

NATIONAL ORIGIN-BASED ANTIDISCRIMINATION FOR
NONIMMIGRANTS ACT

MARCH 5, 2020.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2214]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 2214) to transfer and limit Executive Branch authority to
suspend or restrict the entry of a class of aliens, having considered
the same, reports favorably thereon with an amendment and rec-
ommends that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLES.

This Act may be cited as the “National Origin-Based Antidiscrimination for Non-immigrants Act” or the “NO BAN Act”.

SEC. 2. EXPANSION OF NONDISCRIMINATION PROVISION.

Section 202(a)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1152(a)(1)(A)) is amended—

- (1) by inserting “or a nonimmigrant visa, admission or other entry into the United States, or the approval or revocation of any immigration benefit” after “immigrant visa”;
- (2) by inserting “religion,” after “sex,”; and
- (3) by inserting “, except if expressly required by statute, or if a statutorily authorized benefit takes into consideration such factors” before the period at the end.

SEC. 3. TRANSFER AND LIMITATIONS ON AUTHORITY TO SUSPEND OR RESTRICT THE ENTRY OF A CLASS OF ALIENS.

Section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)) is amended to read as follows:

“(f) AUTHORITY TO SUSPEND OR RESTRICT THE ENTRY OF A CLASS OF ALIENS.—

“(1) IN GENERAL.—Subject to paragraph (2), if the Secretary of State, in consultation with the Secretary of Homeland Security, determines, based on specific and credible facts, that the entry of any aliens or any class of aliens into the United States would undermine the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability, the President may temporarily—

“(A) suspend the entry of such aliens or class of aliens as immigrants or nonimmigrants; or

“(B) impose any restrictions on the entry of such aliens that the President deems appropriate.

“(2) LIMITATIONS.—In carrying out paragraph (1), the President, the Secretary of State, and the Secretary of Homeland Security shall—

“(A) only issue a suspension or restriction when required to address specific acts implicating a compelling government interest in a factor identified in paragraph (1);

“(B) narrowly tailor the suspension or restriction, using the least restrictive means, to achieve such compelling government interest;

“(C) specify the duration of the suspension or restriction; and

“(D) consider waivers to any class-based restriction or suspension and apply a rebuttable presumption in favor of granting family-based and humanitarian waivers.

“(3) CONGRESSIONAL NOTIFICATION.—

“(A) IN GENERAL.—Prior to the President exercising the authority under paragraph (1), the Secretary of State and the Secretary of Homeland Security shall consult Congress and provide Congress with specific evidence supporting the need for the suspension or restriction and its proposed duration.

“(B) BRIEFING AND REPORT.—Not later than 48 hours after the President exercises the authority under paragraph (1), the Secretary of State and the Secretary of Homeland Security shall provide a briefing and submit a written report to Congress that describes—

“(i) the action taken pursuant to paragraph (1) and the specified objective of such action;

“(ii) the estimated number of individuals who will be impacted by such action;

“(iii) the constitutional and legislative authority under which such action took place; and

“(iv) the circumstances necessitating such action, including how such action complies with paragraph (2), as well as any intelligence informing such actions.

“(C) TERMINATION.—If the briefing and report described in subparagraph (B) are not provided to Congress during the 48 hours that begin when the President exercises the authority under paragraph (1), the suspension or restriction shall immediately terminate absent intervening congressional action.

“(D) CONGRESSIONAL COMMITTEES.—The term ‘Congress’, as used in this paragraph, refers to the Select Committee on Intelligence of the Senate, the Committee on Foreign Relations of the Senate, the Committee on the Judiciary of the Senate, the Committee on Homeland Security and Governmental Affairs of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on Foreign Affairs

of the House of Representatives, the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security of the House of Representatives.

“(4) PUBLICATION.—The Secretary of State and the Secretary of Homeland Security shall publicly announce and publish an unclassified version of the report described in paragraph (3)(B) in the Federal Register.

“(5) JUDICIAL REVIEW.—

“(A) IN GENERAL.—Notwithstanding any other provision of law, an individual or entity who is present in the United States and has been harmed by a violation of this subsection may file an action in an appropriate district court of the United States to seek declaratory or injunctive relief.

“(B) CLASS ACTION.—Nothing in this Act may be construed to preclude an action filed pursuant to subparagraph (A) from proceeding as a class action.

