Nonimmigrant Overstays: Brief Synthesis of the Issue

Ruth Ellen Wasem
Specialist in Immigration Policy

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Summary

As the 111th Congress debates comprehensive immigration reform and its component parts of immigration control (i.e., border security and interior enforcement), legal reform (i.e., temporary and permanent admissions), and the resolution of unauthorized alien residents, concerns arise over the capacity of the Department of Homeland Security to identify and remove temporary aliens who fail to depart after their visas expire. It is estimated that each year hundreds of thousands of foreign nationals overstay their nonimmigrant visas or enter the country illegally (with fraudulent documents or bypassing immigration inspections). The most recent published estimate based upon the March Supplement of the Current Population Survey (CPS) is that 11.9 million unauthorized aliens were residing in the United States in 2008. Reliable estimates of the number of nonimmigrant overstays are not available, and the most recent sample estimates range from 31% to 57% of the unauthorized population (depending on methodology) in 2006. This report will be updated.

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Background

Foreign nationals not legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted.[1] Under current law, three departments—the Department of State (DOS), the Department of Homeland Security (DHS) and the Department of Justice (DOJ)—each play key roles in administering the law and policies on the admission of aliens.[2] DOS's Bureau of Consular Affairs (Consular Affairs) is the agency responsible for issuing visas, DHS's U.S. Citizenship and Immigration Services (USCIS) is charged with approving immigrant petitions, and DHS's Customs and Border Protection (CBP) is tasked with inspecting all people who enter the United States. DHS's Immigration and Customs Enforcement (ICE) is the lead agency on enforcing immigration law in the interior of the United States. DOJ's Executive Office for Immigration Review (EOIR) has a significant policy role through its adjudicatory decisions on specific immigration cases.

As the 111th Congress debates comprehensive immigration reform and its component parts of immigration control (i.e., border security and interior enforcement), legal reform (i.e., temporary and permanent admissions), and the resolution of unauthorized alien residents, concerns arise over the capacity of the Department of Homeland Security to identify and remove temporary aliens who fail to depart when their visas expire. The phenomenon of foreign nationals who enter legally on a temporary basis and continue to stay after their visas expire is a fundamental problem of immigration control.[3] This issue is not new; indeed, Congress has been grappling with options to address it over the past two decades.

In the early 1990s, policymakers became especially concerned about what was perceived to be a growing number of nonimmigrant overstays. At that time, nearly 2.7 million aliens had established legal status through the provisions of the Immigration Reform and Control Act (IRCA) of 1986 (P.L. 99-603)—a law which also significantly strengthened border and interior immigration enforcement provisions. Nonetheless, demographers at the former Immigration and Naturalization Service (INS) estimated that 3.5 million unauthorized aliens were residing in the United States in 1990. By 1996, the estimated number of unauthorized alien residents was 5.8 million, with about 2.1 million (41%) estimated to have overstayed their nonimmigrant visas. The remaining 59% were assumed to have entered the United States illegally.[4]

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[1] Authorities to except or to waive visa requirements are specified in law, such as the broad parole authority of the Attorney General under §212(d)(5) of the Immigration and Nationality Act (INA) and the specific authority of the Visa Waiver Program in §217 of the INA.

[2] Other departments, notably the Department of Labor (DOL), and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (DHHS) sets policy on the health-related grounds for inadmissibility discussed below.

[3] A nonimmigrant overstay is defined as when a foreign national who is legally admitted to the United States for a specific authorized period remains in the United States after that period expires, unless an extension or a change of status has been approved.

[4] U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States, by Country of Origin and State of Residence: October 1992*, unpublished paper by Robert Warren, 1994; and U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000,* by Robert Warren, 2003.

Based on the March Supplement of the Current Population Survey (CPS), an estimated 11.9 million unauthorized aliens were residing in the United States in 2008.[5] The most recent published estimate was that there were 11.6 million unauthorized alien residents as of January 2008, according to data from the American Community Survey (ACS) of the U.S. Census Bureau.[6] Reliable estimates of the number of nonimmigrant overstays today are not available, and sample estimates range from 31% to 57% of the unauthorized population (depending on methodology).[7]

Elements of Nonimmigrant Visa Control

Statutorily, the Immigration and Nationality Act (INA) provides the elements to control the entry and exit of foreign nationals. Provisions of law requiring electronic immigration databases and the collection of biometrics were enacted before the close of the 20th Century. The INA makes clear that nonimmigrants who fail to leave under the terms of their visa become ineligible for readmission.

