



# Visa Waiver Program

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## Summary

Since the events of September 11, 2001, concerns have been raised about the ability of terrorists to enter the United States under the visa waiver program (VWP), because the VWP bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. Nonetheless, the inclusion of countries in the VWP may help foster positive relations between the United States and those countries, promote tourism and commerce, and eases consular office workloads abroad. The VWP allows nationals from certain countries to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States.

In FY2007, 16 million visitors entered the United States under this program, constituting 49% of all overseas visitors. To qualify for the VWP, statute specifies that a country must: offer reciprocal privileges to U.S. citizens; have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%; issue their nationals machine-readable passports that incorporate *biometric identifiers*; certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if an emergency occurs that threatens the United States' security interests.

P.L. 110-53 added new requirements to participate in the VWP, and provided the Secretary of the Department of Homeland Security (DHS) the authority to waive the nonimmigrant refusal rate requirement. Certain statutory conditions had to be met before the waiver to become available in October 2008.

All aliens entering under the VWP must present machine-readable passports. In addition, passports issued between October 26, 2005, and October 25, 2006, must have a digitized photo on the data page, while passports issued after October 25, 2006, must contain electronic data chips (e-passports). Under DHS regulations, travelers who seek to enter the United States through the VWP are subject to the biometric requirements of the US-VISIT program. In addition, aliens entering under the VWP must get an approval from the Electronic System for Travel Authorization (ESTA), a web-based system that checks the alien's information against relevant law enforcement and security databases, before they can board a plane to the United States. ESTA became operational for all VWP countries on January 12, 2009. There are concerns that implementation of the ESTA system will be a burden for travelers, or may increase the wait-times for visas at U.S. Embassies and Consulates since those who are not approved under ESTA must get a visa. Nonetheless, ESTA does provide added security to the VWP.

In 2008, eight new countries were added to the VWP, most of the new countries needed the nonimmigrant refusal rate waiver. There are other countries (e.g., Poland, Israel, Taiwan) that have expressed interest in being a part of the VWP. The nonimmigrant refusal rate waiver authority will expire on June 30, 2009, if DHS does not implement an air-exit system that incorporates biometric identifiers. It is unlikely that a biometric exit system will be implemented by that time. This report will be updated if legislative action occurs.

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## Current Policy

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

Temporary foreign visitors for business or pleasure from most countries must obtain a visa from Department of State (DOS) offices at a consular post abroad before coming to the United States.<sup>4</sup> Personal interviews are generally required, and consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may make the alien ineligible for a visa under the so-called “grounds for inadmissibility” of the INA, which include criminal, terrorist, and public health grounds for exclusion. Consular officers are required to check the background of all aliens in the “lookout” databases, including the Consular Lookout and Support System (CLASS) and TIPOFF databases.<sup>5</sup>

Although the VWP greatly eases the documentary requirements for nationals from participating countries, it has important restrictions. Aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status. Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.<sup>6</sup> Additionally, with some limited exceptions, aliens entering through VWP are not permitted to adjust status. An alien entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).

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<sup>1</sup> The Secretary of Homeland Security administers the VWP program. Section 402 of the Homeland Security Act of 2002 (HSA; P.L. 107-296), signed into law on November 25, 2002, states: “The Secretary [of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States.” Prior to March 1, 2003, the Attorney General in consultation with the Secretary of State was responsible for designating the VWP countries.

<sup>2</sup> “B” visa refers to the subparagraph in the Immigration and Nationalization Act (INA § 101(a)(15)(B)).

<sup>3</sup> ESTA became operational for all VWP countries on January 12, 2009.

<sup>4</sup> To obtain a nonimmigrant visa, individuals submit written applications and undergo interviews and background checks. For more information on temporary admissions, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

<sup>5</sup> For more information on visa issuances, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

<sup>6</sup> This provision was amended by P.L. 106-406 to provide extended voluntary departure to nonimmigrants who enter under the VWP and require medical treatment.

## VWP Qualifying Criteria

Currently, to qualify for the VWP a country must:

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%;
- issue machine-readable passports (and all aliens entering under the VWP must possess a machine-readable passport);
- certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier (deadline October 26, 2005);<sup>7</sup>
- be determined, by the Secretary of Homeland Security, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program; and
- certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry (deadline October 26, 2006).
- enter into an agreement with the United States to report or make available through INTERPOL<sup>8</sup> information about the theft or loss of passports (previously, VWP countries only had to certify that they were reporting thefts of blank passports);
- accept the repatriation of any citizen, former citizen, or national against whom a final order of removal is issued no later than three weeks after the order is issued; and
- enter into an agreement with the United States to share information regarding whether a national of that country traveling to the United States represents a threat to U.S. security or welfare.

Countries can be immediately terminated from the VWP if an emergency occurs in the country that the Secretary of Homeland Security in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.<sup>9</sup> For example, because of Argentina's economic collapse in December 2001,<sup>10</sup> and the increase in the number of Argentine

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<sup>7</sup> All passports issued after October 26, 2005 presented by aliens entering under the VWP have to be machine-readable and contain a biometric identifier.

<sup>8</sup> INTERPOL is the world's largest international police organization, with 187 member countries. For more information on INTERPOL see, [<http://www.interpol.int/public/icpo/default.asp>], visited Jan. 28, 2009.

<sup>9</sup> An emergency is defined as (1) the overthrow of a democratically elected government; (2) war; (3) a severe breakdown in law and order in the country; (4) a severe economic collapse; and (5) any other extraordinary event in the program country where that country's participation could threaten the law enforcement or security interests of the United States. INA § 217(c)(5)(B).

