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Immigration, Border Security, and
Claims, Committee on the Judiciary,
House of Representatives

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IMMIGRATION BENEFITS

Circumstances under Which Petitioners' Sex Offenses May Be Disclosed to Beneficiaries



Highlights of [GAO-06-735](#), a report to the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

In fiscal year 2005, U.S. citizens and lawful permanent residents filed about 730,000 petitions with the U.S. Citizenship and Immigration Services (USCIS) to sponsor noncitizen family members, including spouses, fiancé(e)s, and children, to immigrate to the United States. Those doing the sponsoring are called petitioners; those benefiting from the sponsoring are called beneficiaries. If USCIS approves the petition, overseas beneficiaries must also file a visa application with the Department of State to enter the United States. In January 2002, USCIS started to conduct background security checks on all petitioners in addition to the beneficiaries. These background checks revealed that some of the petitioners had convictions for criminal sex offenses; further, some of those criminal sex offenders were filing family-based petitions for children (those under the age of 21). This report addresses the number of convicted sex offenders who filed family-based petitions in fiscal year 2005 based upon a computer match of USCIS data with individuals in the Federal Bureau of Investigation's National Sex Offender Registry and discusses USCIS's and the Department of State's framework for disclosing a sponsor's criminal sexual background to the beneficiary. DHS, the Department of State, and the Department of Justice reviewed a draft of this report. Only technical comments were provided and have been incorporated into this report.

www.gao.gov/cgi-bin/getrpt?GAO-06-735.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Paul Jones at (202) 512-8777 or jonespl@gao.gov.

IMMIGRATION BENEFITS

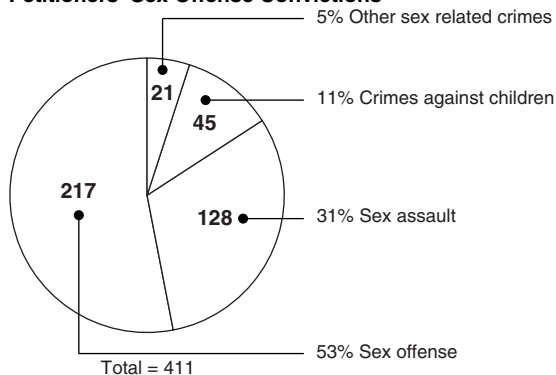
Circumstances under Which Petitioners' Sex Offenses May Be Disclosed to Beneficiaries

What GAO Found

At least 398 convicted sex offenders filed a total of 420 petitions in fiscal year 2005 for spouses, fiancé(e)s, children, and other relatives. Immigration law does not prohibit convicted sex offenders from petitioning to bring their spouses, fiancé(e)s, or children into the United States and generally USCIS cannot deny a petition based solely on the fact that the petitioner is a convicted sex offender. The sex offenders were convicted of at least 411 sex-related crimes, including sexual assault and rape, according to data in the Federal Bureau of Investigation's National Sex Offender Registry. At least 45 convictions involved crimes against children. While most beneficiaries were spouses and fiancé(e)s, criminal sex offenders petitioned for at least 60 children.

According to USCIS and Department of State officials, an exception to the Privacy Act of 1974 gives them authority to disclose a petitioner's criminal sex offender history if there are "compelling circumstances affecting the health and safety" of the beneficiary. For certain noncitizen beneficiaries, disclosure of the petitioner's criminal background information is now mandatory based on new authority granted to USCIS and the Department of State. The International Marriage Broker Regulation Act of 2005 (IMBRA) requires disclosure of a U.S. citizen's criminal background information, including sex crimes, to certain prospective immigrants, essentially noncitizen fiancé(e)s, but some spouses and minor children as well. Mandatory disclosure is not required for beneficiaries not covered by IMBRA, though these beneficiaries may receive information about a petitioner's criminal background on a discretionary basis under the Privacy Act exception. GAO estimates that IMBRA's mandatory disclosure requirement will cover about 20 percent of family-based beneficiaries based on fiscal year 2005 data. On May 3, 2006, USCIS issued interim guidance to its adjudicators on when it may be appropriate to disclose information related to a petitioner's criminal history under the "compelling circumstances" exception to the Privacy Act. USCIS plans to issue separate guidance related to disclosure requirements under IMBRA. Department of State officials said that they are preparing to issue Privacy Act disclosure guidance and are finalizing separate IMBRA disclosure guidance.

Petitioners' Sex Offense Convictions



Source: GAO analysis of USCIS and FBI data.

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Abbreviations

DHS	Department of Homeland Security
FBI	Federal Bureau of Investigation
FDU	Fraud Detection Unit
IMBRA	International Marriage Broker Regulation Act
IBIS	Interagency Border Inspection System
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
NCIC	National Crime Information Center
NSOR	National Sex Offender Registry
USCIS	U.S. Citizenship and Immigration Services

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United States Government Accountability Office
Washington, DC 20548

June 14, 2006

The Honorable John N. Hostettler
Chairman
The Honorable Sheila Jackson Lee
Ranking Minority Member
Subcommittee on Immigration, Border Security, and Claims
Committee on the Judiciary
House of Representatives

