undermined United States efforts to reduce or eliminate terrorist activities; or
- was the spouse or child of an alien who was inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the previous five years, *unless* the spouse or child (1) did not and should not have reasonably known about the terrorist activity or (2) in the reasonable belief of the consular officer or Attorney General, had renounced the activity causing the alien to be found inadmissible under this section.<sup>93</sup>

In addition, INA § 212(a)(3)(F) designates an alien as inadmissible if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines that the alien 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.

**Changes Made by the REAL ID Act.** Section 103(a) of the REAL ID Act reorganizes and generally expands the terror-related grounds for inadmissibility. Given that REAL ID Act § 103(b)-(c) broadens the INA’s definitions of “terrorist organization” and “engage in terrorist activity” — two phrases frequently used in the INA provisions establishing the terror-related grounds for inadmissibility — the REAL ID Act expands the terror-related grounds for inadmissibility more broadly than might first appear. The interplay between the amended definition of “terrorist organization,” discussed above, and the expansion of covered support and associational activities, discussed below, may be particularly significant in broadening the grounds for inadmissibility.

The following paragraphs discuss the alterations that the REAL ID Act makes to the terror-related grounds for inadmissibility.

***Effects of Expanded Definition of “Engage in Terrorist Activity” on Terror-Related Grounds for Inadmissibility.*** As in preexisting law, the REAL ID Act provides that any alien who has engaged in a terrorist activity is inadmissible.<sup>94</sup> As previously mentioned, § 103(b) of the REAL ID Act expands the applicable definition of the term “engage in terrorist activity.” Thus, under the REAL ID Act, an alien who solicited on behalf of or provided material support for

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<sup>93</sup> The limited exception to inadmissibility for the spouse and child of an alien who is inadmissible on terror-related grounds is found in INA § 212(a)(3)(B)(ii).

<sup>94</sup> H.R. 418, § 103(a).

a non-designated terrorist organization is 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).

***Retention of Attorney General’s Role in Deeming an Alien Inadmissible for Terror-Related Activity.*** Though recent law has transferred most immigration enforcement authority to the Department of Homeland Security, the REAL ID Act allows 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.<sup>95</sup>

***Incitement of Terrorist Activity.*** The REAL ID Act does not alter the preexisting ground for inadmissibility on account of the incitement of terrorist activity.

***Representation of a Terrorist Organization or Political Group Espousing Terrorist Activity.*** Under prior law, a representative of a foreign terrorist organization designated as such by the Secretary of State was inadmissible. The REAL ID Act expands this ground for inadmissibility to deny admission to a representative of *any* group that constitutes a “terrorist organization,” as defined under INA § 212(a)(3)(B)(vi). As previously discussed, the REAL ID Act expands the breadth of the term “terrorist organization” for purposes of the INA.

The REAL ID Act also makes inadmissible *any* representative of a political, social or other similar group that endorses or espouses terrorist activity.<sup>96</sup> Previously, such representatives were only inadmissible if (1) the organization *publicly endorsed* terrorist activity and (2) the Secretary of State determined that such endorsement undermined U.S. efforts to reduce or eliminate terrorist activities.<sup>97</sup>

Pursuant to § 104 of the REAL ID Act, the Secretary of State or the Secretary of Homeland Security, in consultation with the other and the Attorney General, may waive this provision with respect to a particular alien.

***Membership in a Terrorist Organization.*** The REAL ID Act substantially increases the grounds for inadmissibility on account of membership in a terrorist organization. Previously, membership in a *foreign terrorist organization designated by the Secretary of State under INA § 219*, or membership in an organization that the alien *knew or should have known* was a terrorist organization, made an alien inadmissible.<sup>98</sup> The REAL ID Act facilitates the removal of a member of a non-designated terrorist organization by shifting the burden from the Government to show that the alien knew or should have known the nature of the organization to the

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<sup>95</sup> INA § 212(a)(3)(B)(i)(II); 8 U.S.C. § 1182(a)(3)(B)(i)(II).

<sup>96</sup> REAL ID Act § 103(a).

<sup>97</sup> INA § 212(a)(3)(B)(i)(IV); 8 U.S.C. § 1182(a)(3)(B)(i)(IV) (2004).

<sup>98</sup> INA § 212(a)(3)(B)(i)(V); 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2004).

alien to demonstrate *by clear and convincing evidence* that he did not know, and should not reasonably have known, that the organization was a terrorist organization.

Again, the expansion of definition of “terrorist organization” could significantly amplify the potential impact of these changes.

***Officers, Spokesmen, and Representatives of the Palestine Liberation Organization.*** In both prior law and the REAL ID Act, an alien who is an officer, official, representative, or spokesman of the PLO is inadmissible.

***Expanding Inadmissibility Grounds for Espousal of Terrorist Activity.*** Prior to enactment of the REAL ID Act, aliens were inadmissible for the espousal of terrorist activity only if they (1) used positions of prominence (within any country) to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, and (2) did so in a way that undermined U.S. efforts to reduce or eliminate terrorist activities, based on a determination by the Secretary of State. The REAL ID Act makes 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.

It is important to note that this ground for inadmissibility does not include a *mens rea* requirement. It appears that an alien who persuades others to support a terrorist organization is inadmissible even if the alien had no knowledge of the organization’s terrorist activities. The possibility of this occurring may not be improbable, given the REAL ID Act’s expansion of the definition of “terrorist organization” to include any group that engages, or has a *subgroup* that engages in terrorist activity, including soliciting funds or otherwise providing material support for a “terrorist organization” (which itself may be one solely because it has, for example, a subgroup that has solicited or provided funds to another “terrorist organization”).

Pursuant to § 104 of the REAL ID Act, the Secretary of State or the Secretary of Homeland Security, in consultation with the other and the Attorney General, may waive this provision with respect to a particular alien.

