

# CRS Report for Congress

Received through the CRS Web

## Immigration: Visa Waiver Program

Alison Siskin  
Analyst in Social Legislation  
Domestic Social Policy Division

### Summary

Since the events of September 11, concerns have been raised about the ability of terrorists to enter the United States under the visa waiver program. The visa waiver program allows nationals from certain countries to enter the United States as temporary visitors for business or pleasure without first obtaining a visa from a U.S. consulate abroad. By eliminating the visa requirement, this program facilitates international travel and commerce and eases consular office workloads abroad, but it also bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. In 2001, 17.1 million visitors entered the United States under this program, more than half of all overseas visitors. This tracking report will be updated as legislative action occurs.

### Current Law<sup>1</sup>

Under the visa waiver program (VWP), the Attorney General, 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 simply complete an admission form before their arrival and are admitted for up to 90 days. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) offices at a consular post abroad before coming to the United States.<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.

---

<sup>1</sup> An earlier version of this report was written by William J. Krouse.

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

<sup>3</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 Ruth Ellen Wasem.

Although the VWP greatly eases the documentary requirements for nationals from participating countries, it has important restrictions. Normally 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>4</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).

Travelers under the VWP do not need a visa, and thus no background checks are done prior to arrival at ports of entry, which allows only one opportunity — INS inspectors at port of entry — to identify inadmissible aliens. At port of entry, INS 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>5</sup>

To qualify for the VWP, the INA specifies that 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 2 fiscal years with neither year going above 2.5%;
- certify that the country issues, or will issue by October 1, 2003, machine-readable passports; and
- be determined, by the Attorney General, 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.

Countries can be immediately terminated from the VWP if an emergency occurs in the country that the Attorney General in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.<sup>6</sup> For example, because of the recent economic collapse in Argentina and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission, that country was removed from the VWP in February 2002. 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>7</sup> Probationary countries with a

---

<sup>4</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.

<sup>5</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>6</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>7</sup> "Disqualification rate" is defined as the percentage of nationals from a country who applied for  
(continued...)

disqualification rate less than 2% over a period not to exceed 3 years may remain VWP countries.<sup>8</sup>

## Legislative History

The Visa Waiver Program (VWP) was established as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). Congress periodically enacted legislation to extend the program's authorization, and program participation grew to include 29 countries.<sup>9</sup> The program was scheduled to expire on September 30, 1997, but temporary extensions were included in both Continuing Resolutions passed in the 105<sup>th</sup> Congress. 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 enacted 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>10</sup>

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 INS Commissioner exercised the Attorney General's parole authority to extend the program temporarily.<sup>11</sup> Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included other provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that: 1) mandate that by October 1, 2007 all entrants under the VWP must have machine-readable passports; 2) require that all visa waiver program applicants be checked against lookout systems; 3) require ongoing evaluations of participating countries (not less than once every 5 years); 4) require the collection of visa waiver program arrival/departure data at air and sea ports of entry; and 5) require that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.<sup>12</sup>

---

<sup>7</sup> (...continued)

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>8</sup> The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

<sup>9</sup> As of April 2002, 28 countries were eligible to participate in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, United Kingdom, and Uruguay. Argentina was removed from the VWP in February 2002.

<sup>10</sup> For further information, see CRS Report 97-309, *Immigration: Visa Waiver Pilot Program*, by Ruth Ellen Wasem.

<sup>11</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 (Immigration and Nationality Act §212(d)(5)(A)).

<sup>12</sup> Many of these requirements were included as a manner in which to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

## 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>13</sup> DOS argues that by waiving the visa requirement for high volume/low risk countries, consular workloads are significantly reduced, allowing for streamlined operations and cost savings, and concentration of resources on greater-risk nations in the visa process. Additionally, some contend that DOS does not have the resources to resume issuing visas to all the visitors from VWP countries.<sup>14</sup>

Nonetheless, while the program has significantly reduced the consular workload and facilitated travel to the United States, it has increased the workload of INS inspectors at ports of entry. Furthermore, others contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security. INS inspectors have stated that terrorist 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>15</sup> On February 28, 2002, the House Judiciary Committee's Immigration and Claims Subcommittee held a hearing on the VWP. Testimony by the Inspector General of the Department of Justice pointed out several shortcomings in the current program. Of particular concern were INS's inability to account for nonimmigrant overstays, stolen passports from VWP countries, and INS's ability to correctly and consistently check applicants against the lookout system.