<sup>10</sup> Beginning in December 2001, Argentina experienced a serious economic crisis, including defaulting on loans by foreign creditors, devaluation of its currency, and increased levels of unemployment and poverty. For more information on the financial collapse in Argentina see CRS Report RS21072, *The Financial Crisis in Argentina*, by J. F. Hornbeck.

nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission,<sup>11</sup> that country was removed from the VWP in February 2002.<sup>12</sup> Similarly, on April 15, 2003, Uruguay was terminated from the VWP because Uruguay's participation in the VWP was determined to be inconsistent with the U.S. interest in enforcing the immigration laws.<sup>13</sup>

Additionally, there is probationary status for VWP countries that do not maintain a low visa refusal rate. Countries on probation are determined by a formula based on a disqualification rate of 2%-3.5%.<sup>14</sup> Probationary countries with a disqualification rate less than 2% over a period not to exceed three years may remain VWP countries.<sup>15</sup> Countries may also be placed on probation if more time is necessary to determine whether the continued participation of the country in the VWP is in the security interest of the United States. For example, in April 2003, Belgium was placed on provisional status because of concerns about the integrity of nonmachine-readable Belgian passports and the reporting of lost or stolen passports.<sup>16</sup> DHS completed another country review of Belgium in 2005, and removed the country from probationary status.

## Nonimmigrant Refusal Rate Waiver

Section 711 of the Implementing the 9/11 Commission Recommendations Act of 2007<sup>17</sup> (P.L. 110-53) allows the Secretary of DHS, in consultation with the Secretary of DOS, to waive the nonimmigrant refusal rate requirement for admission to the VWP after the Secretary of DHS certifies to Congress that:

- an air exit system is in place that can verify the departure of not less than 97% of foreign nationals that exit through U.S. airports,<sup>18</sup> and

<sup>11</sup> In addition, many Argentine nationals were trying to use the VWP to obtain entry to the United States solely for the purpose of proceeding to the Canadian border and pursuing an asylum claim in Canada. According to Citizenship and Immigration Canada, between 1999 and 2001, more than 2,500 Argentines filed refugee claims in Canada after transiting the United States under the VWP. *Federal Register*, February 21, 2002, vol. 67, no. 35, p. 7944.

<sup>12</sup> While the number of Argentine nonimmigrant travelers to the United States declined between 1998 and 2000, the number of Argentines denied admission at the border and the number of interior apprehensions increased. The Department of Justice in consultation with DOS determined that Argentina's participation in the VWP was inconsistent with the United States' interest in enforcing its immigration laws. The Department of Homeland Security did not exist in February 2002, and authority for the VWP resided with the Attorney General in the Department of Justice. *Federal Register*, February 21, 2002, vol. 67, no. 35, pp. 7943-7945.

<sup>13</sup> Between 2000 and 2003 Uruguay experienced a recession causing its citizens to enter under the VWP to live and work illegally in the United States. In 2002, Uruguayan nationals were two to three times more likely than all nonimmigrants on average to have been denied admission at the border. Uruguayan air arrivals had an apparent overstay rate more than twice the rate of the average apparent overstay rate for all air arrival nonimmigrants. *Federal Register*, March 7, 2003, vol. 68, no. 45, pp. 10954-10957.

<sup>14</sup> "Disqualification rate" is defined as the percentage of nationals from a country who applied for admission as a nonimmigrant who either violated the terms of the nonimmigrant visa, who were excluded from admission or who withdrew their application for admission as a nonimmigrant.

<sup>15</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

<sup>16</sup> *Federal Register*, March 7, 2003, vol. 68, no. 45, pp. 10954-10957.

<sup>17</sup> P.L. 110-53 (H.R. 1), signed into law on August 3, 2007. For more details on the changes to the VWP in this Act, see Appendix A "Legislative History."

<sup>18</sup> There was some disagreement between certain critics and DHS regarding exactly what needed to be verified. Some contend that Congressional intent was to have a functional entry-exit system that would be able to match arrival and departure records and know which aliens failed to depart from the United States. For example, see S. 203 which (continued...)

- the electronic travel authorization system (ESTA discussed below) is operational.<sup>19</sup>

The waiver became available in October 2008.

Currently, the air exit system does not need to incorporate biometric identifiers; however, after June 30, 2009, if the air exit system is unable to match an alien's biometric information with relevant watch lists and manifest information, the Secretary of DHS's authority to waive the nonimmigrant refusal rate will be suspended until the air exit system has the specified biometric capacity. DHS is unlikely to meet this deadline.<sup>20</sup>

To participate in the program a country who receives a refusal rate waiver also has to:

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

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

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(...continued)

attempts to clarify the language in this provision. U.S. Congress, Senate Committee on Judiciary, Subcommittee on Terrorism, Technology and Homeland Security, *The Visa Waiver Program: Mitigating Risks to Ensure Safety to All Americans*, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., September 24, 2008.

<sup>19</sup> DHS determined that the law permitted it to utilize the waiver when ESTA was functional but before it was mandatory for all VWP travelers. Critics did not agree with this interpretation and thought that ESTA should have been mandatory for all VWP travelers before new countries were admitted to the program. When the new countries entered the program, their citizens were required to use ESTA before travelling to the United States. U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-967, September 2008. (Hereafter GAO, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*.)

<sup>20</sup> GAO, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*.