“(6) TREATMENT OF COMMERCIAL AIRLINES.—Whenever the Secretary of Homeland Security finds that a commercial airline has failed to comply with regulations of the Secretary of Homeland Security relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Secretary of Homeland Security may suspend the entry of some or all aliens transported to the United States by such airline.

“(7) RULE OF CONSTRUCTION.—Nothing in this section may be construed as authorizing the President, the Secretary of State, or the Secretary of Homeland Security to act in a manner inconsistent with the policy decisions expressed in the immigration laws.”.

SEC. 4. TERMINATION OF CERTAIN EXECUTIVE ACTIONS.

(a) TERMINATION.—Presidential Proclamations 9645, 9822, and 9983 and Executive Orders 13769, 13780, and 13815 shall be void beginning on the date of the enactment of this Act.

(b) EFFECT.—All actions taken pursuant to any proclamation or executive order terminated under subsection (a) shall cease on the date of the enactment of this Act.

SEC. 5. VISA APPLICANTS REPORT.

(a) INITIAL REPORTS.—

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary of State, in coordination with the Secretary of Homeland Security and the heads of other relevant Federal agencies, shall submit a report to the congressional committees referred to in section 212(f)(3)(D) of the Immigration and Nationality Act, as amended by section 3 of this Act, that describes the implementation of each of the presidential proclamations and executive orders referred to in section 4.

(2) PRESIDENTIAL PROCLAMATION 9645 AND 9983.—In addition to the content described in paragraph (1), the report submitted with respect to Presidential Proclamation 9645, issued on September 24, 2017, and Presidential Proclamation 9983, issued on January 31, 2020, shall include, for each country listed in such proclamation—

(A) the total number of individuals who applied for a visa during the time period the proclamation was in effect, disaggregated by country and visa category;

(B) the total number of visa applicants described in subparagraph (A) who were approved, disaggregated by country and visa category;

(C) the total number of visa applicants described in subparagraph (A) who were refused, disaggregated by country and visa category, and the reasons they were refused;

(D) the total number of visa applicants described in subparagraph (A) whose applications remain pending, disaggregated by country and visa category;

(E) the total number of visa applicants described in subparagraph (A) who were granted a waiver, disaggregated by country and visa category;

(F) the total number of visa applicants described in subparagraph (A) who were denied a waiver, disaggregated by country and visa category, and the reasons such waiver requests were denied;

(G) the total number of refugees admitted, disaggregated by country; and

(H) the complete reports that have been submitted to the President every 180 days in accordance with section 4 of Presidential Proclamation 9645 in its original form, and as amended by Presidential Proclamation 9983.

(b) ADDITIONAL REPORTS.—Not later than 30 days after the date on which the President exercises the authority under section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)), as amended by section 3 of this Act, and every 30 days thereafter, the Secretary of State, in coordination with the Secretary of Home-

land Security and heads of other relevant Federal agencies, shall submit a report to the congressional committees referred to in paragraph (3)(D) of such section 212(f) that identifies, with respect to countries affected by a suspension or restriction, the information described in subparagraphs (A) through (H) of subsection (a)(2) of this section and specific evidence supporting the need for the continued exercise of presidential authority under such section 212(f), including the information described in paragraph (3)(B) of such section 212(f). If the report described in this subsection is not provided to Congress in the time specified, the suspension or restriction shall immediately terminate absent intervening congressional action. A final report with such information shall be prepared and submitted to such congressional committees not later than 30 days after the suspension or restriction is lifted.

(c) FORM; AVAILABILITY.—The reports required under subsections (a) and (b) shall be made publicly available online in unclassified form.

Purpose and Summary

H.R. 2214, the “National Origin-Based Antidiscrimination for Nonimmigrants Act” or the “NO BAN Act,” stops executive overreach by preventing the president from abusing his authority to restrict the entry of non-citizens into the United States. The bill does this in three ways. First, it amends section 212(f) of the Immigration and Nationality Act (INA) to place checks and balances on the president’s authority to suspend or restrict the entry of aliens or classes of aliens into the United States, when it is determined that such entry would be “detrimental to the interests of the United States.” Second, the bill expands the INA’s nondiscrimination provision to prohibit discrimination on the basis of religion and further prohibits discrimination with respect to the issuance of non-immigrant visas, entry and admission into the United States, or the approval or revocation of any immigration benefit. Finally, the bill terminates several of President Trump’s proclamations and executive orders invoking section 212(f) authority, including Presidential Proclamation 9645, also known as the “Muslim Ban,” and Presidential Proclamation 9983, barring the entry of immigrants from Burma (Myanmar), Eritrea, Kyrgyzstan, and Nigeria, and suspending participation in the Diversity Visa program for nationals of Sudan and Tanzania.