A U.S. citizen or lawful permanent resident, called the sponsor or petitioner, can file a petition with the U.S. Citizenship and Immigration Services (USCIS), within the Department of Homeland Security (DHS), to have noncitizen relatives, such as spouses or children, immigrate to the United States. In addition, U.S. citizens, but not lawful permanent residents, can petition for noncitizen fiancé(e)s and their children. If USCIS approves the petition, the noncitizen relative or fiancé(e), called the beneficiary, can then apply to enter or remain in the United States. If the beneficiary is overseas, the Department of State is responsible for determining whether to issue a visa. If the beneficiary is already in the United States in a nonimmigrant status, such as a visitor or student, he or she would apply to USCIS to change his/her status to that of lawful permanent resident. In fiscal year 2005, approximately 730,000 family-based petitions were filed with USCIS.¹ Among those filing family-based petitions were convicted sex offenders. The Immigration and Nationality Act does not prohibit convicted sex offenders from petitioning to bring their fiancé(e)s, spouses, or children into the United States, and their petitions may be approved despite their criminal sexual history. USCIS does not have general authority to deny a petition based solely on the fact that a petitioner may be a convicted sex offender. In cases where there is no other basis for denying a petition, USCIS or the State Department may be faced with the issue of whether, and under what circumstances, they can disclose the petitioner's criminal sexual history to a beneficiary consistent with any applicable privacy restrictions.

¹For the purposes of this report, we are considering petitions for family members and fiancé(e)s as family-based petitions.

Prior to September 11, 2001, the Immigration and Naturalization Service (INS), USCIS's predecessor, conducted background security checks on all beneficiaries applying to immigrate to the United States. In January 2002, INS instituted mandatory background checks on all beneficiaries and petitioners for all immigration benefits, including U.S. citizen petitioners. USCIS continues to conduct these checks. While these background checks were primarily instituted for national security and public safety reasons, such as identifying terrorists or terrorist threats, the checks revealed that some petitioners had criminal convictions, including convictions for criminal sex offenses. Some of these petitioners had petitioned for minor children, which the Immigration and Nationality Act generally defines as an unmarried child under 21 years old.²

You asked us to determine the number of convicted sex offenders who filed family-based petitions, and in particular petitions for children. You also expressed interest in understanding the circumstances surrounding possible disclosure of a petitioner's criminal sex offender history to the noncitizen beneficiary. This report addresses the following:

- the number of convicted sex offenders who filed family-based petitions in fiscal year 2005, and
- USCIS's and Department of State's framework for disclosing a sponsor's criminal sexual background to the noncitizen beneficiary.

To determine how many convicted sex offenders filed family-based petitions in fiscal year 2005, we conducted a computer match using data from USCIS's family-based petitions filed in fiscal year 2005 with data on individuals listed in the Federal Bureau of Investigation's (FBI) National Crime Information Center's (NCIC) National Sex Offender Registry (NSOR). The NSOR is a national database that compiles data furnished by the states from their sex offender registries. As of December 2005, the NSOR contained data on approximately 413,000 sex offenders. The FBI is required by federal law to maintain this registry to track the whereabouts and movement of convicted sex offenders who have been (1) convicted of a criminal offense against a victim who is a minor, (2) convicted of a sexually violent offense, or (3) who are "sexually violent predators."³ We

²8 U.S.C. § 1101(b)(1).

³The requirement to establish the registry appears at 42 U.S.C. § 14072(b). Detailed statutory definitions for the registry's three offense categories appear at 42 U.S.C. § 14071(a)(3).

matched several data elements that were the same in both data sets, such as name, date of birth, or Social Security number, to provide a high level of assurance that the petitioner in the USCIS database was the same person as the sex offender in the NSOR. We determined that the data we used from the USCIS database and the NSOR were sufficiently reliable for the purposes of this report. Appendix I contains a more detailed description of the scope and methodology of our computer match, including the data-matching criteria we used to decide whether the petitioner in the USCIS database was a match with the sex offender in the NSOR.

To determine USCIS's and the Department of State's framework for disclosing a sponsor's criminal sexual background to the noncitizen beneficiary, we reviewed relevant laws, including the International Marriage Broker Regulation Act (IMBRA) of 2005, the Immigration and Nationality Act, and the Privacy Act of 1974, as well as relevant regulations and policy guidelines. We also interviewed USCIS and Department of State officials and obtained each agency's written position regarding the scope of its authority to disclose a petitioner's criminal sex offender history to a beneficiary. We conducted our work from August 2005 through June 2006 in accordance with generally accepted government auditing standards.

Results in Brief

At least 398 convicted sex offenders filed petitions for spouses, fiancé(e)s, children (those under the age of 21), and other relatives in fiscal year 2005. They filed a total of 420 of the approximately 730,000 family-based petitions filed in fiscal year 2005. While most of the beneficiaries were spouses and fiancé(e)s, we determined that at least 60 were unmarried children under 21. Fourteen of the 398 sex offender petitioners were classified in the FBI's NSOR as sexually violent predators, defined in federal law as offenders who have been convicted of a sexually violent offense and are likely to engage in predatory sexually violent offenses again. At least 3 of the 14 sexual predators had filed petitions for children.

