



Legislative Bulletin.....May 5, 2005

**H.R. 1268—Conference Report on the
Emergency Supplemental Wartime Appropriations Act**

Summary of Division B—REAL ID ACT:

NOTE: A complete summary of the entire Conference Report is forthcoming.

The Conference Report retains the vast majority of the House-passed language for the REAL ID Act (H.R. 418), which would establish and rapidly implement voluntary regulations for state driver's license and identification document security standards, increase the burden of proof for claiming asylum, synchronize terrorism-related grounds for inadmissibility and removal, and facilitate the completion of the San Diego border fence. Major changes from the House-passed bill are indicated in **red** below. In addition, this division of the Conference Report contains additional immigration-related provisions on seasonal workers (H-2B visas), Australian visas, and nurses, also summarized below.

RSC Staff Contacts:

Seasonal Workers: Joelle Cannon, joelle.cannon@mail.house.gov, (202) 226-9717

Other sections of Division B: Paul S. Teller, paul.teller@mail.house.gov, (202) 226-9718

Asylum.

As the Judiciary Committee reports, the Conference Report would seek to reduce the abuse of America's asylum system. Current law and judicial precedent prevent the U.S. government from asking foreign governments what evidence they have about the terrorist activities of asylum applicants. Furthermore, the 9th Circuit has been granting asylum to applicants on the basis that their respective governments believe that they are terrorists and are thus being persecuted for their political beliefs.

In repealing the related section of the 9/11 Commission Act (Section 5403 of Public Law 108-458), the Conference Report would increase the burden of proof for asylum applicants to demonstrate that they are indeed being persecuted in their respective home countries *primarily* because of their race, religion, nationality, membership in a particular social group, or political opinion. Additionally, the Conference Report would allow the consideration of corroborating evidence in an asylum proceeding that the federal government is currently not allowed to introduce (and immigration judges are not allowed to consider), including, but not limited to, the demeanor of applicants, the consistency between the applicants' written and oral statements, and the consistency of

applicants' statements with the country conditions in the countries from which the applicants claim asylum.

The Conference Report would eliminate the cap on the number of asylees eligible to adjust their status annually (which is currently set at 10,000) and on the number of aliens fleeing coercive population control methods who may receive asylum annually (currently set at 1,000).

San Diego Border Fence.

The Conference Report would give the Secretary of Homeland Security increased authority to waive—and direct the Secretary to waive—all laws that the Secretary deems necessary to ensure expeditious construction of the barriers and roads related to the San Diego Border Fence with Mexico. No decision of the Secretary in this regard would be subject to judicial review.

In 1996, Congress required the building of a 14-mile border fence inland from the Pacific Ocean in San Diego to 1) secure one of the most trafficked corridors for illegal entry into the U.S., and 2) further protect the U.S. Naval Base in San Diego. The security fence is still not completed, primarily because of ongoing environmental lawsuits that have proceeded under the original limited waiver authority.

Inadmissibility and Deportation of Terrorists.

The Conference Report would make aliens deportable for terrorism-related offenses to the same extent that they would be inadmissible. Under current law, not all terrorism-related grounds for keeping an alien out of the U.S. are also grounds for deportation once the alien has infiltrated the U.S. Thus, the Conference Report would provide that an alien who provides funds or other material support to a terrorist organization is inadmissible and deportable if he knew, or reasonably should have known, that he was giving to a terrorist organization.

The Conference Report would clarify that, as before, only circuit courts can hear immigration cases and that all aliens can bring their constitutional and legal claims into the circuits. No alien would be deprived of an opportunity for judicial review of such claims under this provision.

Driver's Licenses.

The Conference Report would repeal the driver's license provisions of the 9/11 Commission Act (Section 7212 of Public Law 108-458), which allow for states to opt-out of various line-items, and replace them with the following:

- The Conference Report would set minimum document and issuance standards for state driver's licenses or ID cards that could be accepted by a federal agency (effective three years after enactment of this bill, subject to extension).

- The document standards would be the inclusion of:
 - The person's full legal name;
 - The person's date of birth;
 - The person's gender;
 - The person's driver license or identification card number;
 - A digital photograph of the person;
 - The person's address of principal residence;
 - The person's signature;
 - Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes; and
 - A common machine-readable technology (such as a barcode), with defined minimum data elements.

- The issuance standards would be the inclusion of:
 - A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth;
 - Documentation showing the person's date of birth;
 - Proof of the person's Social Security account number or verification that the person is not eligible for a Social Security account number; and
 - Documentation showing the person's name and address of principal residence.

(The only foreign document allowable for identification under this section would be a valid passport.)