***Receiving Military-Type Training from or on Behalf of a Terrorist Organization.*** The REAL ID Act makes inadmissible any alien who has received military-type training<sup>99</sup> 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 REAL ID Act § 103(c)). Previously, the receipt

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<sup>99</sup> 18 U.S.C. § 2339D(c)(1) defines “military-type training” as including “training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction.”

of such training is only a deportable offense.<sup>100</sup> It is important to note that this ground for inadmissibility does not include a *mens rea* requirement, and does not specify that the organization must be designated as a terrorist organization by the United States. Accordingly, it appears that an alien who receives military-type training from or on behalf of a terrorist organization is inadmissible, regardless of whether the alien was aware or should have been aware that the organization was engaged in terrorist activity.

***Inadmissibility of a Spouse or Child of an Alien Inadmissible on Terror-Related Grounds.*** The REAL ID Act neither alters the inadmissibility of the spouse or child of an alien who was deemed inadmissible on terror-related grounds nor eliminates the exception to inadmissibility for an alien’s spouse or child who (1) did not and should not have reasonably known about the terrorist activity or (2) in the reasonable belief of the consular officer or Attorney General, has renounced the terror-related activity causing the alien to be found inadmissible.

***Association with a Terrorist Organization.*** The REAL ID Act does not amend INA § 212(a)(3)(F), which designates an alien as inadmissible if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines that the alien 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.

***Effective Date of Changes to the Terror-Related Grounds for Inadmissibility.*** Pursuant to § 103(c) of the REAL ID Act, changes to the terror-related grounds for inadmissibility became effective on the date of the REAL ID Act’s enactment (May 11, 2005), and apply to removal proceedings instituted before or after the REAL ID Act’s enactment, as well as to acts and conditions constituting a ground for inadmissibility occurring or existing before or after the REAL ID Act’s enactment.

## **Waiver of Certain Grounds for Inadmissibility**

Section 104 of the REAL ID Act, as enacted, provides designated officials with waiver authority over certain terrorism-related immigration provisions. The Secretary of State or Secretary of Homeland Security, in consultation with the other and the Attorney General, may waive the applicability of

- INA § 212(a)(3)(B)(i)(IV)(bb), as amended, which makes representatives of political, social, or other groups that endorse or espouse terrorist activity inadmissible;
- INA § 212(a)(3)(B)(i)(VII), as amended, which makes aliens who endorse or espouse terrorist activity, or persuade others to endorse or espouse terrorist activity or support a terrorist organization, inadmissible;

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<sup>100</sup> See INA § 237(a)(4)(E); 8 U.S.C. § 1227(a)(4)(E) (2005) (as amended by the Intelligence Reform and Terrorist Prevention Act of 2004, P.L. 108-458, § 5402).



- INA § 212(a)(B)(iv)(VI), as amended, which defines “terrorist organization,” on the condition that this provision may only be waived with respect to a group who would constitute a “terrorist organization” solely on account of having a subgroup that has engaged in terrorist activity; and
- INA § 212(a)(3)(B)(iv)(VI), as amended, which defines material supports constituting engagement in terrorist activity for purposes of the INA.

The Secretary of State (but not the Secretary of Homeland Security) may not exercise waiver authority with respect to an alien after removal proceedings against the alien are instituted.

REAL ID Act § 104 also imposes reporting requirements on the Secretary of State and Secretary of Homeland Security regarding their exercise of waiver authority under this section. They are required to provide specified House and Senate committees<sup>101</sup> with an annual report regarding the aliens with respect to whom waiver authority under REAL ID Act § 104 was exercised. Additionally, the Secretary of State and/or Secretary of Homeland Security are required to report to specified House and Senate committees within one week of exercising REAL ID Act § 104 waiver authority with respect to a group (i.e., determining that a group that has a subgroup engaged in terrorist activity is not itself a “terrorist organization” for purposes of the INA).

While § 104 provides the Secretary of State and Secretary of Homeland Security with authority to waive certain terrorism-related grounds making an alien inadmissible under INA § 212, no similar waiver authority is provided over the terrorism-related grounds that make an alien deportable under INA § 237.

## Terror-Related Grounds for Deportability of Aliens

Aliens found to have engaged in terror-related activities following admission into the United States may be deportable. Until recently, the terror-related grounds for inadmissibility were significantly broader than those for deportability. The REAL ID Act amended the terror-related grounds for deportability to make them identical to the terror-related grounds for inadmissibility.

**Background.** Prior to the enactment of the REAL ID Act, INA § 237(a)(4)(B) provided that an alien was deportable if he committed any of the actions falling under the INA’s definition of “engage in terrorist activity.” Pursuant to § 5402 of the Intelligence Reform and Terrorism Prevention Act of 2004, any alien who received military-type training from or on behalf of any organization that, at the time the

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<sup>101</sup> These committees are the House and Senate Committees on the Judiciary, the House Committee on International Relations, the Senate Committee on Foreign Relations, and the House Committee on Homeland Security.

training was received, was designated as a terrorist organization by the Secretary of State, was deportable.<sup>102</sup>

**Changes Made by the REAL ID Act.** Section 105(a) of the REAL ID Act significantly expands the terror-related grounds for deportability, so that any alien who is described in the inadmissibility provisions of INA §§ 212(a)(3)(B) (relating to terrorist activity) or 212(a)(3)(F) (relating to association with a terrorist organization) is also deportable. The following sections discuss the new deportation grounds added by the REAL ID Act.

**Effects of Expanded Definition of “Engage in Terrorist Activity” on Terror-Related Grounds for Deportability.** A person who engages in terrorist activity is both inadmissible and deportable under both current law and prior to the enactment of the REAL ID Act. However, as previously mentioned, § 103(b) of the REAL ID Act also expands the applicable definition of the term “engage in terrorist activity.” Thus, an alien who provided material support or solicited funds or participation in a non-designated terrorist organization is now deportable unless he demonstrates *by clear and convincing* evidence that he did not and should not have reasonably known that the organization was a terrorist organization.