According to USCIS and Department of State officials, an exception to the Privacy Act of 1974 gives them authority to disclose a petitioner's criminal sexual history if there are "compelling circumstances affecting the health and safety" of the beneficiary. For certain noncitizen beneficiaries, disclosure of the petitioner's criminal background information is mandatory based on new authority granted to USCIS and the Department of State. IMBRA requires disclosure of a U.S. citizen's criminal background information, including sex crimes, to certain prospective immigrants, essentially noncitizen fiancé(e)s, but some spouses and children as well. Mandatory disclosure is not required for beneficiaries not covered by

IMBRA, though they may receive information about a petitioner's criminal background on a discretionary basis under the Privacy Act exception. We estimate that IMBRA's mandatory disclosure requirement will cover about 20 percent of family-based beneficiaries based on fiscal year 2005 data. On May 3, 2006, USCIS issued interim guidance to its adjudicators⁴ on when it may be appropriate to disclose information related to a petitioner's criminal background information under the "compelling circumstances" exception to the Privacy Act. This guidance also stated that USCIS will issue separate guidance related to disclosure requirements under IMBRA. The Department of State said that it is preparing to issue guidance related to its discretionary disclosure authority under the Privacy Act and plans to issue separate disclosure guidance with respect to disclosure requirements under IMBRA.

We provided a draft of this report to DHS, the Department of State, and the Attorney General for review. Only technical comments were provided, which we incorporated into our report as appropriate.

Background

The Immigration and Nationality Act (INA), as amended, is the primary body of law governing immigration and visa operations. Among other things, the INA defines the powers given to the Secretaries of State and Homeland Security⁵ and the consular and immigration officers who serve under them, delineates categories of and qualifications for immigrant and nonimmigrant visas, and provides a broad framework of operations through which foreign citizens are allowed to enter and immigrate to the United States. USCIS is generally responsible for administering the citizenship and immigration services of the United States. Most foreign nationals living abroad who wish to immigrate to the United States must obtain a visa through the Department of State's Bureau of Consular Affairs.

U.S. citizens and lawful permanent residents, that is, petitioners, can request or petition USCIS to allow certain relatives to immigrate to the

⁴Adjudicators determine eligibility for various types of immigration benefits, including permission for relatives to immigrate and permission to become U.S. citizens.

⁵The INA is deemed to refer to the Secretary of Homeland Security in describing those immigration functions, such as those performed by USCIS, which were transferred to the Secretary from the Attorney General under the Homeland Security Act of 2002. 6 U.S.C. § 557.

United States. As the first step in a two step process, petitioners must file a family-based petition with USCIS. U.S. citizens and lawful permanent residents may file a Form I-130 for an alien relative, such as a wife or child, to immigrate to the United States. U.S. citizens (but not lawful permanent residents) may also petition to bring a noncitizen fiancé(e) to the United States by filing a Form I-129F with USCIS.⁶ The I-129F or I-130 petitions may also list “derivative beneficiaries,” such as the beneficiary’s unmarried child under 21 years old, who are eligible to immigrate with the primary beneficiary. The purpose of these petitions is to establish the petitioner’s relationship to the family member or fiancé(e) who wishes to immigrate to the United States. USCIS adjudicators are to review petitions and make determinations, in accordance with immigration law, on whether to approve or deny petitions. If a petition is approved, the second step in the process is to determine whether the noncitizen is admissible under immigration law to enter or remain in the United States. If the noncitizen is overseas, USCIS will send the approved petition to the State Department and a State Department consular officer will determine whether to issue a visa to the noncitizen. If the noncitizen is already in the United States in a nonimmigrant status, such as a visitor or student, when the petition is approved, a USCIS adjudicator will determine whether to allow the noncitizen to change, or “adjust,” his/her status to that of a lawful permanent resident.

As part of its review, USCIS conducts background security checks on petitioners as well as noncitizen beneficiaries. These background checks were instituted for national security purposes such as identifying terrorists or terrorist threats, and for public safety reasons, such as identifying human rights violators or aggravated felons. According to USCIS officials, background security checks were conducted on all beneficiaries prior to September 11. As of January 2002, however, background security checks were required to be conducted on all petitioners, including U.S. citizens, as well as beneficiaries.

USCIS adjudicators conduct background security checks using the Interagency Border Inspection System (IBIS), which is a multi-agency computer system of lookouts for terrorists, drug traffickers, and other such criminal types. IBIS contains numerous database files and interfaces

⁶Because lawful permanent residents may not bring fiancé(e)s into the United States, they must file an I-130 petition for immigration of a spouse after the marriage.

with sources such as the FBI's National Crime Information Center.⁷ The NCIC contains various data, including data on violent gangs and terrorists, immigration violators, and the National Sex Offender Registry. During a background check, if an IBIS query returns a "hit" where the name and date of birth information entered returns a positive response from one or more of the databases, and it appears the petitioner may have a criminal background, USCIS adjudicators are to forward this information to a Fraud Detection and National Security (FDNS) officer within USCIS. FDNS officers are to conduct further system searches for verification of the criminal hits. After researching and summarizing the criminal data on the petitioner, FDNS officers are to notate their findings in a resolution memorandum and send the memo back to the adjudicator responsible for the file. Assuming the petitioner cannot be referred to law enforcement or, in the case of a lawful permanent resident, deported, the adjudicator then continues the review and accepts or denies the petition based on whether there appears to be a valid relationship between the petitioner and the beneficiary.