## Electronic Travel Authorization System (ESTA)

As previously mentioned, P.L. 110-53 mandated that the Secretary of DHS, in consultation with the Secretary of DOS, develop and implement an electronic travel authorization system (ESTA), through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP.<sup>21</sup> ESTA became fully operational for all VWP visitors traveling to the United States by airplane or cruise ship on January 12, 2009.<sup>22</sup> In advance of departing for the United States by airplane or cruise ship,<sup>23</sup> aliens traveling under the VWP are required to use ESTA to electronically provide biographical information to make the eligibility determinations.<sup>24</sup> Through the Treasury Enforcement Communications System (TECS), ESTA applications are queried against law enforcement databases, including the greater set of watch lists integrated and consolidated in the Terrorist Screening Database, and against databases on lost and stolen passports (including Interpol's Stolen and Lost Travel Documents database), and visa revocations.<sup>25</sup>

ESTA alerts the alien that he or she has been approved to travel, and if not approved that the alien needs to obtain a visa prior to coming to the United States.<sup>26</sup> The information required by ESTA is the same that is currently required on the I-94W form, which aliens arriving in the United States under the VWP are required to complete to be admitted.<sup>27</sup> ESTA also screens applicant responses

<sup>21</sup> Under law, ESTA became operational 60 days after the Secretary of DHS published a notice in the *Federal Register*. The interim final rule was published on June 9, 2008. Department of Homeland Security, "Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program," *Federal Register*, June 9, 2008, vol. 73, no. 11, pp. 32440-32453.

<sup>22</sup> Entrants under the VWP from the newly admitted VWP countries (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, and South Korea) had to use the system starting on the date of their formal admission to the program. For all the countries except Malta, that date was November 17, 2008. Malta was formally admitted to the VWP on December 30, 2008. Department of Homeland Security, "Electronic System for Travel Authorization (ESTA) Advisory Statement," Nov. 6, 2008. Department of Homeland Security, "Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program," *73 Federal Register* 67354, Nov. 13, 2008.

<sup>23</sup> Absent of ESTA, the first time an alien traveling to the United States under the VWP was screened was at the airport after the alien checks in for the flight.

<sup>24</sup> A person is not required to apply for their own travel authorization under ESTA. Friends, relatives, personnel in the travel industry, and other third parties may apply for the traveler.

<sup>25</sup> Personal Conversation with Department of Homeland Security, Office of Congressional Affairs, Nov. 7, 2008.

<sup>26</sup> In most cases, the approval process is almost instantaneous. Under statute, ESTA determinations are not reviewable by the courts.

<sup>27</sup> The following information is required for ESTA and on the I-94W form:

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

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

to the same VWP eligibility questions that are currently collected on the Form I-94W.<sup>28</sup> Eventually, ESTA will replace the I-94W form.<sup>29</sup>

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

## Arrival and Departure Inspections

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

Since October 1, 2002, passenger arrival and departure information on individuals entering and leaving the U.S. under the VWP has been electronically collected from airlines and cruise lines, through DHS's Bureau of Customs and Border Protection's (CBP) Advanced Passenger Information System (APIS) system. If the carrier fails to submit the information, an alien may not enter under the VWP. APIS sends the data to the DHS's Bureau of Immigration and Customs Enforcement's (ICE) Arrival and Departure Information System (ADIS)<sup>30</sup> for matching arrivals and departures and reporting purposes. APIS collects carrier information such as flight number, airport of departure and other data.

At port of entry, immigration inspectors observe and question applicants, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States.<sup>31</sup> DHS's CBP inspects aliens who seek to enter the United States. Primary inspection consists of a brief interview with an immigration inspector, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS),<sup>32</sup> and entry of the traveler into the US-VISIT system. The US-VISIT system uses biometric identification (finger scans) to check identity and track presence in the United States.<sup>33</sup> Currently,

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<sup>28</sup> These eligibility questions pertain to whether the alien would be inadmissible on health, criminal, or terrorist grounds, or because the alien had previously violated immigration law (e.g., been deported). Other eligibility questions include whether the alien has: (1) violated a child custody agreement with a U.S. citizen; (2) previously been denied a visa to travel to the United States; and (3) asserted immunity from prosecution.

<sup>29</sup> Department of Homeland Security, "Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program," *Federal Register*, June 9, 2008, vol. 73, no. 11, pp. 32440-32453.

<sup>30</sup> ADIS feeds information to the Interagency Border Inspection System (IBIS).

<sup>31</sup> Although aliens who enter under the VWP do not need a visa, all visa waiver program applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

<sup>32</sup> IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAIIS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement.

<sup>33</sup> For more information on US-VISIT see, CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Vina.

inspectors at the border collect the following information on aliens entering under the VWP: name, date of birth, nationality, gender, passport number, country of issuance, a digital photograph, and prints for both index fingers. Primary inspections are quick (usually lasting no longer than a minute); however, if the inspector is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.<sup>34</sup>

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

In April 2008, DHS published a Notice of Proposed Rulemaking in the *Federal Register* that would create biometric exit procedures at airports and seaports for international visitors.<sup>35</sup> DHS expected to publish the final rule for this system by October 15, 2008.<sup>36</sup> However, in legislation that became law on September 30, 2008,<sup>37</sup> Congress required DHS to complete and report on at least two pilots testing biometric exit procedures at airports.<sup>38</sup> DHS is conducting the pilot programs, and the exit system cannot be finalized until the pilots are completed.<sup>39</sup>

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<sup>34</sup> Lookout databases such as TIPOFF, which is integrated with CLASS, contain information on aliens who are inadmissible for entry into the United States. NSEERS and SEVIS are also used during secondary inspections. Immigration inspectors may access NAILS II, which is a text-based system that interfaces with IBIS and CLASS. For more information, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

<sup>35</sup> Department of Homeland Security, "Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure," *73 Federal Register* 22065, April 24, 2008.

