



# U.S. Immigration Policy on Haitian Migrants

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## Summary

The environmental, social, and political conditions in Haiti have long prompted congressional interest in U.S. policy on Haitian migrants, particularly those attempting to reach the United States by boat. While some observers assert that such arrivals by Haitians are a breach in border security, others maintain that these Haitians are asylum seekers following a decades old practice of Haitians coming by boat without legal immigration documents. Migrant interdiction and mandatory detention are key components of U.S. policy toward Haitian migrants, but human rights advocates express concern that Haitians are not afforded the same treatment as other asylum seekers.

The devastation caused by the January 12, 2010, earthquake in Haiti has led Department of Homeland Security (DHS) Secretary Janet Napolitano to grant Temporary Protected Status (TPS) to Haitians in the United States at the time of the earthquake. The scale of current humanitarian crisis—estimated thousands of Haitians dead and reported total collapse of the infrastructure in the capital city of Port au Prince—resulted in this TPS announcement on January 15, 2010.

More broadly, there are concerns that the crisis conditions in Haiti may result in mass migration from the island. Agencies within DHS that are the leads in handling a potential mass migration include the U.S. Coast Guard (interdiction); Customs and Border Protection (apprehensions and inspections); Immigration and Customs Enforcement (detention and removal); and the U.S. Citizenship and Immigration Services (credible fear determinations). The balancing of DHS's border security and immigration control responsibilities in the midst of a humanitarian disaster poses a challenge.

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## Current Context

The devastation caused by the January 12, 2010, earthquake in Haiti is focusing world attention on the humanitarian crisis and prompting U.S. leaders to reconsider current policies on Haitian migration.<sup>1</sup> Some Members of Congress have long criticized the interdiction and mandatory detention of Haitians who attempted to enter the United States without proper immigration documents as too harsh given country conditions. Proponents of immigration control policies have held sway for many years in large part because they argue that more lenient treatment of Haitians would serve as a magnet for illegal migration from the poorest nation in this hemisphere. Whether the balance should tip more toward humanitarian policies as a consequence of the earthquake is an issue before the 111<sup>th</sup> Congress.

## Immigration Trends

### Migration by Sea

The phenomenon of Haitians coming to the United States by boat without proper travel documents dates back at least to the 1970s. An estimated 25,000 Haitians were among the mass migration of over 150,000 asylum seekers who arrived in South Florida in 1980 during the Mariel boatlift.<sup>2</sup> The U.S. Coast Guard, as described below, has been interdicting vessels carrying Haitians since 1981. **Figure 1** presents the U.S. Coast Guard data on Haitian migrants that the Coast Guard has encountered on boats and rafts in the years following the Mariel boatlift. Most notably, there was a drop of migrants after the Haitian elections in 1990 followed by a dramatic upturn after the 1991 coup (discussed below). As country conditions in Haiti<sup>3</sup> and U.S. policy responses to the surges in Haitian boat people are considered, the spikes and valleys in **Figure 1** become more understandable. Since FY1998, the Coast Guard had interdicted over 1,000 Haitians each year, with 1,198 in FY2006 and 1,610 in FY2007. Haitian interdictions were second only to Cuban interdictions (2,868) in FY2007. In FY2009, interdictions of 1,782 Haitians led all other countries. As of January 12, 2010, the Coast Guard had interdicted 17 Haitians in FY2010.<sup>4</sup>