The FBI NCIC NSOR is a compilation of state registration information about sex offenders. The NSOR is statutorily mandated by the Pam Lychner Sexual Offender Tracking and Identification Act of 1996.⁸ The act directs the Attorney General to establish a national database at the FBI to track the whereabouts and movement of (1) each person who has been convicted of a "criminal offense against a victim who is a minor," (2) each person who has been convicted of a "sexually violent offense," and (3) each person who is determined to be a "sexually violent predator." As implemented, the NSOR is a nationwide system that links states' sex offender registration and notification programs. Each of the 50 states and the District of Columbia has created a sex offender registry based on the above three conviction categories and has established an interface with the FBI's national system in order to transmit state registry information to the national registry. State registries contain information on sex offenders

⁷The NCIC is a national database of documented criminal justice information and consists of 18 data files. The seven property files contain records for articles, boats, guns, license plates, securities, vehicles, and vehicle and boat parts. The 11 person files are the Convicted Sexual Offender Registry, Foreign Fugitive, Identity Theft, Immigration Violator, Missing Person, Protection Order, Supervised Release, Unidentified Person, U.S. Secret Service Protective, Violent Gang and Terrorist Organization, and Wanted Person Files. The Interstate Identification Index, which contains automated criminal history record information, is also accessible through the same network as the NCIC.

⁸Pub. L. No. 104-236, 110 Stat. 3093 (1996).

who are required to register and that reside, work, or attend school within the state.

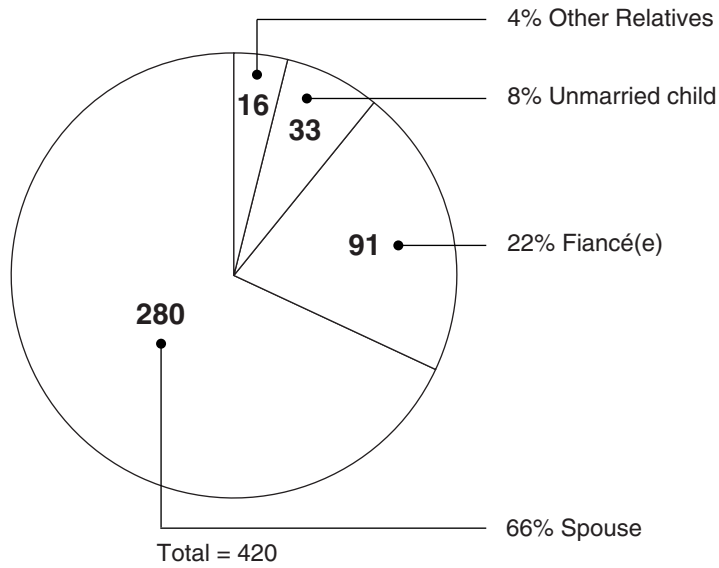
Hundreds of Convicted Sex Offenders Have Petitioned for Spouses, Fiancé(e)s, and other Relatives, including Children

At least 398 convicted sex offenders filed petitions for spouses, fiancé(e)s, children, and other relatives in fiscal year 2005 based upon matching several data elements from USCIS's database with data from FBI's National Sex Offender Registry. There may be additional convicted sex offenders who filed family-based petitions. For example, we could not determine with a high degree of confidence whether 53 petitioners that had the same name and date of birth as a person in the NSOR were the same individuals because there were no additional data items, such as Social Security number or address, that we could match. Therefore, we did not include these additional 53 petitioners in our count because it is possible that two people could have the same name and date of birth.

The 398 sex offenders filed a total of 420 petitions. Figure 1 shows the type of beneficiaries for which petitions were filed by convicted sex offenders. USCIS data indicate that 371 (88 percent) of the beneficiaries were spouses and fiancé(e)s, 33 (8 percent) were unmarried children under 21 years old, and 16 (4 percent) were classified as other relatives. We do not know, however, what percentage of unmarried children under 21 years old were minors under the federal criminal code, which defines a minor as under 18 years old for purposes of certain child sexual offenses.⁹ In addition, certain relatives of the primary beneficiary, such as unmarried children, under 21 years old, of the noncitizen spouse or fiancé(e), called derivative beneficiaries, may also immigrate with the beneficiary. However, USCIS's data system only includes information on the primary beneficiary, not on any derivative beneficiaries. Therefore, our data underestimate the actual number of beneficiaries. For example, in addition to the 33 unmarried children under 21 years of age that were the primary beneficiaries of sex offenders, the State Department provided us data from its visa processing system indicating that there were at least an additional 27 children who were derivative beneficiaries associated with fiancé(e) petitions. Both USCIS and State Department data together total at least 60 unmarried children under 21 years of age.

⁹18 U.S.C. § 2256(1).

Figure 1: Primary Beneficiaries Petitioned For by Convicted Sex Offenders in Fiscal Year 2005