Visa Issuance

There are two broad classes of aliens that are issued visas: immigrants and nonimmigrants. The documentary requirements for visas are stated in §222 of the INA.[8] Nonimmigrants are admitted for a designated period of time and a specific purpose, and they include a wide range of visitors, including tourists, foreign students, diplomats, and temporary workers. In FY2008, the Bureau of Consular Affairs issued 6.6 million nonimmigrant visas. Combined, visitor visas issued for tourism and business comprised the largest group of nonimmigrants in FY2008, with about 4.7 million or 71.1%. Other notable categories were students and exchange visitors (11.6%) and temporary workers (9.9%).[9]

For well over a decade, the Bureau of Consular Affairs has been issuing machine-readable visas. Consular officers use the Consular Consolidated Database (CCD) to store data on visa applicants. Since February 2001, the CCD stores photographs of all visa applicants in electronic form, and more recently the CCD has begun storing ten-finger scans. 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 affect the issuance of the visa. The CCD is the nexus for screening aliens for admissibility, notably screening on terrorist security and criminal grounds, and links with the

[5] Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009.

[6] Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker, 2009. For more complete analysis, see CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

[7] Media reports indicating that 2.9 million nonimmigrant overstayed their visas in FY2008 have not been substantiated by Department of Homeland Security data or sources. E-mail to author from DHS Office of Immigration Statistics, Nov. 16, 2009.

[8] CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

[9] CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Chad C. Haddal and Ruth Ellen Wasem.

United States Visitor and Immigrant Status Indicator Technology (US-VISIT), DHS's automated entry and exit data system, at the time the visa is issued.

Many foreign visitors enter the United States without visas through the Visa Waiver Program (VWP), a provision of the INA that allows the visa requirements to be waived for aliens coming from countries that meet certain standards (e.g., Australia, France, Germany, Italy, Japan, New Zealand, and Switzerland).[10] In addition to the Visa Waiver Program, there are a number of exceptions to documentary requirements for a visa that have been established by law, treaty, or regulation. The INA also authorizes the Attorney General and the Secretary of State acting jointly to waive the documentary requirements of INA §212(a)(7)(B)(i), including the passport requirement, on the basis of unforeseen emergency in individual cases.[11] In 2003, the Administration scaled back the circumstances in which the visa and passport requirements are waived.[12]

Border Inspections

The INA requires the inspection of all aliens who seek entry into the United States; possession of a visa or another form of travel document does not guarantee admission into the United States.[13] As a result, all persons seeking admission to the United States must demonstrate to a CBP inspector that they are a foreign national with a valid visa and/or passport or that they are a U.S. citizen.[14] There are 327 official ports of entry in the United States, including 15 preclearance offices in Canada, Ireland, and the Caribbean. For FY2008, CBP reported inspecting approximately 409 million individuals (citizens as well as foreign nationals) at land, air, and sea ports of entry.[15] Because many foreign nationals are permitted to enter the United States without visas, notably as discussed above through the VWP, border inspections are extremely important for those having their initial screening at the port of entry.[16]

Under the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system, certain foreign nationals are required to provide fingerprints, photographs or other biometric identifiers upon arrival in the United States. US-VISIT has grown from a photograph and two-finger biometric system for immigration identification[17] to the major identity management and screening

[10] CRS Report RL32221, *Visa Waiver Program*, by Alison Siskin.

[11] INA §212(d)(4)(A). The Homeland Security Act (P.L. 107-296) transferred most immigration-related functions from DOJ to DHS. Whether this waiver authority remains, in whole or in part, with DOJ and the Attorney General or with the Secretary of DHS is ambiguous.

[12] For additional information about these exceptions, see 8 C.F.R. §212.1; 22 C.F.R. §41.1; and 22 C.F.R. §41.2.

[13] CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by Ruth Ellen Wasem et al.

[14] CRS congressional distribution memorandum, *Western Hemisphere Travel Initiative*, by Ruth Wasem, Blas Nuñez-Neto, Susan Epstein, Todd Tatelman and Angeles Villerreal, Apr. 26, 2006.

[15] U.S. Department of Homeland Security, *U.S. Customs and Border Protection (CBP) Fiscal Year 2008 Performance and Accountability*, Washington, DC, February 2009.

[16] For further background, see CRS Report RS21899, *Border Security: Key Agencies and Their Missions*, by Chad C. Haddal.