**Designation as Deportable for Terror-Related Activity by a Consular Officer, the Attorney General, or the Secretary of Homeland Security.** The REAL ID Act enables a consular officer, the Attorney General, or the Secretary of Homeland Security to declare an alien inadmissible who is known to be engaged in terrorist activity or is likely to engage in such activity upon entry into the United States. Although the REAL ID Act provides that “any alien considered inadmissible [on terror-related grounds] ... is deportable,”<sup>103</sup> it is unclear whether this means that a consular officer, the Attorney General, or the Secretary of Homeland Security could declare an alien deportable if the alien was known to be engaged in terrorist activity or was likely to engage in such activity within the United States, or what procedures apply in such a circumstance.

**Incitement of Terrorist Activity.** The REAL ID Act makes any alien who incited terrorist activity, under circumstances indicating an intention to cause death or serious bodily harm, deportable as well as inadmissible.

**Representation of a Terrorist Organization or Political Group Espousing Terrorist Activity.** The REAL ID Act makes deportable as well as inadmissible any representative of either (1) a terrorist organization or (2) a political, social or other similar group that endorses or espouses terrorist activity.

**Membership in a Terrorist Organization.** The REAL ID Act makes it a deportable offense for an alien to be either (1) a member of a terrorist organization designated by the Secretary of State, or (2) a member of any group that constitutes a terrorist organization, unless the alien can demonstrate *by clear and convincing*

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<sup>102</sup> Id.

<sup>103</sup> REAL ID Act, § 105(a).

evidence, that he did not know, and should not reasonably have known, that the organization was a terrorist organization.

***Officers, Spokesmen, and Representatives of the Palestine Liberation Organization.*** Pursuant to the REAL ID Act, an alien who is an officer, official, representative, or spokesman of the PLO is deportable.

***Espousal of Terrorist Activity.*** An alien who espouses or endorses terrorist activity, or persuades others to support terrorist activity or a terrorist organization, is deportable as well as inadmissible pursuant to the REAL ID Act. As discussed previously, this ground for inadmissibility/deportability does not include a *mens rea* requirement, meaning that an alien who persuades others to support a terrorist organization may be considered deportable even if the alien has no knowledge of the organization's terrorist activities.

***Receiving Military-Type Training from or on Behalf of a Terrorist Organization.*** Section 105(b) of the REAL ID Act repeals the former grounds for deportability on account of receiving military-type training from or on behalf of a terrorist organization designated by the Secretary of State. Instead, the provision added by the REAL ID Act making aliens who receive military-type training from or on behalf of *any* terrorist organization (i.e., not simply those designated as such by the Secretary of State) inadmissible is also grounds for deporting an alien. Given the REAL ID Act's amendments to the INA's definition of "terrorist organization" and the terror-related grounds for inadmissibility, it appears that an alien who receives military-type training from or on behalf of a terrorist organization is deportable regardless of whether the alien was aware that the organization was engaged in terrorist activity.

***Deportability of a Spouse or Child of an Alien Inadmissible on Terror-Related Grounds.*** The REAL ID Act makes the spouse or child of an alien inadmissible on terror-related grounds deportable, if the terror-related activity causing the alien to be inadmissible occurred within the last five years, unless the alien's spouse or child (1) did not and should not have reasonably known about the terrorist activity or (2) in the reasonable belief of the consular officer or Attorney General, has renounced the terror-related activity causing the alien to be found inadmissible.

***Association with a Terrorist Organization as Grounds for Deportability.*** The REAL ID Act makes an alien deportable on the same grounds that the alien would be inadmissible pursuant to INA § 212(a)(3)(F). Accordingly, an alien is deportable if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines that the alien 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.

***Effective Date of Changes to the Terror-Related Grounds for Deportability.*** Pursuant to § 105(a)(2) of the REAL ID Act, the changes to the terror-related grounds for deportability were effective on the date of the REAL ID Act's enactment (May 11, 2005), and apply to acts and conditions constituting a

ground for removal occurring or existing before or after the REAL ID Act's enactment.

## **Consequences of Terror-Related Activities on Eligibility for Relief from Removal**

An alien found to have engaged in terror-related activities is not only inadmissible and potentially deportable, but is also ineligible for various forms of relief from removal. In modifying the terror-related grounds for inadmissibility and deportability, the REAL ID Act also affects certain aliens' eligibility for relief from removal. Specifically, the REAL ID Act expands the scope of aliens who were ineligible for asylum, withholding of removal, and cancellation of removal.

**Asylum.** Asylum is a discretionary form of relief from removal available to aliens in the U.S. who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Aliens who have been admitted into the U.S. or who entered surreptitiously are generally in the posture of potentially "deportable" aliens, and are removable under grounds for deportation. Aliens otherwise present in the U.S. — "paroled" aliens and aliens presently arriving at an airport or other port of entry, for example — are in the posture of potentially "inadmissible" aliens and removable under the grounds for inadmissibility.

Aliens engaged in terrorist activity are ineligible for asylum, as are aliens who fall under most other terrorism provisions. Mere membership in a terrorist organization is perhaps the most notable exception to this automatic disqualification. The REAL ID Act preserves this exception for *inadmissible* aliens, but as explained below, it appears to deny this exemption to *deportable* aliens. Other changes in law also appear to result due to changes in cross-references and section numbering arising from the REAL ID Act.

***Restrictions on Asylum Eligibility for Aliens Deportable on Terror-Related Grounds Prior to the Enactment of the REAL ID Act.*** A *deportable* alien is ineligible for asylum relief on terror-related grounds if he is "removable under [INA] § 237(a)(4)(B) (relating to terrorist activity)." Prior to the enactment of the REAL ID Act, an alien was only removable under § 237(a)(4)(B) if he committed certain actions defined as "engaging in terrorist activity" under INA § 212(a)(3)(B)(iv). As previously mentioned, "engaging in terrorist activity" is only one of several terror-related grounds under which an alien may be deemed *inadmissible*.