Background and Need for the Legislation

On the campaign trail, then-presidential candidate Donald J. Trump promised “a total and complete shutdown of Muslims entering the United States.”¹ One week after his inauguration, President Trump attempted to partially fulfill that promise by issuing Executive Order (EO) 13769, the first of three versions of the “Muslim Ban.” Following numerous court challenges, EO 13769 was soon replaced by EO 13780, which was followed by Presidential Proclamation 9645. These different iterations relied on evolving yet vague national security justifications to legitimize the President’s actions. Proclamation 9645 was ultimately upheld by the Supreme Court in a 5–4 opinion, with vigorous dissents by Justices Breyer and Sotomayor.²

¹Jessica Taylor, *Trump Calls For ‘Total and Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s>; see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (Sotomayor, J., dissenting).

²*Trump v. Hawaii*, 138 S. Ct. 2392.

MUSLIM BAN I: EXECUTIVE ORDER 13769

On January 27, 2017, President Trump issued EO 13769,³ suspending the entry of nationals of seven Muslim majority countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—for at least 90 days.⁴ In addition, the EO suspended all refugee resettlement for 120 days (with an exception for certain religious minorities), and indefinitely banned the processing and entry of Syrian refugees.

As a result of the Administration’s hasty and mismanaged rollout of EO 13769, widespread chaos unfolded at airports across the nation. Individuals arriving from banned countries were suddenly detained at airports for hours, and many were sent back to their home countries. Tens of thousands of individuals—including lawyers, legal observers, and civil rights activists—flooded airports to support impacted individuals and protest the Administration’s policy.⁵ Additionally, numerous civil rights and immigrant rights organizations, as well as individual states, quickly filed lawsuits challenging the EO, arguing that it was unconstitutional and contrary to the INA.⁶ In the days that followed, several courts issued orders blocking the federal government from continuing to implement the EO.⁷

A Department of Homeland Security (DHS) Inspector General report released on the one-year anniversary of the ban confirmed that the chaos extended well-beyond the airports, with “practically no advance notice” given to DHS and other agencies charged with implementing the EO.⁸ The Inspector General found that DHS, and specifically U.S. Customs and Border Protection (CBP)—the agency primarily responsible for implementation—was “caught by surprise,” and all agencies were forced to “improvise policies and procedures in real time.”⁹ In addition, CBP violated at least two court orders by ordering airlines to prevent passengers from boarding their flights at overseas airports, even after the EO had been enjoined.¹⁰ The Inspector General concluded that CBP’s “highly aggressive stance in light of” the court orders was “questionable” and “troubling.”¹¹

³ Exec. Order No. 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>.

⁴ Michael D. Shear & Helen Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html>.

⁵ Wesley Lowery & Josh Dawsey, *Early Chaos of Trump’s Travel Ban Set Stage For a Year of Immigration Policy Debates*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/national/early-chaos-of-trumps-travel-ban-set-stage-for-a-year-of-immigration-policy-debates/2018/02/06/f5386128-01d0-11e8-8acf-ad2991367d9d_story.html; Abigail Williams & Adam Edelman, *Lawyers, Activists Gear Up for Travel Ban Airport Issues*, NBC NEWS (June 29, 2017), <https://www.nbcnews.com/politics/donald-trump/u-s-defines-who-can-enter-under-travel-ban-n778031>.

⁶ Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-debated-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>.

⁷ See e.g. *Washington v. Trump*, 2017 U.S. Dist. Lexis 16012 (Feb. 3, 2017).

⁸ U.S. Dep’t of Homeland Sec., Off. of Inspector Gen., *DHS Implementation of Executive Order #13769 “Protecting the Nation From Foreign Terrorist Entry Into the United States” (January 27, 2017)* at 5 (Jan. 18, 2018), www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf.