**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 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. Others point out that the latter data are imperfect and currently exist only as *estimates of visa overstays*.<sup>16</sup>

---

<sup>13</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 cite Korea as a country that should be participating in VWP because of the trade and tourism growth it could generate, and contend 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>14</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>15</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*)

<sup>16</sup> Problems that INS has in meeting VWP data requirements are discussed in the Inspector  
(continued...)

Until an automated entry-exit system is fully operational, it is difficult for INS to identify those who have overstayed their 90-day admission periods. Thus, aliens could enter under the VWP and stay indefinitely.<sup>17</sup>

**Stolen Passports.** Document vendors and alien smugglers have targeted the passports of visa waiver countries.<sup>18</sup> The DOS system that keeps track of stolen blank passports reports contains approximately 260,000 reports of stolen passports, of which approximately 44,500 are from VWP countries.<sup>19</sup> Many were not machine-readable. Coupled with the fact that Justice's Inspector General reported that INS inspectors, who have less than a minute to complete most inspections, were not entering the non-machine-readable VWP passport numbers into lookout systems, it is possible that an inadmissible person with such a fraudulent VWP country passport could enter into the country. Indeed, the DOJ documented that a terrorist associated with the World Trade Center bombing in the 1993 conspiracy entered into the United States as a VWP applicant using a photo-substituted Swedish passport.<sup>20</sup>

**Querying Lookout System.** A December 2001 DOJ Office of Inspector General report on the visa waiver program found that INS inspectors were not consistently querying passport numbers against the lookout system. Additionally, not all information about missing and stolen passports was being forwarded for entry into the lookout system, and the information was not always entered into the system within a specified time frame. The report concludes that INS has failed to enter information on lost or stolen passports in a timely, accurate, or consistent manner, and the problem is exacerbated by the fact that there is no single entity within INS charged with the task of maintaining a single database of stolen passports.<sup>21</sup> Additionally, although only one VWP country, Switzerland, does not have machine-readable passports, many passports presented to inspectors were issued before countries began issuing machine-readable passports.<sup>22</sup>

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

General's report. See: U.S. Department of Justice. Office of Inspector General Report No. 1-97-08. *Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays*, September 1997.

<sup>17</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>18</sup> Testimony of Peter M. Becraft, Deputy Commissioner Immigration and Naturalization Service, before the House Immigration and Claims Subcommittee on February 28, 2002.

<sup>19</sup> Information provided in a telephone conversation with John Brennon at Department of State, April 16, 2002.

<sup>20</sup> For further information, see: U.S. Department of Justice. Office of Inspector General Report I-99-10. *The Potential for Fraud and INS's Efforts to Reduce Risks of the Visa Waiver Pilot Program*, March 1999.

<sup>21</sup> DOJ, *Follow-Up Report*.

<sup>22</sup> Testimony of Glenn A. Fine, Inspector General, Department of Justice, before the House Immigration and Claims Subcommittee on February 28, 2002.

## Legislation in the 107<sup>th</sup> Congress

The USA Patriot Act (P.L. 107-56), signed into law on October 26, 2001, directs the Secretary of State each year until 2007 to ascertain that designated VWP countries have established programs to develop tamper-resistant passports. Additionally, there are several bills pending in the 107<sup>th</sup> Congress that seek to reduce the likelihood that terrorists and criminals will be able to enter into the United States under the VWP.

On December 19, 2001, the House passed the Enhanced Border Security and Visa Entry Reform Act of 2001 (H.R. 3525), sponsored by Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, and it has been sent to the Senate. This bill is nearly identical to a bipartisan Senate bill (S. 1749, also titled the Enhanced Border Security and Visa Entry Reform Act of 2001). Senate floor action on H.R. 3525 began on April 15, 2002. H.R. 3525 would require all VWP countries to implement systems for the timely reporting of stolen passports, and would require, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system.

Also under consideration in the 107<sup>th</sup> Congress, H.R. 3077/S. 1518 and H.R. 3229/S. 1627 would require VWP countries to employ tamper resistant passports, and establish a program to reduce passport theft. Additionally, H.R. 3229/S. 1627 would require countries in the VWP to incorporate a biometric identifier into the passports, and would allow the Attorney General to terminate any VWP participant if the inclusion of that country in the VWP poses a national security risk. Finally, H.R. 3286 would make any alien who is a national or was a national in the previous 15 years of Afghanistan, Algeria, Egypt, Lebanon, Saudi Arabia, Somalia, United Arab Emirates, Yemen, or any country designated as a state sponsor of terrorism ineligible to participate in the VWP.