***The REAL ID Act's Effects upon Asylum Eligibility Restrictions for Aliens Deportable on Terror-Related Grounds.*** INA § 208(b)(2)(A)(v) makes ineligible for asylum any alien who is (1) *inadmissible* on specified terrorism grounds (those terror-related grounds for inadmissibility provided under subclause (I), (II), (III), (IV), and (VI) of INA § 212 (a)(3)(B)(i)) or (2) *deportable* under INA § 237(a)(4)(B) (relating to terrorist activity). With regard to (2), the REAL ID Act amends INA § 237(a)(4)(B), so that a deportable alien is not only be deportable for engaging in terrorist activity, but also for committing terror-related activity that

would make the alien inadmissible under INA § 212 — including those activities that do not make an alien who is *inadmissible* on terror-related grounds ineligible for asylum. Accordingly, the REAL ID Act appears to create a disparity in asylum eligibility, under which an alien designated as *inadmissible* on account of certain terror-related activities might still be eligible for asylum relief, while an alien who is *deportable* on the same grounds is ineligible.

Pursuant to amendments made by the REAL ID Act, which do not directly alter the INA's asylum eligibility provisions but do make the terror-related grounds for deportability the same as those for inadmissibility, a *deportable* alien is ineligible for asylum on terror-related grounds if:

- the alien has engaged in a terrorist activity;
- a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, that the alien is engaged in or is likely to engage after entry in any terrorist activity;
- the alien has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;
- the alien is a representative of a terrorist organization, or a political, social or other similar group that endorses or espouses terrorist activity;
- the alien is an officer, official, representative, or spokesman of the PLO;
- the alien is a member of a group designated as a terrorist organization by the United States;
- the alien is a member of a group of two or more individuals, whether organized or not, that engages in, or has a subgroup that engages in a terrorist activity, *unless* the alien can demonstrate *by clear and convincing* evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;
- the alien endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization (possibly including an organization that the alien does not know has engaged in terrorist activities, but nevertheless meets the INA's definition of "terrorist organization");
- the alien has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization (possibly including an organization that the alien does not know to engage in terrorist activities, but nevertheless meets the INA's definition of "terrorist organization");
- a spouse or child of an alien who is inadmissible on terror-related grounds, if the activity causing the alien to be found inadmissible occurred within the last five years, *unless* the spouse or child (1) did not and should not have reasonably known about the terrorist activity or (2) in the reasonable belief of the consular officer or Attorney General, has renounced the terror-related activity causing the alien to be found inadmissible; or

- the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines that the alien 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.<sup>104</sup>

***Restrictions on Asylum Eligibility for Aliens Inadmissible on Terror-Related Grounds Prior to the Enactment of the REAL ID Act.*** Pursuant to INA § 208(b)(2)(A)(v), an *inadmissible* alien is ineligible for asylum only if the alien “is inadmissible under subclause (I), (II), (III), (IV), or (VI) of [INA] § 212(a)(3)(B)(i).” Prior to the enactment of the REAL ID Act, an inadmissible alien would be denied eligibility on terror-related grounds if:

- he had engaged in a terrorist activity (subclause I);
- a consular officer or the Attorney General knew, or had reasonable ground to believe, that the alien was engaged in or was likely to engage after entry in any terrorist activity (subclause II);
- the alien had incited terrorist activity, under circumstances indicating an intention to cause death or serious bodily harm (subclause III);
- the alien was a representative of a foreign terrorist organization designated by the Secretary of State under INA § 219 or a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State had determined undermined United States efforts to reduce or eliminate terrorist activities, *unless* the Attorney General determined, in the Attorney General’s discretion, that there were not reasonable grounds for regarding the alien as a danger to the security of the United States (subclause IV);<sup>105</sup> or
- the alien had used the 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 had determined undermined United States efforts to reduce or eliminate terrorist activities (subclause VI).<sup>106</sup>

***Changes to Asylum Eligibility for Inadmissible Aliens Made by the REAL ID Act.*** INA § 208(b)(2)(A)(v) makes ineligible for asylum any alien who “is inadmissible under subclause (I), (II), (III), (IV), or (VI) of [INA]

<sup>104</sup> Id. (amending the terror-related grounds for deportability to make them identical to the terror-related grounds for inadmissibility found in INA §§ 212(a)(B)(i), 212(a)(3)(F)), as amended).

<sup>105</sup> This exception exists because of the express language of INA § 208(b)(2)(v), which provides that an alien is ineligible for asylum if “the alien is inadmissible under subclause (I), (II), (III), (IV), or (VI) of [INA] § 212(a)(3)(B)(i)...unless, in the case only of an alien inadmissible under subclause (IV)...the Attorney General determines, in the Attorney General’s discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.”

<sup>106</sup> INA § 208(b)(2)(A)(v); 8 U.S.C. § 1158(b)(2)(A)(v) (2004).

§ 212(a)(3)(B)(i)” (terror-related grounds for alien inadmissibility). As discussed previously, § 103(a) of the REAL ID Act significantly modifies INA § 212(a)(3)(B)(i) by *amending and rearranging* the terror-related grounds for inadmissibility found in INA § 212(a)(3)(B)(i). For example, whereas prior to the enactment of the REAL ID Act subclause (VI) of INA § 212(a)(3)(B)(i) made inadmissible (and also ineligible for asylum, as referenced by INA § 208(b)(2)(A)(v)) any alien who used his position of prominence to endorse or espouse terrorist activity, pursuant to the amendments made by the REAL ID Act, subclause (VI) now describes the inadmissibility ground for aliens who are members of non-designated terrorist organizations (espousal of terrorist activity is still a ground for inadmissibility, but is now found in subclause (VII) of INA § 212(a)(3)(B)(i)). By rearranging and amending the INA provisions relating to the terror-related grounds for inadmissibility, the REAL ID Act affects the scope of the terror-related grounds for asylum ineligibility that refer to those amended provisions.