[17] DHS regulations exempted about 20 categories of individuals from providing biometric identifiers upon entry to or exit from the United State; however, the CBP inspector retains discretion to collect an alien's biometric information. CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Vina.

system for DHS. CBP inspectors are currently taking a digital photograph and scanning 10 fingerprints from each foreign national who presents him or herself at designated ports of entry. [18]

Emigration and Exit Data

DHS does not have reliable data on emigration from the United States. With a few exceptions, nonimmigrants are required to complete an I-94 Arrival/Departure Record (or the I-94W for VWP participants) when they arrive in the United States and when they depart.[19] The I-94 Arrival/Departure form is routinely collected from foreign nationals exiting at air and sea ports, but it reportedly poses collection problems at land ports. Several years ago, the U.S. Government Accountability Office (GAO) testified that there were several weaknesses collecting the I-94 Departure Record at land ports of entry. Most notably, GAO concluded that the collection of departure forms is vulnerable to manipulation—"in other words, visitors could make it appear that they had left when they had not. To illustrate, on bridges where toll collectors accept I-94 departure forms at the Southwestern border, a person departing the United States by land could hand in someone else's I-94 form."[20]

The exit component of the US-VISIT system has long been plagued with a variety of budgetary and structural problems, particularly at land ports of exit.[21] In December 2006, DHS officials indicated that they were considering abandonment of plans to implement the exit portion.[22] In 2008, GAO also found weaknesses in the methodology DHS was proposing to use to verify departures of foreign nationals from the United States. GAO concluded that the plan to certify air exit system requirement would not address all potential risks of an expanded Visa Waiver Program. In that report, DHS stated that it would match foreign nationals' departure records against prior records "to determine that the person is a foreign national, and that the person did depart the country through a U.S. airport."[23] A new GAO report on US-VISIT has concluded that "an exit capability has yet to be fully deployed."[24]

[18] According to DHS, US-VISIT operates and maintains two major automated identification systems in support of its mission: the Automated Biometric Identification System (IDENT) for biometric data and the Arrival and Departure Information System (ADIS) for biographic data. U.S. Department of Homeland Security, National Protection and Programs Directorate, *United States Visitor and Immigrant Status Indicator Technology, Fiscal Year 2010 Congressional Justification,* February 2009.

[19] Mexican nationals with Border Crossing Cards (when traveling within the border zone for a limited duration) and tourists and business travelers from Canada are generally exempt from the I-94 requirement.

[20] U.S. General Accounting Office, *Homeland Security: Overstay Tracking Is a Key Component of a Layered Defense,* GAO-04-170T, October 16, 2003, http://www.gao.gov/htext/d04170t.html.

[21] U.S. Government Accountability Office, *US-VISIT Program Faces Strategic, Operational, and Technological Challenges at Land Ports of Entry*, GAO-07-248, December 2006, http://www.gao.gov/new.items/d07248.pdf.

[22] Then-DHS Assistant Secretary for policy Stewart A. Baker said a land-border exit system would cost "tens of billions of dollars." "It is a pretty daunting set of costs, both for the U.S. government and the economy," Baker explained, " ... when you have to sit down and compare all the good ideas people have developed against each other, with a limited budget, you have to make choices that are much harder." Rachel L. Swarns and Eric Lipton, "U.S. Is Dropping Effort to Track if Visitors Leave," *The New York Times*, December 15, 2006. Baker quote confirmed by Jarrod Agen, a spokesman for the Department of Homeland Security, December 15, 2006.

[23] U.S. Government Accountability Office, *Limitations with Department of Homeland Security's Plan to Verify Departure of Foreign Nationals*, GAO-08-458T, February 28, 2008, p. 9, http://www.gao.gov/new.items/d08458t.pdf.

[24] U.S. Government Accountability Office, *Key US-VISIT Components at Varying Stages of Completion, but Integrated and Reliable Schedule Needed,* GAO-10-13, November 19, 2009, http://www.gao.gov/new.items/d1013.pdf.

Past Legislative Action on Nonimmigrant Overstays

Nonimmigrant overstays have been an issue in the debate over immigration control for many years. In 1981, the Select Commission on Immigration and Refugee Policy (SCIRP) cited nonimmigrant visa abuse and document control as concerns and included the establishment of a "fully automated system" to track nonimmigrant arrivals and departures from the United States among its recommendations to the President and the Congress.[25] This unanimous recommendation for an automated entry/exit system to monitor nonimmigrant overstays was part of a comprehensive set of proposals that SCIRP offered as part of its statutory mandate to evaluate the existing laws, policies and procedures governing the admission of immigrants and refugees to the United States.[26] In 1996, Congress put this recommendation into law; nonetheless, the issue of nonimmigrant overstays has remained a congressional concern.