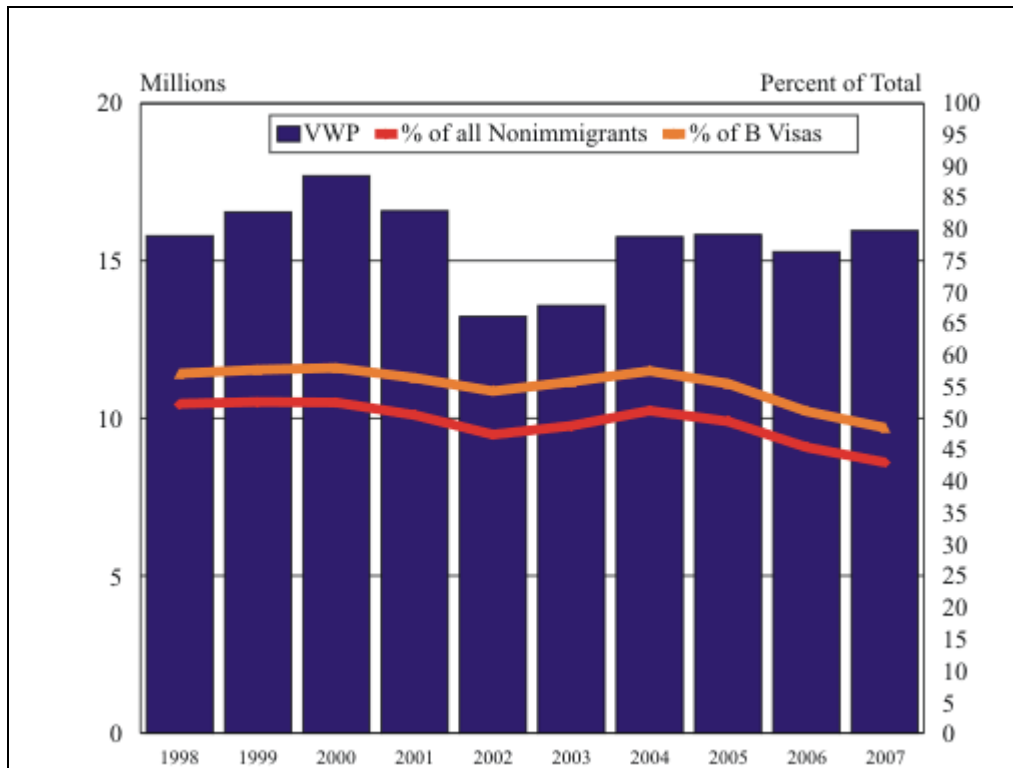
<sup>36</sup> Personal conversation with Department of Homeland Security Congressional Affairs, September 22, 2008.

<sup>37</sup> P.L. 110-329

<sup>38</sup> One pilot will test DHS's recommended solution that carriers collect biometrics from passengers; the other pilot will test CBP officers collecting passenger biometrics at the boarding gate.

<sup>39</sup> E-mail from Edward Lovett, Congressional Relations, Department of Homeland Security, January 23, 2009.

**Figure I. Number of Entrants under the VWP for FY1998-FY2007, Percentage of All Nonimmigrant Entrants Who Are VWP Entrants, and Percentage of All B Visa Entrants Who Are VWP Entrants**



**Source:** Department of Homeland Security, *FY2006: Yearbook of Immigration Statistics*. Data are not available for FY1997. Department of Homeland Security, *Nonimmigrant Admissions to the United States: 2007*, August 2008.

**Note:** Number of countries participating in the VWP at the end of the fiscal year: FY1998, 26; FY1999-FY2001, 29; FY2002, 28; and FY2003-FY2007, 27.

## Trends in Use of the VWP

The number of people entering under the VWP grew steadily as countries were added to the program, and reached a peak of 17.7 million in FY2000. In FY2007, 16 million people entered under the VWP. The number of visitors entering under the VWP declined by 3.4 million or 20% between FY2001 and FY2002. The number of all nonimmigrants entering the United States declined by 4.9 million or 14.9% during the same period, but the number of nonimmigrants who were not from VWP countries declined by 1.6 million (9.6%). Similarly, the number of foreign nationals entering the United States with B visas between FY2001 and FY2002 declined by 13.4% or 1.7 million, which is a smaller decline than the decline in the percent of visitors entering under the VWP.

Between FY2002 and FY2005, the number of people entering under the VWP increased 16.4%, from 13.2 to 15.8 million. The number of people entering under the VWP declined slightly between FY2005 and FY2006, from 15.8 million to 15.3 million, and then increased to 16 million in FY2007. The number of people entering as nonimmigrants decreased slightly between FY2002 and FY2003, from 27.9 to 27.8 million, and then increased from 27.8 to 37.1 million (33.5%) between FY2003 and FY2007. The number of aliens entering as temporary visitors for business

or pleasure increased 35.4% from 24.3 to 32.9 million between FY2002 and FY2007. In FY2007, visitors entering under the VWP constituted 43% of all nonimmigrant admissions, and 48.5% of all temporary visitors.<sup>40</sup>

During the most recent years, the majority of the growth in nonimmigrant and temporary visitor admittances came from aliens from countries not in the VWP. Between FY2002 and FY2004, the percent increase of the number of aliens entering under the VWP was *larger* than the increase in both the number of nonimmigrant and temporary visitor entrants. However, between FY2004 and FY2007, the increase in the number of aliens entering under the VWP was *smaller* than the increase in both the number of nonimmigrant and temporary visitor entrants. Moreover, in FY2007 the proportions of nonimmigrant and temporary visitor admissions from VWP countries were the smallest in more than 10 years, when there were fewer countries in the program. Additionally, for the first time since 1995, when there were 23 VWP countries, visitors from VWP countries constitute less than 50% of all temporary visitors to the United States.