⁹ *Id.* at 5.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 6–7, 66, 79.

MUSLIM BAN II: EXECUTIVE ORDER 13780

On March 6, 2017, President Trump rescinded Executive Order 13769 and issued Executive Order 13780, a revised version of the ban that (1) suspended the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days; (2) removed Iraq from the list of covered countries, but subjected Iraqi nationals to heightened vetting; (3) suspended the refugee resettlement process for 120 days worldwide; and (4) required several federal agencies to conduct a “worldwide review” of visa processes and policies.¹²

As with the prior EO, advocates immediately filed legal challenges to EO 13780, with courts in Maryland and Hawai‘i ultimately enjoining the Administration from implementing it.¹³ However, in June 2017, the Supreme Court narrowed the scope of the injunctions, allowing the ban to go into effect against persons “who lack any bona fide relationship with a person or entity in the United States.”¹⁴

MUSLIM BAN III: PRESIDENTIAL PROCLAMATION 9645

The Ban

On September 24, 2017, the same day that Executive Order 13780 expired, President Trump issued Presidential Proclamation 9645. Although the policies and procedures articulated in the Proclamation were similar to those in EO 13780, the Proclamation imposed entry restrictions on nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen, and made such restrictions indefinite.¹⁵ On April 10, 2018, the Administration announced that Chad had made significant improvements to its information sharing protocols and lifted the travel restrictions on nationals of Chad.¹⁶ Although this version of the ban was also challenged and enjoined by multiple federal courts, the Supreme Court ultimately allowed it to take effect in *Trump v. Hawai‘i* upon determining that Proclamation 9645 did not violate the INA and likely did not violate the Constitution.¹⁷

¹² Exec. Order No. 13780, *Protecting the Nation from Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 13209 (Mar. 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

¹³ See *Hawai‘i v. Trump*, 1:17-cv-00050-DKW-KSC (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 8:17-cv-00361-TDC (D. Md. 2017).

¹⁴ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

¹⁵ Presidential Proclamation 9654, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats*, 82 Fed. Reg. 45161 (Sep. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats>. Although some claim that the term “Muslim Ban” is a misnomer—presumably due to the addition of Venezuela and North Korea to the list of covered countries—the ban still has a significantly disproportionate impact on Muslims. Venezuelan nationals, for example, are subject to only minimal restrictions and continue to be eligible for immigrant visas and most nonimmigrant visas. Moreover, the number of people seeking to travel from North Korea is a tiny percentage of total immigration to the United States. In Fiscal Year (FY) 2016, only 9 immigrant visas and 100 nonimmigrant visas were issued North Korean nationals. See Dep’t of State, *Report of the Visa Office 2016*, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2016.html>.

¹⁶ Presidential Proclamation 9723, *Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public Safety Threats*, 83 Fed. Reg. 15937 (Apr. 10, 2018), <https://www.federalregister.gov/documents/2018/04/13/2018-07864/maintaining-enhanced-vetting-capabilities-and-processes-for-detecting-attempted-entry-into-the>.

¹⁷ *Trump v. Hawai‘i*, 138 S. Ct. at 2423.

The Waiver Process

Proclamation 9645 expressly provides for a discretionary waiver for impacted individuals. According to the proclamation, a Department of State consular officer or CBP official may waive application of the ban if the official determines that (1) denying entry would cause “undue hardship” to the individual; (2) admission of the individual would pose no threat to national security or public safety; and (3) admission of the individual would be in the national interest.¹⁸ In addition, the Proclamation instructs the Secretaries of State and Homeland Security to issue guidance that addresses “the standards, policies, and procedures” for waivers, in order to implement a uniform process.¹⁹ Reports from consular officers and impacted individuals, however, indicate that the waiver process is anything but clear, uniform, or predictable.²⁰

The waiver process has been sharply criticized by advocacy organizations, as well as Justice Breyer, who stated in his dissent in *Trump v. Hawaii* that “waivers are not being processed in an ordinary way” and “there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham.”²¹ Immediately after the ban went into effect, thousands of visa denials were issued to individuals around the world, without providing any opportunity to effectively seek waivers.²² Further, State Department guidance from January 2018 provides an extraordinarily difficult “undue hardship” standard for waiver applicants, including restrictions prohibiting the consideration of relevant country conditions.²³