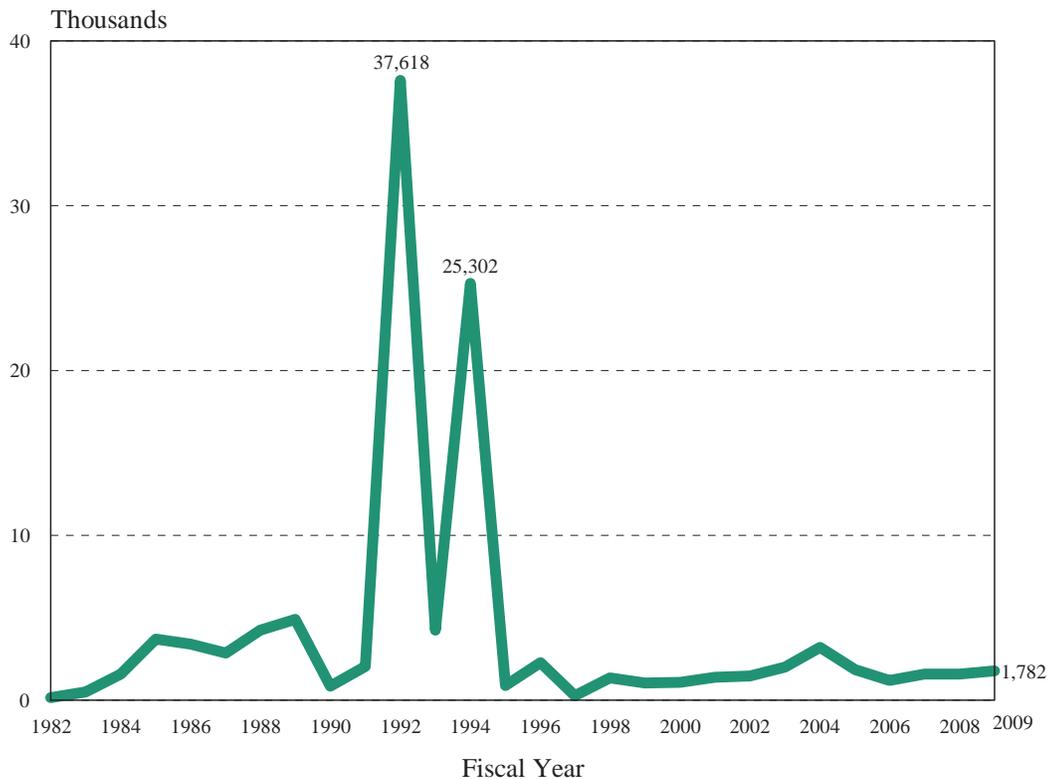
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<sup>1</sup> For further discussion on current conditions in Haiti, see CRS Report R40507, *Haiti: Current Conditions and Congressional Concerns*, by Maureen Taft-Morales.

<sup>2</sup> During a seven-month period in 1980, approximately 125,000 Cubans and 25,000 Haitians arrived by boats to South Florida. This mass migration became known as the Mariel boatlift because most of the Cubans departed from Mariel Harbor in Cuba.

<sup>3</sup> For historical analysis of conditions in Haiti, see CRS Report RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns*, by Maureen Taft-Morales and Clare Ribando Seelke.

<sup>4</sup> For interdiction data, see <http://www.uscg.mil/hq/cg531/AMIO/FlowStats/currentstats.asp>

**Figure I.U.S. Coast Guard Interdiction of Haitians, 1982-2009**

**Source:** CRS presentation of U.S. Coast Guard data.

Not all Haitian migrants are interdicted by the Coast Guard, as witnessed in the widely televised landing of over 200 Haitians in Biscayne Bay, Florida, in October 2002. Another noteworthy incident occurred in December 2001 when a boat bringing 167 Haitians ran aground in South Florida. In March 2007, the U.S. Border Patrol apprehended 100 Haitians who came ashore near Miami. During 2007, there were also reports of deaths at sea when boats with Haitians capsized or—in one report—caught fire.<sup>5</sup>

## Haitians Currently Residing in the United States

In the 2000 Decennial census of the U.S. population, there were 532,000 Haitians residing in the United States. According to Congressional Research Service estimates based on the 2006-2008 American Community Survey (a 1% sample of the U.S. population conducted by the Bureau of the Census), there were approximately 757,000 Haitians in the United States (margin of error is 15,366). These data do not indicate the immigration status of the Haitians.

During the period 2001-2008, there were 166,281 Haitian who became legal permanent residents (LPRs) in the United States, according to the Office of Immigration Statistics (OIS) in the

<sup>5</sup> Manuel Roig-Franzia, "20 Haitian Migrants Die at Sea; 58 Missing," *The Washington Post*, May 5, 2007, A12.

Department of Homeland Security (DHS).<sup>6</sup> Many of these Haitians adjusted to LPR status as a result of the Haitian Refugee Immigration Fairness Act of 1998, which is discussed more fully below.