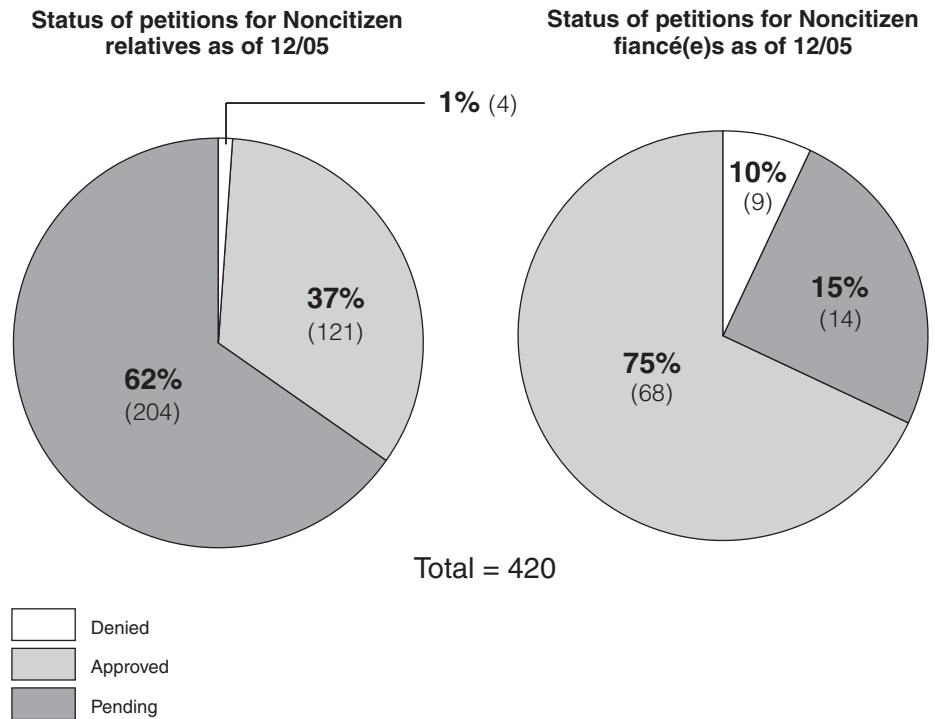


Source: GAO analysis of USCIS and FBI data.

Note: Total does not equal 100 percent because of rounding.

As of December 2005, the majority, or about 62 percent, of the petitions filed in fiscal year 2005 for noncitizen relatives—spouses, children, and other relatives—by petitioners with criminal sex offender backgrounds were still pending a decision; about 37 percent had been approved, and 1 percent had been denied. Most, or approximately 75 percent of, petitions filed by criminal sex offenders for fiancé(e)s had been approved (see fig. 2).

Figure 2: Status of Petitions Filed by Convicted Sex Offenders



Source: GAO analysis of USCIS and FBI data.

As shown in table 1, some of the sex offenders have been convicted of multiple sex crimes. The 398 sex offenders were convicted of at least 411 sex offenses, including sexual assault, rape, and child molestation, according to conviction data contained in the NSOR. At least 45 of the convictions were for sex offenses against children.¹⁰ It is possible that more than 45 convictions involved sex offenses against children, but this number could not be determined based on the conviction description in the registry. For example, the conviction description for 217 of the 411 convictions, or 53 percent, is “sex offense.” In addition, 14 petitioners were classified as sexual predators. Consistent with statute,¹¹ the NSOR classifies “sexual predator” as an offender who has been convicted of a sexually violent offense and suffers from a mental abnormality or

¹⁰The 45 convictions include sex offender--child fondling (35), statutory rape (7), sex assault--sodomy boy (1), incest with minor (1), and exploitation minor-photograph (1).

¹¹ 42 U.S.C. § 14071(a)(3)(C).

personality disorder that makes the person likely to engage in predatory sexually violent offenses again. These 14 sexual predators filed a total of 17 petitions. As of December 2005, 9 of the 17 petitions filed were approved and 8 were pending. Three of the 14 petitioners who were classified as sexual predators filed for unmarried children under 21 years old.

Table 1: Conviction Descriptions of 411 Sex Offenses Committed by the 398 Sex Offenders

Conviction description	Total
Sex offense	217
Sex assault	119
Sex offense—child fondling	35
Rape—strong arm	9
Sexual Assault—carnal abuse	9
Statutory rape—no force	7
Crimes against persons	4
Indecent exposure	3
Kidnapping	2
Obscene material possession	2
Sovereignty (restrict movement)	1
Sex assault—sodomy boy	1
Incest with minor	1
Exploitation minor—photograph	1
Total	411

Source: GAO analysis of USCIS and FBI data.

Note: Thirteen sex offenders had more than one conviction in the NSOR.

Convicted sex offenders are not prohibited by the INA from petitioning to bring their spouses, fiancé(e)s, or children into the United States. According to USCIS and the Department of State, neither agency has general authority to deny a petition or visa based solely on the fact that a petitioner may be a convicted sex offender. In a December 2005 letter to GAO, USCIS’s Acting Chief Counsel stated that USCIS may not reject or deny family-based petitions on the grounds that the petitioner has a criminal background, lacks good moral character, or other possible

negative factors.¹² The review and ultimately the approval of such petitions centers on whether the facts stated in the petition are true and whether there exists the requisite relationship between the petitioner and the beneficiary. It is possible that a petitioner's criminal history may be relevant to the question of whether the petitioner has established the requisite relationship. For example, a petitioner's conviction for fraud, bigamy, or alien smuggling would be relevant in determining whether a bona fide relationship exists between the petitioner and a noncitizen spouse beneficiary.

According to officials in the Department of State's Bureau of Consular Affairs, the Department of State cannot deny a visa to a noncitizen based solely on the fact that the petitioner is a convicted sex offender or has other criminal convictions. The review and ultimately the approval of a visa centers on whether the noncitizen is admissible under immigration law to enter the United States and on whether there exists the prerequisite relationship between the petitioner and the beneficiary. Therefore, consular officers have no legal basis to deny a visa to a noncitizen based solely on the fact that the petitioner has a criminal sexual background. In cases where there is no basis for denying a petition or visa, both the State Department and USCIS may be faced with the issue of whether, and under what circumstances, they can disclose the petitioner's criminal sexual history to a beneficiary consistent with any applicable privacy restrictions.

¹²While USCIS may not deny a petition based solely on the petitioner's criminal history, USCIS officials stated that they may commence removal proceedings if the petitioner is a lawful permanent resident who has been convicted of a sex offense that renders him or her removable from the United States. Section 237(a)(2) of the Immigration and Nationality Act contains a list of criminal offenses (such as moral turpitude) that could cause a person to lose his or her lawful permanent resident status. 8 U.S.C. § 1227(a)(2). However, deportation is not an option for U.S. citizens with criminal backgrounds.