Illegal Immigration Reform and Immigrant Responsibility Act

Congress strengthened the anti-terrorism provisions in the INA and passed provisions that many maintained would ramp up enforcement activities in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208, Division C). In IIRIRA, there were several provisions aimed at nonimmigrant overstays. Foremost, IIRIRA clarified that the visa of a nonimmigrant is void as soon as the nonimmigrant alien overstays the period of authorized stay. IIRIRA furthermore created new grounds of exclusion for aliens who are unlawfully present in the United States. Those who are unlawfully present for more than 180 days but less than one year and who voluntarily depart the country are ineligible for admission or reentry to the United States for three years. An alien unlawfully present for one year or more who leaves or is removed from the United States is inadmissible for 10 years. These provisions are generally referred to as the three- and 10-year bars.

Finally, §110 of IIRIRA required the Attorney General to develop an automated entry/exit system that among other things (1) collects a record of departure for every alien departing the United States, and matches the record against the record of the alien's arrival in the United States; and (2) allows the identification, through online searches, of nonimmigrants who remain beyond their period of authorized stay. As amended by several subsequent laws, §110 of IIRIRA became the statutory basis of what is now the US-VISIT system, which uses biometric identification (i.e., finger scans and digital photographs) to check identity.

Enhanced Border Security and Visa Entry Reform Act of 2002

The Enhanced Border Security and Visa Entry Reform Act of 2002 (P.L. 107-173) expressly targeted the improvement of visa issuance and alien tracking procedures. Among its provisions, it required the development of an interoperable electronic data system to be used to share information relevant to alien admissibility and removability and the implementation of an

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[25] Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest*, Staff Report, Washington, DC, April 30, 1981, p. xxxiii.

[26] P.L. 95-412 established the SCIRP, which was also referred to as the Hesburgh Commission because it was chaired by the Reverend Father Theodore M. Hesburgh, who was President of Notre Dame at the time.

integrated entry-exit data system.[27] It also required that all visas have biometric identifiers.[28] The act placed new requirements on the VWP, specifically mandating that the government of each VWP country certify that it has established a program to issue tamper-resistant, machine-readable passports with a biometric identifier. The act also required all VWP countries to certify that they report in a timely manner the theft of blank passports.

Legislation Implementing the 9/11 Commission Recommendations

The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 (P.L. 108-458) included visa policy and immigration-related provisions aimed at curbing nonimmigrant overstays as well as the specific recommendations offered by the 9/11 Commission.[29] The IRTPA required accelerated deployment of the biometric entry and exit system to process or contain certain data on aliens and their physical characteristics.[30] The act also expanded the pre-inspection program that places U.S. immigration inspectors at foreign airports, increasing the number of foreign airports where travelers would be pre-inspected before departure to the United States. Moreover, it required all individuals entering the United States (including U.S. citizens and visitors from Canada and other Western Hemisphere countries) to bear a passport or other documents sufficient to denote citizenship and identity. The IRTPA required the establishment of new standards aimed at ensuring the integrity for federal use of birth certificates, state-issued driver's licenses and identification cards, and social security cards.[31]

The Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) created a waiver allowing the Secretary of Homeland Security (Secretary) to admit countries with visa refusal rates under 10% to the VWP. This waiver authority became available in October 2008, when the Secretary certified that (1) an air exit system was in place that verifies the departure of not less than 97% of foreign nationals that exit through U.S. airports, and (2) the electronic system for travel authorization (ESTA) was operational. The ESTA is a system through which each foreign national electronically provides, in advance of travel, the biographical information necessary to check the relevant databases and "watch lists" to see whether the foreign national poses a law enforcement or security risk. [32] The CBP officer makes a determination on whether the nonimmigrant may enter the United States and the permitted duration of stay.

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[27] §414 of the USA PATRIOT Act (P.L. 107-56) also encouraged the full implementation of the integrated, automated entry and exit data system "with all deliberate speed and as expeditiously as practicable."

[28] The Border Security and Visa Reform Act also required the establishment of electronic means to monitor and verify the status of the students and exchange visitors. CRS Report RL32188, *Monitoring Foreign Students in the United States: The Student and Exchange Visitor Information System (SEVIS)*, by Alison Siskin.