There is little evidence that the waiver process has improved significantly since the Supreme Court’s decision in *Trump v. Hawaii*. According to Edward Ramotowski, Deputy Assistant Secretary for Visa Services, as of September 2019, the State Department had granted waivers to approximately 10 percent of visa applicants from impacted countries.²⁴

To date, the Department of State has not published a waiver application or issued comprehensive guidance to the public on the waiver process. In addition, the low rate of waiver approvals does not reflect (is not consistent with . . . ?) the relatively generous process described in the Proclamation, which expressly contemplates a number of situations in which waivers would be appropriate, including for purposes of family reunification, maintaining significant

¹⁸ Presidential Proclamation 9654 § 3(c).

¹⁹ *Id.* § 3(c)(ii).

²⁰ Compare Operational Q&As on P.P. 9645 in light of the U.S. Supreme Court orders of December 4, 2017, lifting lower court injunctions and pursuant to guidance in 17 STATE 97682, Dep’t of State (Jan. 23, 2018), <https://refugeerights.org/wp-content/uploads/2018/09/FOIA-Waiver-Guidance.pdf>; with Jeremy Stahl, *The Waiver Process Is Fraud*, SLATE <https://slate.com/news-and-politics/2018/06/trump-travel-ban-waiver-process-is-a-sham-two-consular-officers-say.html>.

²¹ 138 S. Ct. at 2432, 2445 (Breyer, J., dissenting).

²² See, e.g., Dara Lind, *Exclusive: Trump’s Travel Ban Is Supposed to Make Exceptions for Worthy Cases. A New Lawsuit Alleges It Doesn’t.*, VOX (July 29, 2018), <https://www.vox.com/2018/7/29/17625194/travel-muslim-ban-lawsuit-waiver-how>; Liz Robbins, *Your Visa Is Approved, They Were Told, And Then It Wasn’t*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/nyregion/immigrants-visa-yemen.html>.

²³ Dara Lind, *Exclusive: Internal Documents Show How Hard it is for Some Immigrants to Get a Travel Ban Waiver*, VOX (Sep. 21, 2018), <https://www.vox.com/2018/9/20/17622622/travel-ban-waiver-muslim-how>.

²⁴ Abigail Hauslohner, *During First Two Years of ‘Muslim Ban,’ Trump Administration Granted Few Waivers*, WASH. POST (Sep. 24, 2019), https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0_story.html.

business relationships, and seeking urgent medical care.²⁵ Two class action lawsuits are currently pending in the Northern District of California that challenge the government’s failure to implement the waiver process in accordance with the terms set forth in the Proclamation.²⁶

The Muslim Ban has kept far too many families apart and has brought needless suffering to American communities. A 2019 Cato Institute analysis, for example, found that the ban has prevented more than 9,000 family members of U.S. citizens from entering the country, including more than 5,500 children.²⁷ Moreover, legal services and community organizations have observed a pattern of waivers being selectively granted in high-profile, publicized cases. For example, the Administration refused to provide a waiver to the mother of a dying 2-year-old boy for months, until a media push garnered congressional and press attention, which ultimately led to her entry into the United States just days before her son died.²⁸

EXECUTIVE ORDER 13815: ENHANCED VETTING FOR REFUGEES

On October 23, 2017, the President issued an executive order resuming refugee admissions while introducing “enhanced vetting” for refugees from 11 unnamed “high-risk” countries.²⁹ Rather than improving existing vetting procedures, the Administration’s new procedures appear to have needlessly brought processing to a standstill for vulnerable groups.³⁰ For example, the new vetting procedures have dramatically slowed processing for Afghan and Iraqi translators and interpreters seeking refugee and Special Immigrant Visa status—leaving them trapped in their home countries, where their lives are at risk due to their support of U.S. troops.³¹

PRESIDENTIAL PROCLAMATION 9822: ASYLUM BAN

On November 9, 2018, President Trump issued Presidential Proclamation 9822, which invoked section 212(f) of the INA to bar individuals from applying for asylum if they crossed the southern border of the United States between ports of entry.³² This ban was an-

²⁵ Presidential Proclamation 9654 § 3(c)(iv).

²⁶ *Emami v. Nielsen*, No. 18–cv–01587–JD (N.D. Cal. 2018); *Pars Equality Center v. Pompeo*, No. 18–cv–07818–JSC (N.D. Cal. 2018).