Agencies Have a Framework for Disclosing Petitioners' Criminal Sexual History to Noncitizen Beneficiaries

According to both USCIS and Department of State officials, the compelling circumstances exception to the Privacy Act of 1974 provides authority to disclose a petitioner's criminal sexual history to a noncitizen beneficiary on a case-by-case basis. For certain noncitizen beneficiaries, disclosure of the petitioner's criminal background information is mandatory based on new authority granted to USCIS and the Department of State. The recently enacted International Marriage Broker Regulation Act (IMBRA) of 2005¹³ requires disclosure of a U.S. citizen's criminal background information, including sex crimes, to certain prospective immigrants, essentially noncitizen fiancé(e)s, but some spouses and children as well. USCIS must furnish this criminal background information to the Department of State for purposes of making IMBRA disclosures. On May 3, 2006, USCIS officials issued interim guidance to its adjudicators on making disclosures under the compelling circumstances exception to the Privacy Act and stated that USCIS would soon issue additional guidance with respect to IMBRA disclosures. The Department of State informed us that it is preparing to issue disclosure guidance to consular officers that will cover discretionary Privacy Act disclosures and that it is finalizing separate disclosure guidance with respect to the mandatory disclosures required under IMBRA, but this guidance cannot be issued until USCIS finalizes its IMBRA related procedures.

USCIS and the Department of State May Disclose a Petitioner's Criminal Sexual History to a Noncitizen Beneficiary Based on Their Interpretation of a Privacy Act Exception

The Privacy Act of 1974 states that, "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains."¹⁴ While information from the covered systems is generally not to be disclosed, there are 12 exceptions. One of these exceptions authorizes an agency to make a disclosure "to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual." Both USCIS and the Department of State have interpreted the compelling circumstances exception in the Privacy Act as

¹³IMBRA was enacted on January 5, 2006, as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006). The statute's IMBRA provisions are set forth in sections 831 through 834, and IMBRA citations in this report will identify the appropriate section.

¹⁴5 U.S.C. § 552a(b).

authority to permit the disclosure of a petitioner's criminal sexual history information.

In a December 2005 letter to GAO, USCIS's Acting Chief Counsel stated that if USCIS learns that a petitioner has a substantiated history of sexual assault or child molestation, then USCIS has the discretion in compelling circumstances to disclose that information to the beneficiary. On May 3, 2006, USCIS issued Privacy Act interim guidance advising adjudicators of when it may be appropriate to disclose a petitioner's criminal history involving violence or sex offenses to potential visa beneficiaries under the compelling circumstances exception. Generally, disclosure is limited to those portions of the petitioner's criminal history involving violence or sex offenses that are directly relevant to the "health and safety" of the potential beneficiary. As an example, the guidance provides that normally, "a conviction as a sexual predator should be considered a compelling circumstance affecting the health and safety of a child who would reside with the sexual predator." The guidance further states that any concerns about safety that adjudicators have that are outside the scope of the guidance should be brought to the attention of their supervisor.

According to Department of State officials, protecting the health or safety of a minor child would constitute compelling circumstances to disclose a petitioner's criminal sex offender background, though the exception might also apply in cases that did not involve a minor child. In a letter to GAO, the Chief, Advisory Opinions Branch, of the Department of State's Visa Office wrote, "the clear possibility of abuse that an immigrant child would face while living in the same household as a convicted sex offender provides a strong basis for applying the health and safety exception in these cases." The Department of State asserts that its position is "consistent with overall U.S. policy balancing the need to inform the public of the potential threat to a community posed by a child sex offender with the privacy interests of the offender." According to the Department, consular officials are to consult with the department's visa policy and legal staff prior to disclosure of a criminal record or other negative factors.

New Statute Requires Disclosure of Petitioner's Criminal Background Information to Some Noncitizen Beneficiaries

For certain noncitizen beneficiaries, disclosure of the petitioner's criminal background information is now mandatory based on new authority granted to USCIS and the Department of State. The recently enacted International Marriage Broker Regulation Act of 2005 requires disclosure of a U.S. citizen's criminal background information, including sex crimes, to certain prospective immigrants, essentially noncitizen fiancé(e)s, but

also some spouses and children (i.e., unmarried children under 21 years old who are derivatives of the primary beneficiary).

IMBRA mandates disclosure of a U.S. citizen's criminal history, including sex crimes, to certain prospective immigrants known as K nonimmigrant visa applicants,¹⁵ who are essentially noncitizen fiancé(e)s, but also some spouses and children. Obtaining a K visa allows the fiancé(e), spouse, or child to enter the United States as a nonimmigrant and then apply for immigrant (i.e., lawful permanent resident) status while in this country. Under section 832 of IMBRA, USCIS must revise its I-129F petition to require petitioners to disclose criminal background information for numerous specified crimes, including domestic violence, sexual assault, child abuse and neglect, and incest.¹⁶ Any criminal background information USCIS possesses with respect to the petitioner must accompany any approved petition that is forwarded to the Department of State.¹⁷ IMBRA goes on to provide: "The Secretary of State, in turn, shall share any such criminal background information that is in government records or databases with the K nonimmigrant visa applicant who is the beneficiary of the petition. The visa applicant shall be informed that such criminal background information is based on available records and may not be complete."¹⁸ To effectuate IMBRA's mandatory disclosure requirement, the Department of State must mail the visa applicant a copy of the petition,

¹⁵K nonimmigrant visa applicants are so called because they are defined by subparagraph (K) of section 101(a)(15) of the Immigration and Nationality Act (INA). In particular, a K nonimmigrant is one of the following: (1) a fiancé(e) of a U.S. citizen seeking to marry within 90 days of entering the United States; (2) the spouse of a U.S. citizen seeking to enter the United States as a nonimmigrant while awaiting the approval of an immigrant (i.e., lawful permanent resident) visa; or (3) the minor child (i.e., unmarried child under 21 years old) of the aforementioned fiancé(e) or spouse, who will be accompanying them to the United States. 8 U.S.C. § 1101(a)(15)(K), (b)(1).