There are currently no reliable estimates of Haitians residing in the United States without authorization (i.e., unauthorized aliens). The OIS estimates on unauthorized alien residents in 2008 do not include Haiti among the top 10 sending countries.<sup>7</sup>

## **Policy Evolution**

### **Post-Mariel Policy**

The Carter Administration labeled Haitians as well as Cubans who had come to the United States during the 1980 Mariel Boatlift as “Cuban-Haitian Entrants” and used the discretionary authority of the Attorney General to admit them. It appeared that the vast majority of Haitians who arrived in South Florida did not qualify for asylum according to the newly-enacted individualized definition of persecution in §207-208 of the Immigration and Nationality Act (INA, as amended by the Refugee Act of 1980).<sup>8</sup> Subsequently, an adjustment of status provision was included in the Immigration Reform and Control Act (IRCA) of 1986 that enabled Cuban-Haitian Entrants to become legal permanent residents (LPRs).<sup>9</sup>

### **Interdiction Agreement**

In 1981, the Reagan Administration reacted to the mass migration of asylum seekers who arrived in boats from Haiti by establishing a program to interdict (i.e., stop and search certain vessels suspected of transporting undocumented Haitians). This agreement, made with then-dictator Jean-Claude Duvalier, authorized the U.S. Coast Guard to board and inspect private Haitian vessels on the high seas and to interrogate the passengers. At that time, the United States generally viewed Haitian boat people as economic migrants deserting one of the poorest countries in the world.

Under the original agreement, an inspector from the former Immigration and Naturalization Service (INS) and Coast Guard official, working together, would check the immigration status of the passengers and return those passengers deemed to be undocumented Haitians. An alien in question must have volunteered information to the Coast Guard or INS inspector that she or he would be persecuted if returned to Haiti in order for the interdicted Haitian to be considered for asylum. Ultimately, INS would determine the immigration status of the alien in question. From 1981 through 1990, 22,940 Haitians were interdicted at sea. Of this number, INS considered 11 Haitians qualified to apply for asylum in the United States.

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<sup>6</sup> Department of Homeland Security Office of Immigration Statistics, *2008 Yearbook of Immigration Statistics*, August 2009.

<sup>7</sup> Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008*, by Michael Hofer, Nancy Rytina, and Bryan C. Baker, 2009.

<sup>8</sup> Aliens must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.

<sup>9</sup> §202 of the Immigration Reform and Control Act of 1986 (P.L. 99-603).

## Crisis After the Coup

The 1991 military *coup d'état* deposing Haiti's first democratically elected President, Jean Bertrand Aristide, however, challenged the assumption that all Haitian boat people were economic migrants. The State Department reportedly hesitated on whether the Haitians should be forced to return given the strong condemnation of the *coup* by the United States and the Organization of American States. By November 11, 1991, approximately 450 Haitians were being held on Coast Guard cutters while the administration of then-President George H. W. Bush considered the options. The former Bush Administration lobbied for a regional solution to the outflow of Haitian boat people, and the United Nations High Commissioner for Refugees (UNHCR) arranged for several countries in the region—Belize, Honduras, Trinidad and Tobago, and Venezuela—to temporarily provide a safe haven for Haitians interdicted by the Coast Guard. Some of the other countries in the region were each willing to provide safe haven for only several hundred Haitians. Meanwhile, the Coast Guard cutters were becoming severely overcrowded, and on November 18, 1991, the United States forcibly returned 538 Haitians to Haiti.

## Pre-Screening and Repatriation

The options for safe havens in third countries in the region proved inadequate for the sheer numbers of Haitians fleeing their country, and the George H. W. Bush Administration began treating the Haitians fleeing by boat as asylum seekers. The Coast Guard took them to the U.S. naval base in Guantanamo, Cuba, where they were pre-screened for asylum in the United States. During this period, there were approximately 10,490 Haitians who were paroled into the United States after a pre-screening interview at Guantanamo determined that they had a credible fear of persecution if returned to Haiti. On May 24, 1992, citing the surge of Haitians that month, then-President Bush ordered the Coast Guard to intercept all Haitians in boats and immediately return them without interviews to determine whether they were at risk of persecution. The Administration offered those repatriated the option of in-country refugee processing.<sup>10</sup>