Following the enactment of the REAL ID Act, asylum eligibility continues to be denied only to those aliens who are *inadmissible* under subclause (I), (II), (III), (IV), or (VI) of INA § 212(a)(3)(B). Pursuant to the amendments made by the REAL ID Act to the terror-related grounds for inadmissibility, which amend and rearrange the terror-related grounds for inadmissibility described in INA § 212(a)(3)(B), an *inadmissible* alien may now be denied asylum on terror-related grounds if:

- the alien has engaged in a terrorist activity (subclause I, as amended);
- a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, that the alien is engaged in or is likely to engage after entry in any terrorist activity (subclause II, as amended);
- the alien has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity (subclause III, as amended);
- the alien is a representative of a terrorist organization, or a political, social or other similar group that endorses or espouses terrorist activity, unless the Attorney General determines, in the Attorney General’s discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States (subclause IV, as amended); or
- the alien is a member of non-designated terrorist organization, whether organized or not, which engages in, or has a subgroup which engages in a terrorist activity, *unless* the alien can demonstrate *by clear and convincing* evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization (subclause VI, as amended).<sup>107</sup>

Because of the manner in which the REAL ID Act amends the INA provision concerning the terror-related grounds for inadmissibility, an inadmissible alien is no

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<sup>107</sup> See REAL ID Act § 103 (amending the terror-related grounds for inadmissibility and the INA’s definition of “terrorist organization” and “engage in terrorist activity”).

longer automatically ineligible for asylum if he has used a position of prominence to endorse or espouse terrorist activity (although, as discussed previously, a *deportable* alien is ineligible for asylum on such grounds).<sup>108</sup> On the other hand, membership in a non-designated terrorist organization automatically denies an alien eligibility for asylum relief, unless the alien can demonstrate *by clear and convincing* evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization.

**Withholding of Removal.** Apart from asylum is the separate remedy of withholding of removal. Like asylum, withholding of removal is premised upon a showing of prospective persecution of an alien if removed to a particular country.<sup>109</sup> In certain circumstances, aliens are ineligible for withholding of removal, including in cases where the Attorney General decides:

- that having been convicted by a final judgment of a particularly serious crime, an alien is a danger to the community of the United States;
- there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or
- that there are reasonable grounds to believe that the alien is a danger to the security of the United States.<sup>110</sup>

By statute, an alien who is described in INA § 237(a)(4)(B) (i.e., the terror-related grounds for removal) is reasonably regarded as a danger to the security of the United States, and is therefore ineligible for withholding of removal.<sup>111</sup>

***Restrictions on Withholding of Removal Eligibility for Aliens Deportable on Terror-Related Grounds Prior to the Enactment of the REAL ID Act.*** An alien lawfully admitted into the United States was ineligible for withholding of removal on terror-related grounds only if he was deportable under INA § 237(a)(4)(B), which prior to the enactment of the REAL ID Act made an alien deportable if he was “engaged in terrorist activity,” as defined under INA § 212(a)(3)(B)(iv).

***The REAL ID Act’s Effects upon Withholding of Removal Eligibility for Aliens Deportable on Terror-Related Grounds.*** The REAL ID Act amends INA § 237(a)(4)(B) to make an alien deportable on the same terror-related grounds that make an alien inadmissible. Because the REAL ID Act does not modify the previous wording of the INA’s withholding of removal eligibility requirements, an alien who is removable pursuant to any of the expanded, terror-related grounds for deportability is now also ineligible for withholding of removal.

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<sup>108</sup> Compare INA § 212(a)(3)(B)(i)(VI) (2004) with REAL ID Act § 103(a) (amending and rearranging the terror-related grounds for inadmissibility).

<sup>109</sup> See INA § 241(b)(3); 8 U.S.C. § 1231(b)(3) (2004). See also 8 C.F.R. § 208.16 (2004).

<sup>110</sup> INA § 241(b)(3)(B); 8 U.S.C. § 1231(b)(3)(B) (2004).

<sup>111</sup> *Id.*



***Restrictions on Withholding of Removal Eligibility for Aliens Inadmissible on Terror-Related Grounds Prior to the Enactment of the REAL ID Act.*** The INA does not specify that aliens who are inadmissible on terror-related grounds are automatically ineligible for withholding of removal, though they might nevertheless fulfill the criteria for relief ineligibility. For example, an alien who is *deportable* on the grounds that he has engaged in terrorist activity is ineligible for withholding of removal on account of the danger he likely poses to the United States.<sup>112</sup> An alien who is *inadmissible* on account of engaging in terrorist activity is ineligible for withholding of removal for the same reason.

***The REAL ID Act's Effects upon Withholding of Removal Eligibility for Aliens Inadmissible on Terror-Related Grounds.*** The REAL ID Act appears to make aliens who are inadmissible on terror-related grounds ineligible for withholding of removal. INA § 241(b)(3) provides that an alien who is *described* by INA § 237(a)(3)(B) is ineligible for withholding of removal. The REAL ID Act amends § 237(a)(3)(B) to cover any alien who would be considered inadmissible on terror-related grounds.<sup>113</sup> Accordingly, it appears that pursuant to the REAL ID Act, an alien who is inadmissible on terror-related grounds is also ineligible for withholding of removal.

***Cancellation of Removal.*** The INA provides the Attorney General with the discretionary authority to cancel the removal of certain permanent and nonpermanent residents. However, aliens who are inadmissible or deportable on account of terror-related activity are ineligible for such relief.