¹⁶USCIS's revised I-129F petition is currently in draft form. As required by statute, the specified crimes that petitioners must report on their I-129F forms are domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, stalking, homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or at least three convictions for crimes relating to a controlled substance or alcohol not arising from a single act.

¹⁷IMBRA does not permit USCIS to conduct any new or additional criminal background check that is not otherwise conducted in the course of adjudicating petitions. IMBRA, section 833(a)(5)(A)(iii). On the basis of this restriction, USCIS officials said that petition background checks will be limited to IBIS.

¹⁸IMBRA, section 833(a)(5)(A)(iii).

including any criminal background information, as well as a government-developed domestic violence information pamphlet.¹⁹ Supplementing the disclosure by mail, IMBRA also requires Department of State consular officers to “provide for the disclosure of such criminal background information to the visa applicant at the consular interview in the primary language of the visa applicant.”²⁰

IMBRA’s mandatory disclosure requirement only extends to fiancé(e)s, spouses, and their minor children (i.e., unmarried children under 21 years old), who are sponsored by U.S. citizens and enter the United States on a K nonimmigrant visa issued by the Department of State. IMBRA’s mandatory disclosure requirement does not cover (1) the spouses and minor children of lawful permanent residents, who do not have the option of entering the United States using a K visa; (2) the spouses and minor children of U.S. citizens who enter the United States on an immigrant visa; or (3) any noncitizen already in the United States applying directly to USCIS for immigrant status.²¹ According to the data we reviewed, most noncitizens entering under family-based petitions will not be covered by IMBRA’s mandatory disclosure requirement. In fiscal year 2005, about 80 percent of all family-based petitions filed were for other than K visas.

USCIS and Department of State Efforts to Issue Disclosure Guidance

USCIS issued interim guidance related to Privacy Act disclosures on May 3, 2006. The guidance advises adjudicators of when “compelling circumstances” may exist to disclose a petitioner’s criminal history involving violence or sex offenses: for example, protecting the health and safety of a child beneficiary who would reside with a sexual predator would normally constitute a compelling circumstance to make a

¹⁹ IMBRA, section 833(a)(5)(A). IMBRA charges the Secretary of Homeland Security with developing the domestic violence information pamphlet, in consultation with the Attorney General, the Secretary of State, and nongovernmental organizations with expertise on the legal rights of immigrant victims of battery, extreme cruelty, sexual assault, and other crimes. The pamphlet must describe the legal rights and resources for immigrant victims of domestic violence and must be translated by the State Department into the languages having the greatest concentration of K nonimmigrant visa applicants. IMBRA, section 833(a)(1), (4). IMBRA required the pamphlet to be available for distribution in the required translations by May 5, 2006 (120 days after IMBRA’s January 5 enactment). IMBRA, section 833(a)(6). However, at the time of this report, the pamphlet was still in draft form.

²⁰ IMBRA, section 833(a)(5)(A)(iii).

²¹ The legislative history does not explain why Congress limited IMBRA’s mandatory disclosure requirement to K nonimmigrants. See H.R. Rep. No. 109-233, at 117, 121 (2005).

disclosure. The guidance states that disclosure should be limited only to those portions of the petitioner's criminal history that are directly relevant to the health and safety of the potential beneficiary. The guidance also contains Privacy Act procedures that adjudicators must follow when they make a disclosure, such as providing written notice of the disclosure to the petitioner and annotating the USCIS file to maintain a record of the disclosure and the justification for it. When the beneficiary is within USCIS's jurisdiction, the guidance informs adjudicators to make disclosures during in-person interviews with the beneficiary. When the beneficiary is abroad, the guidance requires the adjudicator to provide to the State Department any adverse information that might affect the health or safety of a beneficiary to enable the State Department to make a decision regarding disclosure.

USCIS's interim guidance related to Privacy Act disclosure states that USCIS will issue separate guidance addressing the special procedures adjudicators must follow with respect to I-129F petitions. As previously discussed, to meet IMBRA requirements, USCIS must revise its I-129F petition to require petitioners to disclose criminal background information for numerous specified crimes, including sex offenses. Any criminal background information USCIS possesses with respect to the petitioner must accompany any approved petition that is forwarded to the State Department to enable the State Department to effectuate IMBRA's mandatory disclosure requirement. IMBRA mandated that USCIS revise its I-129F petition by March 6, 2006 (60 days after IMBRA's January 5 enactment).²² USCIS has not yet revised the petition. USCIS officials told us that they have been reviewing and consolidating suggested revisions to the I-129F, including IMBRA-related changes, and expect publication of the new Form I-129F in the *Federal Register* in mid-June 2006.