## Safe Haven and Refugee Processing

The repatriation policy continued for two years, until then-President Bill Clinton announced that interdicted Haitians would be taken to a location in the region where they would be processed as potential refugees. The refugee processing policy lasted only a few weeks—June 15 to July 5, 1994. Much like the George H. W. Bush Administration, the Clinton Administration cited the exodus of Haitian boat people as a reason for suspending refugee processing. Instead, the new policy became one of regional “safe havens” where interdicted Haitians who expressed a fear of persecution could stay, but they would not be allowed to come to the United States. In 1993, in-country refugee processing was further expanded to Les Cayes and Cape Haiten. In December 1997, President Clinton instructed the Attorney General to grant deferred enforced departure (DED) to Haitians for one year. Currently interdicted Haitians who expressed a fear of persecution are taken for a credible fear hearing at the Guantanamo Bay detention center. If

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<sup>10</sup> CRS Report 93-233, *Asylum Seekers: Haitians in Comparative Context*, by Ruth Ellen Wasem. (Archived report available upon request.)

deemed a refugee, they are resettled in the third country. In 2005, only 9 of the 1,850 interdicted Haitians received a credible fear hearing and, of those—one man was granted refugee status.<sup>11</sup>

## **Haitian Refugee Immigration Fairness Act (HRIFA)**

When Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA) in November 1997 that enabled Nicaraguans and Cubans to become legal permanent residents and permitted certain unsuccessful Central American and East European asylum applicants to seek another form of immigration relief, it opted not to include Haitian asylum seekers. The following year, Congress enacted the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998 (S. 1504/H.R. 3049) that enabled Haitians who filed asylum claims or who were paroled into the United States before December 31, 1995, to adjust to legal permanent residence. HRIFA was added to the FY1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277) at the close of the 105<sup>th</sup> Congress.<sup>12</sup> P.L. 110-161 deleted the requirement that the Comptroller General of the United States submit to Congress a status report on HRIFA applications every six months.

## **Mandatory Detention of Aliens in Expedited Removal**

Since enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 (P.L. 104-208), aliens arriving in the United States without proper immigration documents are immediately placed in expedited removal. If an alien expresses a fear of being forced to return home, the immigration inspector refers the alien to a asylum officer who determines whether the person has a “credible fear.” IIRIRA requires that those aliens must be kept in detention while their “credible fear” cases are pending.<sup>13</sup> As a result, those Haitians who do make it to U.S. shores and do express a fear of repatriation are placed in detention. After the credible fear determination, the case is referred to an Executive Office for Immigration Review (EOIR) immigration judge for an asylum and removal hearing, (during which there is no statutory requirement that aliens be detained).

EOIR granted asylum to 570 Haitians and denied asylum to 2,522 Haitians in FY2006.<sup>14</sup> EOIR granted asylum to 587 Haitians in FY2007 and 510 Haitians in FY2008, an approval rate of 4.6% and 4.8% respectively.<sup>15</sup>

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<sup>11</sup> *Miami Herald*, “U.S. Policy Unjust to Haitians Fleeing Violence,” January 9, 2006; data confirmed in telephone conversation with DHS officials, January 12, 2006.

<sup>12</sup> CRS Report 98-270, *Immigration: Haitian Relief Issues and Legislation*, by Ruth Ellen Wasem. (Archived report available upon request.)

<sup>13</sup> CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

<sup>14</sup> U.S. Department of Justice, Executive Office for Immigration Review, *FY2006 Statistical Yearbook*.

<sup>15</sup> U.S. Department of Justice, Executive Office for Immigration Review, *FY2008 Statistical Yearbook*.