²⁷ David Bier, *It’s Not Just Immigrants. Trump is Separating American Families, Too.*, WASH. POST (Jan. 29, 2019), [https://www.washingtonpost.com/opinions/2019/01/29/its-not-just-immigrants-trump-is-separating-american-families-too/?hpid=hp_hp-top-table-main-trump-immigration%3Ahomepage%2Ft-1_p-gp](https://www.washingtonpost.com/opinions/2019/01/29/its-not-just-immigrants-trump-is-separating-american-families-too/?hpid=hp_hp-top-table-main-trump-immigration%3Ahomepage%2Ft-1_p-gp&hpid=hp_hp-top-table-main-trump-immigration%3Ahomepage%2Ft-1_p-gp); *See also*, *One Year After the SCOTUS Ruling: Understanding the Muslim Ban and How We’ll Keep Fighting It*, National Immigration Law Center, 14 (Jun. 2019), <https://www.nilc.org/issues/immigration-enforcement/understanding-muslim-ban-one-year-after-ruling/>.

²⁸ Erin Allday, *Trump Travel Ban Keeps Yemeni Mother from Seeing Dying 2-Year-Old in Oakland*, S.F. CHRON. (Dec. 17, 2018), <https://www.sfchronicle.com/bayarea/article/Trump-s-travel-ban-keeping-mother-from-dying-13470703.php>.

²⁹ Exec. Order No. 13815, *Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, 82 Fed. Reg. 50055 (Oct. 24, 2017), <https://www.federalregister.gov/documents/2017/10/27/2017-23630/resuming-the-united-states-refugee-admissions-program-with-enhanced-vetting-capabilities>.

³⁰ David Bier, *Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures*, The Cato Institute (Apr. 18, 2018), <https://www.cato.org/publications/policy-analysis/extreme-vetting-immigrants-estimating-terrorism-vetting-failures>.

³¹ Rebecca Gibian, *The US promised thousands of foreign interpreters special immigrant visas. Now they’re trapped*, PUBLIC RADIO INT’L (Sep. 19, 2019), <https://www.pri.org/stories/2019-09-19/us-promised-thousands-foreign-interpreters-special-immigrant-visas-now-they-re>.

³² Presidential Proclamation 9822, *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018), <https://www.hsdil.org/?abstract&did=819149>.

other attempt by the Administration to circumvent our immigration laws, which expressly allow individuals who arrive in the United States, “whether or not at a designated port of arrival,” to apply for asylum.³³ On November 20, 2018, Judge Tigar of the Northern District of California issued a temporary restraining order stopping the asylum ban from moving forward. In his order Judge Tigar stated:

The rule barring asylum for immigrants who enter the country outside a port of entry irreconcilably conflicts with the INA and the expressed intent of Congress. Whatever the scope of the President’s authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden.³⁴

The case remains pending before the U.S. Court of Appeals for the Ninth Circuit.

PRESIDENTIAL PROCLAMATION 9983: EXPANDED MUSLIM BAN

On January 31, 2020, the Trump Administration issued Presidential Proclamation 9983, banning the entry of immigrants, except those whose eligibility is based on having provided assistance to the U.S. government, from Burma (Myanmar), Eritrea, Kyrgyzstan, and Nigeria. Proclamation 9983 also suspends nationals of Sudan and Tanzania from participation in the “Diversity Visa” program.³⁵ Five of these six countries have significant Muslim populations, including Nigeria, the most populous country in Africa.³⁶ Proclamation 9983 went into effect on February 21, 2020.

ABUSE OF SECTION 212(F)

With the enactment of section 212(f) of the INA, Congress authorized the President to “suspend the entry of all aliens or any class of aliens” if it is determined that the entry of such aliens “would be detrimental to the interests of the United States.” Before January 2017, both Democratic and Republican presidents typically invoked section 212(f) in specific, discrete situations to exclude small, well-defined groups of individuals.³⁷ Examples of prior uses include executive orders excluding “serious human rights violators,” members of the North Korean government, or individuals attempting to overthrow governments.³⁸ Further, past section 212(f) suspensions have included categorical exceptions for family- and humanitarian-based cases—exceptions that were not subject to a separate waiver determination.³⁹ These actions were executed in a manner consistent with the purpose of section 212(f), which is to allow the president to act quickly to address emergent situations,

³³ INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

³⁴ *East Bay Sanctuary Covenant et al., v. Trump*, Case No. 18-cv-06810-JST (N.D. Cal. 2018).