## Policy Issues

The VWP is supported by the U.S. travel and tourism industry, the business community, and DOS. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the United States.<sup>41</sup> DOS argues that by waiving the visa requirement for high-volume/low-risk countries, consular workloads are significantly reduced, allowing for streamlined operations, cost savings, and concentration of resources on greater-risk nations in the visa process. Additionally, some contend that currently DOS does not have the resources to resume issuing visas to all the visitors from VWP countries.<sup>42</sup>

Nonetheless, while the program has significantly reduced the consular workload and facilitated travel to the United States, it has increased the workload of immigration inspectors at ports of entry by shifting background checks to ports of entry. Furthermore, others contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security. Immigration inspectors have stated that terrorists and criminals believed they would receive less scrutiny during the immigration inspection process if they applied for admission into the United States under the VWP.<sup>43</sup> Another concern has been the lack of information on aliens from VWP countries who overstay the terms of their admittance.

<sup>40</sup> Temporary visitors include aliens who entered with B visas and those who entered under the VWP.

<sup>41</sup> The example of Argentina was frequently used to illustrate this relationship; during the first year Argentina was in the VWP, tourism from that country to the United States grew by 11.5%. Some argue that because of the trade and tourism growth additional VWP membership could generate for the United States, that this factor should be added to the criteria used to select participating countries. Other proponents of the VWP, however, contend that the criteria should not be broadened to include tourism potential if the thresholds of refusal rates and visa overstay violations are weakened, arguing that these provisions are essential to safeguard and control our borders.

<sup>42</sup> In his testimony before the House Immigration and Claims Subcommittee on February 28, 2002, William S. Norman, President and Chief Executive Officer of the Travel Industry Association of America, stated that it would take hundreds of new consular staff and tens of millions of dollars to issue visas to visitors currently entering under the VWP.

<sup>43</sup> U.S. Department of Justice, Office of Inspector General Report I-2002-002, *Follow-Up Report on the Visa Waiver Program*, December 2001. (Hereafter cited as DOJ, *Follow-Up Report*.)

On September 6, 2006, the Senate Judiciary Committee’s Terrorism, Technology, and Homeland Security Subcommittee held a hearing entitled “Keeping Terrorists Off The Plane: Strategies For Pre-Screening International Passengers Before Takeoff.” During that hearing, testimony by Jess T. Ford of the Government Accountability Office (GAO) noted that the VWP has many benefits as well as some inherent risks. Of particular concern are the stolen passports from VWP countries especially since they are prized travel documents among those attempting to illegally enter the United States; and problems with the two-year reviews of participating VWP countries.<sup>44</sup>

## Adding Countries to the VWP

Although some view the VWP as a security risk since travelers under the program do not undergo the screening required to receive a visa, others contend that the inclusion of countries in the VWP actually increases U.S. security. They argue that the VWP enhances security by setting standards for travel documents and information sharing, and that the program promotes economic growth and cultural ties. In addition, membership in the VWP could be used as an incentive to get other countries to share information with the United States.<sup>45</sup>

Although DHS admitted eight new countries into the program in 2008, there are other countries that have expressed a desire to be included in the VWP. These countries want to be in the VWP because of the possible economic benefits (e.g., increasing commerce and tourism), making it easier and cheaper for their populace to travel to the United States (i.e., since their citizens do not have to get a visa before traveling temporarily to the United States), and because membership in the program is often perceived as evidence of close ties with the United States. In 2005, the administration began providing countries interested in joining the VWP with “road maps” to aid the countries in meeting the program’s criteria.<sup>46</sup> However, some of the countries have complained that since the “road maps” do not contain milestones or time tables, it is difficult to measure the amount of progress made towards fulfilling the criteria for VWP membership.<sup>47</sup> Moreover, others contend that since U.S. consular officers are the ones that approve or disapprove applications for visas, it is extremely difficult for countries to affect their visa refusal rates, limiting the ability of a country to follow a defined set of steps to meet the required VWP criteria.

<sup>44</sup> Testimony of Jess T. Ford, Director International Affairs and Trade, General Accounting Office, in U.S. Congress, Senate Committee on the Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security, *Keeping Terrorists Off The Plane: Strategies For Pre-Screening International Passengers Before Takeoff*, hearings, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess., September 7, 2006.

<sup>45</sup> For an example of this agreement, see James Jay Carafano, *With a Little Help from Our Friends: Enhancing Security by Expanding the Visa Waiver Program*, Heritage Foundation, Executive Memorandum no. 991, February 3, 2006.

<sup>46</sup> There were 13 “road map” countries. They were Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, South Korea, Latvia, Lithuania, Malta, Poland, Romania, and Slovakia. Seven of these countries have been admitted to the VWP. In addition, it is expected that Greece will be admitted to the program in 2009.

<sup>47</sup> For example, on February 8, 2006, the Heritage Foundation held an event entitled *Fighting a More Effective War on Terrorism: Expanding the Visa Waiver Program*. The featured speakers were Ambassadors Petr Kolar of the Czech Republic, John Bruton of the EU, Janusz Reiter of Poland, and András Simonyi of Hungary. A recording of the event is available at <http://www.heritage.org/Press/Events/ev020806a.cfm>.

## EU Countries

Six of the current road map countries are members in the EU,<sup>48</sup> which may also raise another issue concerning the VWP. EU rules require that all member states be treated equally (solidarity clause). In addition, a visa is required for all citizens from non-VWP EU countries wishing to travel to the United States, whereas under EU law, these countries do not require visas of US citizens for stays up to 90 days. Presently any of the 12 EU Member States not participating in the VWP could invoke the EU solidarity clause<sup>49</sup> and visa reciprocity clause,<sup>50</sup> with the result that the other EU countries may have to decline to be members of the VWP, or place visa requirements on United States citizens traveling to EU countries unless the other countries are allowed to enter the VWP.<sup>51</sup> Nonetheless, the other EU countries may put pressure on the non-VWP EU countries not to file a formal complaint which could strain EU-U.S. relations. Also, some of the countries may not have raised this issue yet because they are not full members of the Schengen area.<sup>52</sup> Notably, Greece, a full member of the EU that is not a VWP country (but who was nominated in 2007 by DOS to become a VWP country), has not filed a complaint about unequal treatment.<sup>53</sup>