## Procedural Practices and Controversies

### National Security

The former INS published a notice clarifying that certain aliens arriving by sea who are not admitted or paroled are to be placed in expedited removal proceedings and detained (subject to humanitarian parole) in November 2002.<sup>16</sup> This notice concluded that illegal mass migration by sea threatened national security because it diverts the Coast Guard and other resources from their homeland security duties. Then-Attorney General John Ashcroft expanded on this rationale in his April 17, 2003 ruling that instructs EOIR immigration judges to consider “national security interests implicated by the encouragement of further unlawful mass migrations ...” in making bond determinations regarding release from detention of unauthorized migrants who arrive in “the United States by sea seeking to evade inspection.”<sup>17</sup> The case involved a Haitian who had come ashore in Biscayne Bay, Florida, on October 29, 2002, and had been released on bond by an immigration judge. EOIR’s Board of Immigration Appeals (BIA) had upheld his release, but the Attorney General vacated the BIA decision.<sup>18</sup>

### Parole from Detention

In 2002, DOJ acknowledged that it instructed field operations “to adjust parole criteria with respect to all inadmissible Haitians arriving in South Florida after December 3, 2001, and that none of them should be paroled without the approval of headquarters.”<sup>19</sup> The Administration of President George W. Bush maintained that paroling Haitians (as is typically done for aliens who meet the credible fear threshold) would encourage other Haitians to embark on the “risky sea travel” and “potentially trigger a mass asylum from Haiti to the United States.” The Bush Administration further argued that all migrants who arrive by sea posed a risk to national security and warned that terrorists may pose as Haitian asylum seekers. Critics of the Bush Administration’s Haitian parole policy focused on the 167 Haitians detained after their boat ran aground in South Florida on December 3, 2001, a majority of whom reportedly passed the initial credible fear hearing. Critics maintained that the Haitians were being singled out for more restrictive treatment.<sup>20</sup> They challenged the view that Haitians posed a risk to national security and asserted that the term was being construed too broadly, being applied arbitrarily to Haitians, and wasting limited resources.<sup>21</sup> OIS has reported that Haitians made up 2% of the 378,582 foreign nationals detained by DHS Immigration and Customs Enforcement in 2008.

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<sup>16</sup> *Federal Register*, vol. 67, no. 219, pp. 68923-68926 (November 13, 2002).

<sup>17</sup> 23 I&N December 572 (A.G. 2003).

<sup>18</sup> CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

<sup>19</sup> Letter from Daniel J. Bryant, Assistant Attorney General, to Sens. Edward Kennedy and Sam Brownback, dated September 25, 2002.

<sup>20</sup> U.S. Senate, Committee on the Judiciary, Subcommittee on Immigration, *Hearing on the Detention and Treatment of Haitian Asylum Seekers*, October 1, 2002. (Hereafter cited as Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*.)

<sup>21</sup> George Lardner Jr., “More Illegal Immigrants Can Be Held Ashcroft’s Ruling Cites National Security Issues,” *The Washington Post*, April 25, 2003, p. A6.

## Access to Legal Counsel

Concern also arose that the detention of Haitians interferes with access to legal counsel to aid with their asylum cases. According to congressional testimony, attorneys in South Florida for the detained Haitians maintained that they face various obstacles, including restricted hours to meet with clients and a serious lack of adequate visitation space. Pro bono lawyers working with Haitians argued that they experienced long delays waiting to see clients.<sup>22</sup> Others pointed out that the expedited removal provisions in INA were enacted to do just that—*expedite removals*. Aliens without proper immigration documents who try to enter the United States, they argued, should not be afforded the same procedural and legal rights as aliens who enter legally.

## Issues in 111<sup>th</sup> Congress

### Temporary Protected Status

The issue of Haitian TPS has arisen several times in the past few years, most notably after the U.S. Ambassador declared Haiti a disaster in September 2004 due to the magnitude of the effects of Tropical Storm Jeanne. More recently, a series of tropical cyclones in 2008 resulted in hundreds of deaths and led some to label the city of Gonaives uninhabitable.<sup>23</sup> The Administration of President George W. Bush did not grant TPS or other forms of blanket relief to Haitians, nor was legislation that would have provided TPS to Haitians, such as H.R. 522 in the 110<sup>th</sup> Congress, enacted. Opponents to Haitian TPS traditionally argue that it would result in an immigration amnesty for unauthorized Haitians and foster illegal migration from the island.

The scale of current humanitarian crisis—estimated thousands of Haitians dead and reported total collapse of the infrastructure in the capital city of Port au Prince—led DHS to announce on January 13, 2010, that it is temporarily halting the deportation of Haitians. “TPS is in the range of considerations we consider in a disaster,” stated DHS Deputy Press Secretary Matthew Chandler, “but our focus remains on saving lives.”<sup>24</sup> In the 111<sup>th</sup> Congress, Representative Alcee Hastings has introduced H.R. 144, which would make nationals from Haiti eligible for TPS status. H.R. 264, introduced by Representative Shelia Jackson-Lee, includes a sense of Congress that “the Secretary of Homeland Security should be more liberal with respect to Haiti in deciding whether to designate that country for temporary protected status....”