***Restrictions on Cancellation of Removal Eligibility for Aliens Deportable on Terror-Related Grounds Prior to the Enactment of the REAL ID Act.*** An alien is ineligible for cancellation of removal if he is deportable under INA § 237(a)(4).<sup>114</sup> Prior to the enactment of the REAL ID Act, the only terror-related grounds under which an alien was expressly ineligible for cancellation of removal was if the alien either engaged in terrorist activity, as defined by INA § 212(a)(3)(B)(iv) or received military-type training from or on behalf of a designated terrorist organization.<sup>115</sup>

***The REAL ID Act's Effects upon Cancellation of Removal Eligibility for Aliens Deportable on Terror-Related Grounds.*** The REAL ID Act amends INA § 237(a)(4)(B) so that any alien who would be considered inadmissible on terror-related grounds (as amended by the REAL ID Act) is also deportable, significantly increasing the terror-related grounds that may disqualify a deportable alien from having his removal canceled.

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<sup>112</sup> *Id.*

<sup>113</sup> REAL ID Act § 104(a)(1).

<sup>114</sup> INA § 240A(c)(4); 8 U.S.C. § 1229b(c)(4) (2004).

<sup>115</sup> See INA § 237(a)(4); 8 U.S.C. § 1227(a)(4) (2004). A deportable alien involved in terror-related activity might nevertheless be ineligible for cancellation of removal on security or foreign policy grounds. See INA §§ 237(a)(4)(A), (C); 8 U.S.C. §§ 1227(a)(4)(A), (C) (2004).

***Restrictions on Cancellation of Removal Eligibility for Aliens Inadmissible on Terror-Related Grounds Prior to the Enactment of the REAL ID Act.*** An alien is ineligible for cancellation of removal if he is inadmissible under INA § 212(a)(3), which contains both security and terror-related grounds for inadmissibility.

***The REAL ID Act's Effects upon Cancellation of Removal Eligibility for Aliens Inadmissible on Terror-Related Grounds.*** As discussed previously, the REAL ID Act amends INA § 212(a)(3)(B)(i) to broaden the terror-related grounds for inadmissibility. Accordingly, the category of inadmissible aliens who are ineligible for cancellation of removal on terror-related grounds is expanded.

## V. Improved Security for Drivers' Licenses and Personal Identification Cards<sup>116</sup>

Prior to the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, standards with respect to drivers' licenses and personal identification cards were determined on a state-by-state basis with no national standards in place.<sup>117</sup> Even with the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, with the exception of what was specifically provided for by the legislation, a majority of the standards remained at the discretion of state and local governments.<sup>118</sup>

The REAL ID Act contains a number of provisions relating to improved security for drivers' licenses and personal identification cards, as well as instructions for states that do not comply with its provisions. The REAL ID Act also repeals certain overlapping and potentially conflicting provisions of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>119</sup>

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<sup>116</sup> Discussion of this topic was prepared by Todd B. Tatelman, Legislative Attorney.

<sup>117</sup> Congressional action prior to 9/11 on national standards in this direction proved highly controversial. For example, § 656 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208, Division C) provided federal standards for state drivers' licenses and birth certificates when used as identification-related documents for federal purposes. A state had two choices under this provision. It could require that each of its licenses include the licensee's Social Security number in machine-readable or visually-readable form. Or the state could more minimally require that each applicant submit the applicant's Social Security number and verify the legitimacy of that number with the Social Security Administration. However, this section became subject to widespread public criticism shortly after its enactment, with opponents most frequently alleging that it could be construed as a step toward a national identification card system. Congress blocked funds to implement regulations aimed at assisting the states to adopt the Social Security number requirements, and the underlying requirement itself was subsequently repealed in § 355 of the Department of Transportation and Related Agencies Appropriations Act 2000 (P.L. 106-69). Prior to 9/11, legislation aimed at discouraging national standards for identification documents had gained bipartisan support and was thought likely to pass.

<sup>118</sup> P.L. 108-458, §§ 7211-7214.

<sup>119</sup> As mentioned previously, a bill containing only the provisions of THE REAL ID ACT  
(continued...)

**Background.** The Intelligence Reform and Terrorism Prevention Act of 2004 delegated authority to the Secretary of Transportation, in consultation with the Secretary of Homeland Security, empowering them to issue regulations with respect to minimum standards for federal acceptance of drivers' licenses and personal identification cards.<sup>120</sup>

Pursuant to the Intelligence Reform and Terrorism Prevention Act, the Secretary was required to issue regulations within 18 months of enactment that required each driver's license or identification card, to be accepted for any official purpose by a federal agency, to include the individual's: (1) full legal name; (2) date of birth; (3) gender; (4) driver's license or identification card number; (5) digital photograph; (6) address; and (7) signature.<sup>121</sup> In addition, the cards were required to contain physical security features designed to prevent tampering, counterfeiting or duplication for fraudulent purposes; as well as a common machine-readable technology with defined minimum elements.<sup>122</sup> Moreover, states were required, pursuant to implementing regulations, to confiscate a driver's license or personal identification card if any of the above security components were compromised.<sup>123</sup>

The statute also required that the implementing regulations address how drivers' licenses and identification cards were issued by the states. Specifically, the regulations were required to include minimum standards for the documentation required by the applicant, the procedures utilized for verifying the documents used, and the standards for processing the applications.<sup>124</sup> The regulations were, however, prohibited from not only infringing upon the "State's power to set criteria concerning what categories of individuals are eligible to obtain a driver's license or personal

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<sup>119</sup> (...continued)

relating to drivers' licenses and personal identification cards, has also been introduced. *See* Driver's License Security and Modernization Act, H.R. 368, 109th Cong. (1st Sess. 2005).

<sup>120</sup> *See* P.L. 108-458, § 7212. Whether limiting the standards to federal acceptance - as opposed to direct federal prescriptions on the states - obviates federalism concerns under Supreme Court jurisprudence, remains to be seen. The Court has held that in exercising its power under the Commerce Clause, Congress may not "commandeer" the state regulatory processes by ordering states to enact or administer a federal regulatory program. *See New York v United States*, 505 U.S. 144 (1992). The Court has extended this principle by holding, in *Printz v. United States*, that Congress may not circumvent the prohibition on commandeering a state's regulatory processes "by conscripting the State's officers directly." *Printz v. United States*, 521 U.S. 898, 935 (1997). It may be possible to argue that, because the issuance of drivers' licenses remains a state regulatory function, the minimum issuance and verification requirements established in this bill, even if limited to federal agency acceptance, constitute an effective commandeering by Congress of the state regulatory process, or a conscription of the state and local officials who issue the licenses.