Moreover, leaders and publics in many new EU members, such as Poland, are extremely unhappy with their exclusion from the VWP given their support of controversial U.S. policies in Iraq and in the fight against terrorism. They bristle at the time-consuming and expensive requirements their citizens incur when seeking to obtain U.S. visas. For example, there is a \$100 nonrefundable application fee for tourist visas. Analysts suggest that the VWP issue has contributed to a sense in some central and eastern European states that they have gotten little in return for their efforts to be staunch U.S. allies, and is part of the reason for a decline in public support for the United States in some of these countries. Some U.S. officials acknowledge privately that the VWP is the biggest irritant in bilateral U.S. relations with the countries of central and eastern Europe.<sup>54</sup>

The Commission on European Communities has stated that it believes that the road map process could be “an adequate means for ensuring visa exemption for all EU citizens in the medium term ... ” However, the Commission noted that to make the process fully effective there needs to be more consistency in setting the goals and measures for road map countries. The Commission also stated that the United States had not shown any willingness to consider interim facilitation measures such as providing a fee exemption for tourist visas, and that the EU should continue to press the United States to streamline at least some aspects of the visa application process.<sup>55</sup>

<sup>48</sup> Twelve of the 13 road map countries were EU countries, but 6 of those countries were admitted to the VWP in 2008.

<sup>49</sup> Non-VWP EU countries could contend that the fact that other countries in the EU are part of the VWP constitutes unequal treatment.

<sup>50</sup> The same visa rules do not apply to U.S. citizens traveling to the Non-VWP EU countries, and Non-VWP EU citizens traveling to the United States.

<sup>51</sup> Conversation with Telmo Baltazar, Justice and Home Affairs Counselor, European Union, April 18, 2005.

<sup>52</sup> The Schengen area comprises the EU countries which have signed the convention implementing the Schengen Agreements of 1985 and 1990 on the free movement of persons and the standardization of border controls. See <http://mondediplo.com/maps/schengen2000>, visited January 23, 2006.

<sup>53</sup> DHS began its review of Greece for participation in the VWP in late 2007.

<sup>54</sup> Craig Whitlock, “Poland’s Leader Hopes To Gain from Support of U.S. Policies,” Washington Post, Feb. 7, 2006; Discussions with U.S. and European officials.

<sup>55</sup> Commission of the European Communities, *Report from the Commission to the Council on Visa Waiver Reciprocity with Certain Third Countries*, October 1, 2006, pp.11-12.

## GAO Report

A September 2008 report by the Government Accountability Office (GAO) noted that the executive branch moved aggressively to expand the VWP by the end of 2008, but that the process was not transparent leading to confusion among interagency partners and aspiring program countries. The Department of State reported difficulties explaining to certain countries with FY2007 refusal rates below 10% and that have interest in joining the program (e.g., Croatia, Israel, and Taiwan) why DHS had not negotiated MOUs with them, but had negotiated MOUs with several countries with refusal rates over 10% (e.g., Hungary, Latvia, Lithuania, and Slovakia).<sup>56</sup> GAO also found that DHS had achieved some security enhancements to the program during the negotiations with aspiring VWP countries (e.g., sharing of information on lost and stolen passports), but concluded that DHS had not fully developed the tools to access and mitigate the risks of the VWP.<sup>57</sup>

## Lost and Stolen Passports

Although P.L. 110-53 required all VWP countries to enter into an agreement to share information on lost and stolen passports, concerns remain about information sharing on lost and stolen passports. A July 2006 GAO report noted that DHS has not established time frames and operating procedures for the requirement that VWP countries report information on lost and stolen passports in a timely manner.<sup>58</sup> The issues with lost and stolen passports are similar to those documented in the IG April 2004 report which found that information provided by VWP governments on lost and stolen passports was not been checked against United States' entry/exit data to determine whether the passports have been used to enter the United States, and noted that collection of data on lost and stolen passports is not proactive, uniform, nor disseminated in an organized manner. In addition, the IG report observed that the lack of international standardization in passport numbering systems complicates the ability to identify people using stolen VWP country passports.

As in the April 2004 IG report, the July 2006 GAO report also noted that the U.S. lacks a centralized mechanism for foreign governments to report lost and stolen passports. In May 2004, the United States joined 40 other countries in providing information on lost and stolen passports to the U.S. National Central Bureau of the International Criminal Police Organization (Interpol). The Interpol lost and stolen passport database is available to law enforcement and immigration authorities worldwide.<sup>59</sup> Although all but four of the VWP countries provide data to the Interpol

<sup>56</sup> In a meeting with CRS, DHS said that the countries who had previously been "road map" countries were given priority, since in some respects, they were "first in line." Also, DHS expected, and was correct, that the countries with FY2007 refusal rates above 10% with whom DHS signed MOUs would have FY2008 refusal rates below the 10% threshold.

<sup>57</sup> U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-967, September 2008. (Hereafter GAO, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*.)

<sup>58</sup> U.S. Government Accountability Office, *Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program*, GAO-06-854, July, 2006, p. 51. (Hereafter GAO, *Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program*.)