Department of State officials told us that they had drafted guidance for consular officers that addresses the disclosure of a petitioner's criminal sexual offender background under the compelling circumstances exception to the Privacy Act. According to the Department of State, the draft guidance was essentially ready for issuance when IMBRA, which mandates disclosure of a petitioner's criminal history to certain beneficiaries, was enacted. As a result, it decided to revise its draft guidance to take the new statutory requirements into account. The officials said that they are preparing to issue disclosure guidance to

²²IMBRA, section 832(a)(3).

consular officers that will cover discretionary Privacy Act disclosures not covered under IMBRA and are finalizing separate guidance with regard to the mandatory disclosures required under IMBRA. However, according to State Department officials, the IMBRA-related guidance cannot be issued until USCIS finalizes its IMBRA procedures, including revising the I-129F petition.

Concluding Observations

Convicted sex offenders can sponsor noncitizen relatives, such as spouses, fiancé(e)s, and children, for entry into the United States. Not all beneficiaries may know that their petitioner has a criminal sex offender history that may put the beneficiary at risk. Recently enacted legislation has mitigated this risk for certain beneficiaries by requiring the State Department, in cooperation with USCIS, to disclose the petitioner's criminal background information, including sex crimes. Both agencies said that they plan to issue guidance on the new mandatory disclosure requirement. For beneficiaries who are not covered by the mandatory disclosure requirement, both USCIS and the State Department interpret a Privacy Act exception as giving them discretion to disclose a petitioner's criminal sexual history based on "compelling circumstances affecting the health or safety" of the beneficiary. Until recently, neither agency had issued guidance on this authority, but USCIS has now issued interim guidance to its adjudicators addressing compelling circumstance disclosures, and the State Department is preparing to issue its guidance to consular officers regarding discretionary Privacy Act disclosures not covered by IMBRA. On the basis of the agencies' Privacy Act guidance, beneficiaries who are not statutorily protected by the mandatory disclosure requirement may nevertheless be informed of their petitioners' criminal sexual history and the possible risk to their safety.

Agency Comments

We requested comments on a draft of this report from the Secretaries of Homeland Security and State and the Attorney General. None of these officials provided formal comments. However, representatives from each of these departments provided technical comments which we incorporated into this report, as appropriate.

We are sending copies of this report to the Secretaries of Homeland Security and State, the Attorney General, and interested congressional committees. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me at (202) 512-8777 or Jonespl@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix II.



Paul L. Jones
Director, Homeland Security
and Justice Issues

Appendix I: Scope and Methodology

To identify the number of convicted sex offenders who filed family-based petitions, we conducted a computer match of U.S. Citizenship and Immigration Services (USCIS) family-based petitioner data with data on individuals contained in the Federal Bureau of Investigation's (FBI) National Crime Information Center (NCIC) Convicted Sexual Offender Registry File, known as the National Sex Offender Registry. The USCIS petitioner data file contained records on 667,023 individuals who filed petitions for noncitizen relatives, such as a spouse or child, and 66,658 individuals who filed petitions for noncitizen fiancé(e)s in fiscal year 2005. The FBI's NCIC National Sex Offender Registry contained data on the 412,773 convicted sex offenders as of December 2005.

The USCIS and FBI data files contained seven common data elements: (1) name (2) date of birth, (3) Social Security number, (4) street address, (5) city, (6) state, and (7) ZIP code that we could attempt to match in order to determine which petitioners were registered sex offenders. The name and date of birth were always present in both datasets, but in some cases the other data elements in either the USCIS or FBI dataset were either missing or not entered correctly. In order to increase the possibility of a valid match, we first applied acceptable data-cleaning steps. For example, we eliminated certain extraneous characters from the names and addresses, such as dashes, periods and hyphens and other nonessential characters that would otherwise impede our matching. In addition, we corrected for certain obvious typographical errors, such as typing a zero instead of the letter O.

We conducted our match in two steps. In the first step, we matched cases on name and Social Security number since the Social Security number is considered a unique identifier. For our purposes, if the name and Social Security number were the same in both cases, we considered it a match. In the second step, after eliminating those we matched based on name and Social Security number, we matched the remaining records on name and date of birth. It is possible for two people to have the same name and date of birth. Therefore, to be deemed a match for our purposes, the name, date of birth, and several data elements needed to match to provide a high level of assurance that the petitioner and the registered sex offender were the same person. For example, if the name, date of birth and street address, city, and ZIP code were the same, we considered it a match. We also analyzed the USCIS data set to determine the number of petitioners that may have filed more than one petition to arrive at the number of unique sex offenders.

To determine the reliability of the USCIS data, we observed how petitioner data are entered into the USCIS data system, interviewed relevant USCIS officials and staff, reviewed pertinent documents, and performed electronic testing for obvious errors in accuracy and completeness. To determine the reliability of the FBI's Convicted Sexual Offender Registry File, we interviewed FBI officials and system programmers knowledgeable about the data, reviewed pertinent information regarding the FBI's sex offender registry, and performed electronic testing for obvious errors in accuracy and completeness. We determined that the data were sufficiently reliable for the purposes of this report.

We conducted our work from August 2005 through June 2006 in accordance with generally accepted government auditing standards.

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

Paul L. Jones, (202) 512-8777

Staff Acknowledgments

In addition to the above, Michael Dino, Assistant Director, Carla Brown, Christine Davis, Katherine Davis, Darryl Dutton, Lemuel Jackson, and James Ungvarsky were key contributors to this report.

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