<sup>121</sup> P.L. 108-458, § 7212(b)(2)(D)(i)-(vii).

<sup>122</sup> *Id.* at § 7212(b)(2)(E)-(F).

<sup>123</sup> *Id.* at § 7212(b)(2)(G).

<sup>124</sup> *Id.* at § 7212(b)(2)(A)-(C).

identification card from that State,”<sup>125</sup> but also from requiring a state to take an action that “conflicts with or otherwise interferes with the full enforcement of state criteria concerning the categories of individuals that were eligible to obtain a driver’s license or personal identification card.”<sup>126</sup> In other words, it appeared that if a state granted a certain category of individuals (i.e., aliens, legal or illegal) permission to obtain a license, nothing in the implementing regulations were to infringe on that state’s decision or its ability to enforce that decision. In addition, the regulations were also not to require a single uniform design, and were required to include procedures designed to protect the privacy rights of individual applicants.<sup>127</sup>

Finally, the law required the use of negotiated rulemaking pursuant to the Administrative Procedure Act.<sup>128</sup> This process was designed to bring together agency representatives and concerned interest groups to negotiate the text of a proposed rule. The rulemaking committee was required to include representatives from: (1) state and local offices that issue drivers’ licenses and/or personal identification cards; (2) state elected officials; (3) Department of Homeland Security; and (4) interested parties.<sup>129</sup>

**Changes Made by the REAL ID Act.** In general, while the REAL ID Act does not directly impose federal standards with respect to states’ issuance of drivers’ licenses and personal identification cards, states nevertheless appear to need to adopt such standards and modify any conflicting laws or regulations in order for such documents to be recognized by federal agencies for official purposes.

As enacted version of the REAL ID Act contains a definition of the phrase “official purpose.” For purposes of the act, an “official purpose” is defined as including, but not limited to, “accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of Homeland Security] shall determine.” In addition, the REAL ID Act contains a provision that specifically repeals the recently enacted § 7212 of the Intelligence Reform and Terrorism Prevention Act of 2004, which contained the preexisting law with respect to national standards for drivers’ licenses and personal identification cards.

**Minimum Issuance Standards.** Section 202(c) of the REAL ID Act establishes minimum issuance standards for federal recognition requiring that before a state can issue a driver’s license or photo identification card, a state will have to verify with the issuing agency, the issuance, validity and completeness of: (1) a photo identification document or a non-photo document containing both the individual’s full legal name and date of birth; (2) date of birth; (3) proof of a social security number (SSN) or verification of the individual’s ineligibility for a SSN; and (4) name

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<sup>125</sup> Id. at § 7212(b)(3)(B).

<sup>126</sup> Id. at § 7212(b)(3)(C).

<sup>127</sup> P.L. 108-458, § 7212(b)(3)(D)-(E).

<sup>128</sup> See Negotiated Rulemaking Act of 1990, P.L. 101-648, 104 Stat. 4970 (1990) (codified as amended at 5 U.S.C. §§ 581 *et seq.*).

<sup>129</sup> See P.L. 108-458, § 7212(b)(4)(A)-(B).

and address of the individual's principal residence. To the extent that information verification requirements previously existed, they were a function of state law and varied from state to state. This REAL ID Act provision appears to preempt any state verification standards and replace them with the new federal standards as established by this statutory language.

**Evidence of Legal Status.** Section 202(c)(2)(B) of the REAL ID Act appears to require states to verify an applicant's legal status in the United States before issuing a driver's license or personal identification card. Previously, the categories of persons eligible for drivers' licenses were determined on a state-by-state basis. As indicated above, the Intelligence Reform and Terrorist Prevention Act of 2004 specifically prevented the Secretary of Transportation from enacting regulations that would interfere with this authority. This section of the REAL ID Act appears to preempt any state law requirements and appears to require the states to verify the legal status of the applicant.<sup>130</sup>

**Temporary Drivers' Licenses and Identification Cards.** Section 202(c)(2)(C) of the REAL ID Act establishes a system of temporary licenses and identification cards that can be issued by the states to applicants who can present evidence that they fall into one of six categories.<sup>131</sup> Under the REAL ID Act, a state may only issue a temporary driver's license or identification card with an expiration date equal to the period of time of the applicant's authorized stay in the United States. If there is an indefinite end to the period of authorized stay, the card's expiration date is one year. The temporary card must clearly indicate that it is temporary and state its expiration date. Renewals of the temporary cards are to be done only upon presentation of valid documentary evidence that the status had been extended by the Secretary of Homeland Security. If such provisions existed prior to the enactment of the REAL ID Act, they existed as a function of state law and are preempted by the act.

**Other Requirements.** Pursuant to § 202(d) of the REAL ID Act, states are required to adopt procedures and practices to: (1) employ technology to capture digital images of identity source documents; (2) retain paper copies of source documents for a minimum of seven years or images of source documents presented for a minimum of ten years; (3) subject each applicant to a mandatory facial image capture; (4) establish an effective procedure to confirm or verify a renewing applicant's information; (5) confirm with the Social Security Administration a SSN

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<sup>130</sup> For more information relating to current state laws regarding the issuance of drivers' licenses to aliens see CRS Report RL32127, *Summary of State Laws on the Issuance of Driver's Licenses to Undocumented Aliens*, by Allison M. Smith.