<sup>59</sup> The Interpol lost and stolen passport database became operational in July, 2002. The United States agreed to transfer 320,000 records of lost or stolen U.S. passports reported since 2002. Interpol's database presently contains approximately 1.6 million records reported by the 41 countries. Of the 1.6 million records, approximately 60% are (continued...)

database, DHS is not using Interpol's database to its full potential because DHS does not automatically access the information at primary inspection. According to the Secretary General of Interpol, the United States will not have an effective screening tool for checking passports until Interpol's data can be automatically queried during primary inspections.<sup>60</sup>

Due to the findings in the April 2004 report detailing deficiencies in the reporting of lost and stolen passports, in December 2004 DHS' Office of the Inspector General<sup>61</sup> released a follow up report entitled, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States* which found that the majority of aliens applying for admission to the United States using stolen passports are admitted, and that the likelihood of being admitted only slightly declined if the passport was posted in the lookout system.<sup>62</sup> The study reviewed two groups of aliens who used stolen passports to attempt to enter the United States. One group did not have lookouts posted for the stolen passports, and 79 out of 98 aliens were admitted (81%). The other group had lookouts posted for the stolen passports, and 57 out of 78 aliens were admitted (73%), of which 33 of the admissions occurred after September 11, 2001.

### The Number of Lost/Stolen Passports

Currently, DOS receives most of the stolen passport reports from foreign governments. Based on DOS reports from January 2002 to June 2004, 28 foreign governments reported 56,943 stolen blank foreign passports.<sup>63</sup> In June 2004, the Director of the U.S. National Central Bureau of Interpol said that for 55 of the 181 Interpol countries, there probably were over 10 million lost and stolen passports that might be in circulation. In August 2004, according to CBP, their database contains 1.2 million records of stolen passports.<sup>64</sup> Notably, between January and June 2005, DHS confiscated 298 passports issued by VWP countries that travelers were attempting to use at ports of entry to fraudulently enter the United States.<sup>65</sup>

### Overstays

Some maintain that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers rather than the actual behavior of

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(...continued)

passports, predominantly lost or stolen from the bearer, while 40% are national identification documents. U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews OIG-05-07, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, December 2004, pp. 7-8. (Hereafter cited as DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*.)

<sup>60</sup> GAO, *Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program*, p. 5.

<sup>61</sup> U.S. Department of Homeland Security, Office of Inspections, Evaluations, and Special Reviews OIG-05-07, *A Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, December 2004.

<sup>62</sup> A lookout system contains information on aliens who are or may be inadmissible to the United States, or who may be of interest to law enforcement for reasons such as immigration violations, alien smuggling, suspected or actual criminal activity, and suspected ties to terrorists.

<sup>63</sup> There are two types of lost or stolen passports: passports stolen from individuals, and stolen blank passports. Since passports stolen from individuals are modified by replacing the existing photographs and biographical data with that of the intended users, these changes are usually easier for an inspector to detect, unlike forged stolen blank passports which are often modified with high quality photographs and biographic data and are very difficult to detect.

<sup>64</sup> DHS, *Review of the Use of Stolen Passports from Visa Waiver Countries to Enter the United States*, p. 8.

<sup>65</sup> GAO, *Border Security: Stronger Actions Needed to Assess and Mitigate Risks of the Visa Waiver Program*, p. 3.

nonimmigrants. When the program was conceived, it was expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation. Reportedly, since December 2002, DHS has been matching the entry and exit portions of the I-94 forms for participants in the VWP to create an entry/exit system for VWP nationals. Some question whether this system can produce accurate counts of those who overstay the terms of their entry. Until an automated entry-exit system is fully operational and the data produced are trusted and easily accessible, it is difficult for immigration agents to identify those who have overstayed their 90-day admission periods. Thus, aliens could enter under the VWP and stay indefinitely.<sup>66</sup>

## Legislation in the 111<sup>th</sup> Congress

Senators Diane Feinstein and Jon Kyl introduced S. 203 on January 12, 2009. S. 203 contains several provisions that aim to increase the security of the VWP. The bill would require that within 180 days of enactment every country in the VWP have in effect an agreement to share data on lost and stolen passports. (The requirement to enter into these agreements was included in P.L. 110-53.) Countries that refused to enter into the agreement within the specified time period would be suspended from the program until an agreement is reached. In addition, S. 203 would prohibit new countries from being admitted to the VWP until all current countries had agreements. The bill would also require within a year after enactment that DHS evaluate every country admitted to the VWP prior to January 1, 2009, including calculating the country's overstay rate.<sup>67</sup> Furthermore, S. 203 would establish the maximum overstay rate as 2%, and require that countries with higher overstay rates be suspended from the VWP.

S. 203 would also change the language regarding the exit system requirement for the nonimmigrant refusal waiver. In order to have the nonimmigrant refusal rate authority, DHS would have to certify to Congress that an air entry and exit system is in place that verifies the arrival and departure of 97% of all foreign nationals who exit through airports.<sup>68</sup> Once the Secretary of DHS made such a certification, the U.S. Comptroller would be required within 180 days to conduct a study of the entry-exit system.

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<sup>66</sup> For further information, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William J. Krouse and Raphael F. Perl; and CRS Report 98-89, *Immigration: Visa Entry/Exit Control System*, by William J. Krouse and Ruth Ellen Wasem.

<sup>67</sup> Under current statute, country evaluations must be completed every two years.

<sup>68</sup> Under current law, the refusal rate waiver became available on the day that an air exit system is in place that could verify the departure of at least 97% of foreign nationals departing from the United States.

## Appendix. Legislative History

### Visa Waiver Pilot Program

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

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

The pilot program was scheduled to expire on September 30, 1997, but temporary extensions were included in the Continuing Resolutions passed in the 105<sup>th</sup> Congress.<sup>69</sup> The Commerce, Justice, State, and Judiciary (CJS) FY1998 Appropriations Act (P.L. 105-119) also contained an extension through April 30, 1998. In 1998, Congress passed legislation (P.L. 105-173) that not only extended the program through April 30, 2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.<sup>70</sup> By 1999, program participation had grown to include 29 countries.<sup>71</sup>

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

<sup>70</sup> Originally, to qualify for the Visa Waiver Pilot Program countries needed to have had an average nonimmigrant refusal rate of no more than 2% over the past two fiscal years with neither year going above 2.5%. P.L. 105-173 added the criteria that a country could have a nonimmigrant refusal rate of less than 3% for the previous year and qualify for the program.