[29] 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.

[30] CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Vina.

[31] CRS Report RL32722, *Intelligence Reform and Terrorism Prevention Act of 2004: National Standards for Driver's Licenses, Social Security Cards, and Birth Certificates*, by Todd B. Tatelman.

[32] Section 711(h)(3) of P.L. 110-53 provides: "A determination by the Secretary of Homeland Security that an alien is eligible to travel to the United States under the program is not a determination that the alien is admissible to the United States." That subsection further provides: "A determination by the Secretary of Homeland Security that an alien who applied for authorization to travel to the United States through the System is not eligible to travel under the program is not a determination of eligibility for a visa to travel to the United States and shall not preclude the alien from applying for a visa."

Estimating Overstays

Over the years, it became apparent that the data on nonimmigrant overstays were unreliable because these data were based upon the I-94 Arrival/Departure form.[33] Although the I-94 forms are usually collected from foreign nationals at air and sea ports, the integrity of the collection process at land ports is problematic, as discussed above. Moreover, two major classes of nonimmigrants are exempt from filling out the I-94 when visiting the United States for business or pleasure: Canadian citizens admitted for up to six months and Mexican citizens entering with a border crossing card (laser visa) along the southwestern border who intend to limit their stay to less than 30 days and intend not to travel beyond a set perimeter from the border.

Robert Warren, then a demographer with the former INS, attempted to calculate nonimmigrant overstays based on estimations of the percentage overstays for each country. Warren's efforts yielded an estimate that 2.3 million, or 33%, of the 7.0 million unauthorized immigrants residing in the United States in January 2000 were nonimmigrant overstays.[34] In 2004, the U.S. Government Accountability Office (GAO) attempted to estimate nonimmigrant overstays using samples based upon three different methodologies. GAO concluded, "three alternative data sources on illegal immigrants indicate varying—but uniformly substantial—percentages of overstays: 31%, 27%, and 57%."[35]

In 2003, Warren reached the following conclusion: "In general, the net nonimmigrant overstay figures are more likely to be overestimates than underestimates because the collection of departure forms for long-term overstays who depart probably is less complete than for those who depart within the first year."[36] The 2004 GAO study, however, drew two different conclusions: "The extent of overstaying is significant and may be understated by DHS's most recent estimate."[37]

In 2006, the Pew Hispanic Center applied the Warren methodology (with some modifications) to their estimates of the unauthorized resident alien population in 2006. Their estimates suggest that out of an unauthorized resident alien population of 11.5 million to 12 million, about 4 million to 5.5 million, or between 33% and 50%, are nonimmigrant overstays.[38] The 2006 estimate remains the most recent calculation.

Estimates of nonimmigrant overstays residing in the United States are plagued by the broader difficulties in measuring all three components of unauthorized migration—aliens entering without inspection between ports of entry and aliens entering with fraudulent documents, as well as aliens overstaying or otherwise violating the terms of legal entry. The extent that some nonimmigrant

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33 U.S. Department of Homeland Security Customs and Border Protection, *Filling Out Arrival-Departure Record, CBP Form I-94, for Nonimmigrant Visitors with a Visa for the U.S.*, Washington, DC, December 30, 2008, http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/cbp_i94w_form.xml.

34 U.S. Immigration and Naturalization Service, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, by Robert Warren, 2003 (hereafter *Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*).

35 U.S. Government Accountability Office, *Overstay Tracking: A Key Component of Homeland Security and a Layered Defense*, GAO-04-82, May 2004 (hereafter *Overstay Tracking*. GAO-04-82).

36 *Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*.

37 *Overstay Tracking*. GAO-04-82.

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

overstays become "quasi-legal" aliens (e.g., those who have legal permanent resident petitions pending or have sought relief from removal from an immigration judge) further complicate the estimates.[39] Reportedly, the failure of DHS to consistently update the alien's record—for example if the authorized period of admission is extended, if deferred departure is granted, or if the immigration status changes—is another major factor that prevents DHS from calculating reliable estimates of overstays.[40]

A way forward on the issue of nonimmigrant overstays seems out of reach, absent a reliable method to measure emigration or an effective exit-monitoring system.

Author Contact Information

Ruth Ellen Wasem
Specialist in Immigration Policy
rwasem@crs.loc.gov, 7-7342

[39] *Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*.

[40] *Overstay Tracking*. GAO-04-82.