<sup>131</sup> According to the REAL ID Act, persons are only be eligible for temporary drivers' licenses or identification cards if evidence is presented that they: (1) have a valid, unexpired non-immigrant visa or non-immigrant visa status for entry into the United States; (2) have a pending or approved application for asylum in the United States; (3) have entered into the United States in refugee status; (4) have a pending or approved application for temporary protected status in the United States; (5) have approved deferred action status; or (6) have a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

presented by a person using the full Social Security account number;<sup>132</sup> (6) refuse issuance of a driver's license or identification card to a person holding a driver's license issued by another state without confirmation that the person is terminating or has terminated the driver's license; (7) ensure the physical security of locations where cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced; (8) subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements; (9) establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards; (10) would limit the length of time a drivers' license or personal identification card is valid to eight years.

In addition to these requirements, the REAL ID Act contains language requiring that states, if they elect to issue a drivers' license or personal identification card that does not conform to the requirements of this act, be required to use a unique color identifier or design to alert officials that the document is not to be accepted for any official purpose. Moreover, the states are required to clearly state on the face of the document that it is not to be accepted for federal identification or for any official purpose. Further, the enacted version of the REAL ID Act includes a provision requiring the states to maintain a motor vehicle database that, at a minimum, contains all data fields printed on the drivers' license or identification card and all motor vehicle driver histories, including violations, suspensions or "points." Finally, the act requires the states to provide electronic access to their databases to all other states. To the extent that any of these requirements previously existed, they did so as a function of state law. Thus, it appears that the state laws are preempted in favor of the new federal standards.

**Trafficking in Authentication Features for Use in False Identification Documents.** Section 203 of the REAL ID Act amends 18 U.S.C. § 1028(a)(8), which makes it a federal crime to either actually, or with the intent to, transport, transfer, or otherwise dispose of to another, materials or features<sup>133</sup> used on a document of the type intended or commonly used for identification purposes. By replacing the phrase "false identification features" with "false or actual authentication features," this provision appears to broaden the scope of the criminal provision, making it a crime to traffic in identification features regardless of whether the feature is false. In addition, section 203 requires that the Secretary of Homeland Security enter into the appropriate aviation-screening database the personal information of anyone convicted of using a false drivers' license at an airport.

**Additional Provisions.** Section 204 of the REAL ID Act authorizes the Secretary of Homeland Security to make grants to the states, for the purpose of assisting them in conforming to the new national standards. The section also

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<sup>132</sup> In the event that a SSN is already registered to or associated with another person to whom any state has issued a driver's license or identification card, the state is required to resolve the discrepancy and take appropriate action.

<sup>133</sup> These include, but are not limited to, holograms, watermarks, symbols, codes, images, or sequences. See 18 U.S.C. § 1028(d)(1) (2004).

contains the necessary language authorizing the appropriation of federal funds for the grant program.

Section 205 provides the Secretary of Homeland Security with the statutory authority to promulgate regulations, set standards, and issue grants. The Secretary is required by the statute to consult with both the Secretary of Transportation as well as with the states when acting pursuant to this authority. Moreover, the Secretary is authorized to extend the three-year deadline contained in section 202(a)(1) for any state on the condition that the state provide an adequate justification for their non-compliance.

## **VI. Improving Border Infrastructure and Technology Integration<sup>134</sup>**

Title III of the REAL ID Act is directed at improving border infrastructure and technology integration between state and federal agencies.<sup>135</sup> It requires DHS to conduct a study on U.S. border security vulnerabilities, establish a pilot program to test ground surveillance technologies on the northern and southern borders to enhance U.S. border security, and implement a plan to improve communications systems and information-sharing between federal, state, local, and tribal agencies on matters relating to border security. DHS is also required to submit reports to Congress regarding its implementation of these requirements.

### **Vulnerability and Threat Assessment Relating to Border Infrastructure Weaknesses**

Section 301 of the REAL ID Act requires the Under Secretary of Homeland Security for Border and Transportation Security, in consultation with the Under Secretary of Homeland Security for Science and Technology and the Under Secretary of Homeland Security for Information Analysis and Infrastructure Protection, to study the technology, equipment, and personnel needed by field offices of the Bureau of Customs and Border Protection to address security vulnerabilities within the United States, and conduct a follow-up study at least once every five years thereafter. The Under Secretary of Homeland Security for Border and Transportation Security is required to submit a report to Congress of findings and conclusions from each study, along with legislative recommendations for addressing security vulnerabilities. Section 301(c) authorizes necessary appropriations for fiscal years 2006 through 2011 to carry out recommendations from the first study.

### **Establishment of a Ground Surveillance Pilot Program**

The U.S. borders with Mexico and Canada are monitored in a variety of ways, including through the use of border patrol agents, video cameras, ground sensors, and

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<sup>134</sup> Discussion of this topic was prepared by Michael John Garcia, Legislative Attorney.

<sup>135</sup> Title III was added to the REAL ID Act pursuant to an amendment offered by Rep. James Kolbe.

aircraft.<sup>136</sup> Pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004, a pilot program was established to test various advanced technologies — including sensors, video, and unmanned aerial vehicles — to improve surveillance along U.S.-Canadian border.<sup>137</sup> Section 302 of the REAL ID Act requires the Department of Homeland Security to establish a pilot program to identify and test ground surveillance technologies to enhance border security. The program covers both northern and southern border locations. The REAL ID Act also requires DHS to submit a report to designated House and Senate committees within a year of program implementation describing the program and recommending whether it should terminate, be made permanent, or be enhanced.

## **Enhancement of Border Communications Integration and Information Sharing**

Section 303 of the REAL ID Act requires the Secretary of Homeland Security, in consultation with various federal, state, local, and tribal agencies, to develop and implement a plan to improve interagency communication systems and enhance information-sharing on matters related to border security on the federal, state, local, and tribal level. DHS is required to submit a report to designated House and Senate committees within a year of plan implementation that includes any recommendations that the Secretary of Homeland Security found appropriate.

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<sup>136</sup> For additional background on border surveillance, see CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Blas Nunez-Neto; and CRS Report RS21698, *Homeland Security: Unmanned Aerial Vehicles and Border Surveillance*, by Christopher Bolkcom.

<sup>137</sup> P.L. 108-458, §§ 5101-5105.