<sup>71</sup> As of January 2007, 27 countries were eligible to participate in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Argentina was removed from the VWP in February 2002, and Uruguay was removed in April 2003.

## Visa Waiver Permanent Program Act

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the Commissioner of the former Immigration and Naturalization Service (INS)<sup>72</sup> exercised the Attorney General's parole authority to extend the program temporarily.<sup>73</sup> Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that

- mandate that by October 1, 2007 all entrants under the VWP must have machine-readable passports;
- require that all visa waiver program applicants be checked against lookout systems;
- require ongoing evaluations of participating countries (not less than once every five years);
- require the collection of visa waiver program arrival/departure data at air and sea ports of entry; and
- require that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.<sup>74</sup>

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

## USA Patriot Act of 2001

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

On September 24, 2003 the Secretary of State extended the deadline for visitors from 21 VWP countries to present a machine-readable passport at the ports of entry until October 26, 2004.<sup>75</sup> At

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<sup>72</sup> The Homeland Security Act of 2002 (P.L. 107-296) abolished the Immigration and Naturalization Service (INS) and effective March 1, 2003, transferred most of its functions to three bureaus in the new Department of Homeland Security (DHS): Citizenship and Immigration Services (USCIS); Bureau of Immigration and Customs Enforcement (ICE); and, Bureau of Customs and Border Protection (CBP).

<sup>73</sup> Parole is a temporary authorization to enter the United States and is normally granted when the alien's entry is determined to be in the public interest (INA § 212(d)(5)(A)).

<sup>74</sup> Many of these requirements were included to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

<sup>75</sup> The 21 countries granted a postponement were: Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. On November 11, 2003, Luxembourg was granted an extension of the deadline.

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

## **Enhanced Border Security and Visa Entry Reform Act of 2002**

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act),<sup>76</sup> signed into law on May 14, 2002, required all VWP countries to certify that they report in a timely manner the theft of blank passports, and required, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system. The Border Security Act also mandated that by October 26, 2004 the government of each VWP country needed to certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier.<sup>77</sup> The Border Security Act specified that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier unless the passport was issued prior to October 26, 2004. The USA Patriot Act established the deadline for all foreign nationals entering under the VWP to have machine-readable, tamper-resistant passports, and the new requirement of biometrics in the passports did not change the deadline in the USA Patriot Act for the presentation of machine-readable, tamper-resistant passports. The biometric passport requirement deadline was extended to October 27, 2005 by P.L. 108-299.<sup>78</sup> Thus, as of October 27, 2005 (the day after the new deadline) all entrants under the VWP were required to present machine-readable, tamper-resistant passports (as required by the USA Patriot Act, and P.L. 108-299), but only passports issued after October 26, 2005 were required to have a biometric identifier.

Although Congress extended the deadline for VWP countries to certify that they had a program to issue machine-readable passports with biometric identifiers, most VWP countries would have been unable to meet the new, October 26, 2005, deadline, especially if the biometric requirement could only have been fulfilled by countries who had electronic data chips in their passports (e-passports). In addition, there was resistance in Congress to grant another extension of the biometric deadline.<sup>79</sup> As a result, the U.S. government clarified that a digitized photograph printed on a data page in the passport would count as a biometric for the October 26, 2005, requirement. Thus, only France and Italy were unable to meet the new deadline, but have since come into compliance. In addition, any passports used by VWP travelers issued after October 26, 2006, requires integrated chips with information from the data page (e-passports).

## **The Intelligence Reform and Terrorism Prevention Act of 2004**

P.L. 108-458,<sup>80</sup> the Intelligence Reform and Terrorism Prevention Act of 2004, added the requirement that by October 26, 2006, as a condition of being in the VWP, each VWP country must certify that it is developing a program to issue tamper-resistant, machine-readable visa

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<sup>76</sup> P.L. 107-173. The original bill, H.R. 3525, was sponsored by Representative F. James Sensenbrenner.

<sup>77</sup> The act tasked the International Civil Aviation Organization (ICAO) with developing the biometric standard.

<sup>78</sup> Signed into law on August 9, 2004.

<sup>79</sup> For example, see letter from Rep. F. James Sensenbrenner, Jr., to Luc Frieden, President of the European Council of Ministers, and Franco Frattini, Vice-President of the European Commission, April 7, 2005.

<sup>80</sup> The original bill, H.R. 2845, was sponsored by Senator Susan M. Collins and signed into law on December 17, 2004.

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

## **Implementing the 9/11 Commission Recommendations Act of 2007**

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

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

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

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

In addition, P.L. 110-53 made several changes to the criteria to qualify as a VWP country, which were intended to enhance the security of the program. As previously mentioned, the Act mandated that the Secretary of DHS, in consultation with the Secretary of State, develop and implement an electronic travel authorization system (the system),<sup>81</sup> through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the

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<sup>81</sup> The system as implemented is known as the Electronic System for Travel Authorization (ESTA).

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

P.L. 110-53 also required the Secretary of DHS, no later than one year after enactment, to establish an exit system that records the departure of every alien who entered under the VWP and left the United States by air. The exit system is required to match the alien's biometric information against relevant watch lists and immigration information, and compare such biographical information against manifest information collected by airlines to confirm that the alien left the United States.<sup>82</sup>

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

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

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

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<sup>82</sup> This exit system is not necessarily the same as the exit system required for the nonimmigrant refusal rate waiver authority. DHS appears to have incorporated this requirement as part of the exit portion of automated entry and exit data system known as US-VISIT.