- Additionally, for a state to meet the issuance standards, it would have to:
 - Employ technology to capture digital images of identity source documents so that the images can be retained in electronic storage in a transferable format;
 - Retain paper copies of source documents for a minimum of seven years or images of source documents presented for a minimum of ten years;
 - Subject each person applying for a driver's license or identification card to mandatory facial image capture;
 - Establish an effective procedure to confirm or verify a renewing applicant's information;
 - Confirm with the Social Security Administration a Social Security account number presented by a person using the full Social Security account number;
 - Refuse to issue a driver's license or identification card to a person holding a driver's license issued by another state without confirmation that the person is terminating or has terminated the driver's license;
 - Ensure the physical security of locations where drivers' licenses and identification cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced;

- Subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements;
- Establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards;
- Limit the period of validity of all driver's licenses and identification cards that are not temporary to a period that does not exceed eight years; and
- In any case in which a state issues a driver's license or identification card that *does not* satisfy these federal requirements, ensure that such license or identification card--
 - (A) clearly states on its face that it may not be accepted by any federal agency for any official purpose; and
 - (B) uses a unique design or color indicator to alert federal agency and other law enforcement personnel that it may not be accepted for any such purpose.
- Provide electronic access to all other states to information contained in the motor vehicle database of the state.**
- Maintain a state motor vehicle database that contains at a minimum all data fields printed on driver's licenses and identification cards issued by the state; and motor vehicle drivers' histories, including motor vehicle violations, suspensions, and points on licenses.**

- States would also have to verify that a person is in the United States legally before issuing a driver's license or ID card.
- States could only issue a temporary driver's license (clearly identified as such) to certain aliens who are in the U.S. temporarily. If no specific end-date to the period of authorized stay, then a temporary driver's license would be valid for one year. Renewals could only be granted upon presentation of valid documentary evidence that the status by which the applicant qualified for the temporary driver's license or temporary identification card has been extended by the Secretary of Homeland Security.
- Not later than September 11, 2005, each participating state would have to enter into a memorandum of understanding with the Secretary of Homeland Security to routinely utilize the automated system known as Systematic Alien Verification for Entitlements to verify the legal presence status of a person, other than a United States citizen, applying for a driver's license or identification card.
- Authorizes the Secretary of Homeland Security to further limit the validity period for driver's licenses and ID documents and to prescribe one or more design formats for such licenses and documents.
- Authorizes "such sums" to states for fiscal years 2005 to 2009 to meet the minimum driver's license and ID standards detailed in the bill. **To be eligible to receive federal grant money for meeting the minimum standards, a state**

~~would have to participate in the current interstate compact known as the “Driver License Agreement” to provide electronic access by a state to information contained in the motor vehicle databases of all other states. A state motor vehicle database would have to contain, at a minimum:~~

~~--All data fields printed on driver’s licenses and identification cards issued by the state; and~~

~~--Motor vehicle drivers’ histories, including motor vehicle violations, suspensions, and points on licenses.~~

- Makes it illegal to traffic in actual authentication features and devices for identity documents (it’s already illegal to traffic in fake authentication features and devices).
- Requires the Secretary of Homeland Security to enter into the appropriate aviation security screening database the appropriate background information of any person convicted of using a false driver’s license for the purpose of boarding an airplane.
- Requires DHS to report to Congress on the technology, equipment, and personnel needed to address border security for the U.S. (“such sums” authorized for FY2006-FY2011 for carrying out any recommendations) and requires DHS to develop and carry out a pilot program to identify and test ground surveillance technologies that will improve border security.
- Rests all authority to issue regulations, certify standards, and issue grants under this legislation in the Secretary of Homeland Security and only requires that the Secretary consult with the Secretary of Transportation and the states.

ADDITIONAL PROVISIONS:

Seasonal Workers.

(Changes made to the original Senate-passed [Mikulski] provision are shown below in red-bolded and shaded text)

- Under the direction of the Department of Labor (DOL), the H-2B visa program allows U.S. employers to hire foreign workers for temporary *nonagricultural* work, including one-time, seasonal, peak load or intermittent. Currently, 66,000 foreign workers are permitted each fiscal year (October 1st – September 30th) to receive the H-2B worker visas.
- According to various news reports, the 66,000-person H-2B visa cap had already been reached a little over five months into fiscal year 2004, and three months into fiscal year 2005. Because the law specifies that H-2B petitions (applications) may not be filed more than six months before the proposed employment will begin or the extension of stay is required, those employers needing seasonal workers for the spring and summer have been closed out of the FY05 cap.

Year	Current Law # of H-2B Visas	When Sen. Mikulski's Provision Becomes Law
FY04	66,000	66,000
FY05	66,000	66,000 + ("returning worker" who held an H-2B visa from either FY04, FY03, or FY02, as confirmed by the Departments of State or in certain circumstances, Homeland Security) ¹
FY06	66,000	66,000 + ("returning worker" who held an H-2B visa from either FY05, FY04, or FY03, as confirmed by the Departments of State or in certain circumstances, Homeland Security), of which no more than 33,000 may be granted in the first six months of the year ²
FY07	66,000	66,000, of which no more than 33,000 may be granted in the first six months of the year
FY08	66,000	66,000, of which no more than 33,000 may be granted in the first six months of the year