On January 15, 2010, DHS Secretary Napolitano granted TPS for 18 months to Haitian nationals who were in the United States as of January 12, 2010. She stated: “Providing a temporary refuge for Haitian nationals who are currently in the United States and whose personal safety would be endangered by returning to Haiti is part of this Administration’s continuing efforts to support Haiti’s recovery.”<sup>25</sup>

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<sup>22</sup> Senate Subcommittee on Immigration, *Hearing on Haitian Asylum Seekers*

<sup>23</sup> Trenton Daniel and Jacqueline Charles, “Mud and Misery Rule Storm-Ravaged City,” *Miami Herald*, November 2, 2008, p. A1.

<sup>24</sup> Toluse Olorunnipa and Alfonso Chardy, “U.S. Halts Deportation of Undocumented Haitians Due to Earthquake,” *Miami Herald*, January 13, 2010.

<sup>25</sup> U.S. Department of Homeland Security, “Statement from Secretary Janet Napolitano,” press release, January 15, 2010.

## **Possible Mass Migration**

There are growing concerns that the crisis conditions in Haiti may result in mass migration from the country. Not only has there been massive displacement of people caused by the earthquake, but observers of the situation warn of potential and widespread lawlessness as well as outbreaks of disease. These health, safety, and security factors—individually or in combination—could trigger an exodus of Haitians seeking refuge in nearby countries, including the United States. At least five federal agencies now handle Haitian migrants: DHS's Coast Guard (interdiction); Customs and Border Protection (apprehensions and inspections); Immigration and Customs Enforcement (detention); U.S. Citizenship and Immigration Services (credible fear determination); and DOJ's EOIR (asylum and removal hearings). DHS would take the lead in handling a potential mass migration and has long had a set of operational plans in place to respond to such a situation. In her TPS announcement, Secretary Napolitano warned of the consequences of Haitians fleeing to the United States.

At this moment of tragedy in Haiti it is tempting for people suffering in the aftermath of the earthquake to seek refuge elsewhere. But attempting to leave Haiti now will only bring more hardship to the Haitian people and nation.... It is important to note that TPS will apply only to those individuals who were in the United States as of January 12, 2010. Those who attempt to travel to the United States after January 12, 2010 will not be eligible for TPS and will be repatriated.<sup>26</sup>

The balancing of DHS's border security and immigration control responsibilities in the midst of a humanitarian disaster poses a unique challenge.

## **Status Adjustment**

Several versions of the legislation on comprehensive immigration reform that stalled in the Senate in June 2007 (e.g., S. 1348 and S. 1639) included provisions that would have enabled many of the Haitians in the United States without authorization to adjust to LPR status under certain circumstances and with some penalties. In the 110<sup>th</sup> Congress, H.R. 1645 also included provisions that would have allowed HRIFA adjustments to encompass a child of an applicant based on the child's age and status on October 21, 1998. H.R. 750 would have, among other things, authorized the adjustment of status for certain nationals or citizens of Haiti who are present in the United States. H.R. 454 would have amended HRIFA to provide that determinations with respect to children be made according to their age and status as of October 21, 1998; would have permitted an application based upon child status to be filed by a parent or guardian if the child is present in the United States on such filing date; and would have included document fraud among the grounds of inadmissibility, which would not have precluded an otherwise qualifying Haitian alien from permanent resident status adjustment. Many of these elements are included in a comprehensive immigration reform piece of legislation in the 111<sup>th</sup> Congress (H.R. 4321).

During the 110<sup>th</sup> Congress, §105 of the FY2008 Consolidated Appropriations Act (P.L. 110-161) continued the prohibition of the use of funds to provide visas to certain aliens who were involved in political violence in Haiti.

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<sup>26</sup> U.S. Department of Homeland Security, "Statement from Secretary Janet Napolitano," press release, January 15, 2010.

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