- This section adds a provision to 8 U.S.C. 1184, exempting (in FY05 and FY06) returning seasonal workers from being included in the 66,000 yearly H-2B visa limit, if they had served under an H-2B visa for any one of the previous three fiscal years, **as confirmed by the Departments of State or in certain circumstances, Homeland Security.** **The modification is retroactive to "October 1, 2004, and shall expire on October 1, 2006."** Thus, an individual who participated in the H-2B program in FY04, but has not already been accepted under the 66,000-person cap for FY05, will now be allowed in under this provision, after the Department has determined the individual was in fact a seasonal worker in one of the previous three years. **The Conference Report adds a new implementing section for the FY05 H-2B visa provision, which directs the Secretary of Homeland Security to "allocate [these] additional numbers for fiscal year 2005 based on statistical estimates and projections derived from Department of State data." In other words, the Secretary is directed to consider FY2005 projections of regional need for seasonal workers, in considering where to direct FY05 "returning workers" allowed in under the Mikulski amendment.**

¹ SEC. 7002. NUMERICAL LIMITATIONS ON H-2B WORKERS.

(a) In General.--Section 214(g) of the Immigration and Nationality Act (8 U.S.C. 1184(g)) is amended by adding at the end the following:

“(9) An alien counted toward the numerical limitations of paragraph (1)(B) **during any one of the 3 fiscal years prior to the submission of a petition** for a nonimmigrant worker described in section 101(a)(15)(H)(ii)(b) **may not be counted toward such limitation** for the fiscal year in which the petition is approved” (emphasis added).

² SEC. 7005. ALLOCATION OF H-2B VISAS DURING A FISCAL YEAR.

“(j) The numerical limitations of paragraph (1)(B) shall be allocated for a fiscal year so that the total number of aliens who enter the United States pursuant to a visa or other provision of nonimmigrant status under section 101(a)(15)(H)(ii)(b) during the first 6 months of such fiscal year is not more than 33,000.”

- **The Conference Report provides that within 14 days of enactment, the Secretary of Homeland Security would have to begin accepting and processing H-2B visa applications.**
- According to the House Judiciary Committee, **the Department of Homeland Security estimates that an additional 30,000 people a year, for the next two years, will be admitted under this expanded cap.**
- **The Conference Report defines the seasonal worker reapplying for H-2B visa status, who counts above the current-law 66,000 cap, as a “returning worker.”**
- **The Conference Report would add the following changes to the H-2B visa application for a returning worker:**
 - **“All information and evidence that the Secretary of Homeland Security determines is required;**
 - **“the full name of the alien; and**
 - **“a certification to the Department of Homeland Security that the alien is a returning worker.”**
- **The Conference Report outlines that a seasonal worker reapplying for H-2B visa status as “a returning worker shall be approved only if the alien is confirmed to be a returning worker by:**
 - **“the Department of State; or**
 - **“if the alien is visa exempt or seeking to change status under the H-2B visa, the Department of Homeland Security.”**
- A new \$150 “fraud prevention and detection fee” would be paid by employers filing H-2B petitions. The fee would be deposited into the Fraud Prevention and Detection Account (an account created in the FY05 Omnibus), to be used for “programs and activities to prevent and detect fraud with respect to” the H-2B program. The Secretary of Homeland Security could impose punishment upon H-2B visa employers for “failure to meet any of the conditions of the petition to admit or otherwise provide status” to an H-2B visa worker. If punishment is a monetary fine, it could not exceed \$10,000.
- The Conference Report would limit distribution of H-2B visas to “not more than 33,000” during the first six months of the fiscal year, to account for the seasonal workers who work in the spring and summer months.
- The Conference Report would clarify that the Secretary of Homeland Security would enforce these provisions and requires the Secretary of Homeland Security to report to Congress, no later than March 1, 2006, on a ~~quarterly~~ **semiannual** basis, outlining the following information for the previous year:
 - Number of aliens granted or terminated from H-2B status or terminated from H-2B status, on a ~~quarterly~~ **semiannual** basis;

- Countries of origin, occupations of, and compensation paid to aliens granted H-2B status; and
- Number of aliens expired and/or revoked from H-2B status during both the fiscal year reported and the preceding fiscal year, on an annual basis.

➤ **The Conference Report would exempt much of the authorities in this section from the requirements of the “Administrative Procedure Act or any other law relating to rulemaking, information collection or publication in the Federal Register...to the extent the Secretary Homeland Security, the Secretary of Labor, or in the Secretary of State determine that compliance with any such requirement would impede the expeditious implementation” of this section (emphasis added).**

Australian Visas.

- H-1B visas are available for workers coming temporarily to the United States to perform services in a specialty occupation, usually requiring a bachelor’s degree (or higher) in a specific specialty allowed under current law. The annual quota on H-1B visas is 65,000 (with certain recipients not counted towards the cap). The Conference Report would create a new "E-3" temporary work visa only for Australian nationals that would mirror the requirements of the H-1B program but would have a separate annual quota of 10,500 (plus the spouses and children of such aliens).

Nurses.

- The Conference Report would make up to 50,000 of unused immigrant visas (from fiscal years 2001-2004) available for aliens who have been approved for employment-based preference visas as nurses or physical therapists. These visas would remain available until exhausted. The 50,000 cap would NOT include accompanying or following family members of qualifying immigrants.

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