³⁵ Presidential Proclamation, *Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry*, (Jan. 31, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-improving-enhanced-vetting-capabilities-processes-detecting-attempted-entry/>.

³⁶ Caitlin Oprysko, Anita Kumar, and Nahal Toosi, *Trump Administration Expands Travel Ban*, POLITICO (Jan. 31, 2020), <https://www.politico.com/news/2020/01/31/trump-administration-expands-travel-ban-110005>.

³⁷ Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief*, Cong. Res. Svc., 6–10 (Jan. 23, 2017).

³⁸ *Id.*

³⁹ *Id.*

such as those involving national security, public safety, or international stability.

President Trump, however, has invoked section 212(f) in an unprecedented and far more sweeping fashion than any president in modern history, often making unsupported national security-based claims to justify his actions. In fact, with respect to the Muslim ban, more than 50 former national security, intelligence and foreign policy officials, who served in both Republican and Democratic administrations, challenged the administration’s purported national security justifications for the ban, noting that the “overbroad, blanket entry bans based on national origin” are “not supported by any intelligence.”⁴⁰

In other instances, the president has invoked section 212(f) in an effort to fundamentally change our immigration laws without congressional approval. For example, the president has cited section 212(f) as authority to render all southern border crossers ineligible for asylum, contrary to section 208(a)(1) of the INA, which allows any alien who arrives in the United States, “whether or not at a designated port of arrival,” to apply for asylum.⁴¹ The president has also cited section 212(f) as a basis for imposing health insurance requirements on immigrants that are inconsistent with provisions of the Affordable Care Act.⁴² Recognizing that the significant power afforded to the president under section 212(f) does not include the power to effectively rewrite immigration laws with which he might disagree, both of these measures have been enjoined in federal court.⁴³

Unfortunately, the Supreme Court concluded in a 5-to-4 decision that the Administration’s third attempt at the Muslim ban (Presidential Proclamation 9645) fell within the delegation of authority provided in section 212(f).⁴⁴ The Committee disagrees with the Court’s decision, and believes that Justice Sotomayor captured it best when she noted that “a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus” based on the “full record,” including the President’s statements.⁴⁵ As such, the Court’s decision illustrates the need for legislation to ensure that future uses of section 212(f) comport with congressional intent. H.R. 2214 will prevent future presidents from relying on 212(f) authority to rewrite immigration law without congressional approval, and will ensure that it is used in a manner consistent with historical norms.

Hearings

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing, held on September 24, 2019, was used

⁴⁰ Amicus Br. of Former National Security Officials, *Trump v. Hawaii*.

⁴¹ Presidential Proclamation 9880, *Addressing Mass Migration Through the Southern Border of the United States*, 84 Fed. Reg. 21229 (May 13, 2019), <https://www.federalregister.gov/documents/2019/05/13/2019-09992/addressing-mass-migration-through-the-southern-border-of-the-united-states>.

⁴² Presidential Proclamation 9945, *Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order To Protect the Availability of Healthcare Benefits for Americans*, 84 Fed. Reg. 53991 (Oct. 4, 2019), <https://www.federalregister.gov/documents/2019/10/09/2019-22225/suspension-of-entry-of-immigrants-who-will-financially-burden-the-united-states-healthcare-system-in>.

⁴³ *East Bay Sanctuary Covenant et al., v. Trump*, Case No. 18-cv-06810-JST (N.D. Cal. 2018); *Doe v. Trump*, Case No. 3:19-cv-01743-SB (D. Or. Nov. 2, 2019).

⁴⁴ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁴⁵ *Id.* at 2433, 2435–38 (Sotomayor, J., dissenting).

to develop H.R. 2214: “Oversight of the Trump Administration’s Muslim Ban,” a joint hearing held before the House Committee on the Judiciary, Subcommittee on Immigration and Citizenship and the House Foreign Affairs Committee, Subcommittee on Oversight and Investigations. The Subcommittees heard testimony from:

- Edward J. Ramotowski, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State;
- Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security;
- Todd Hoffman, Executive Director of Admissibility and Passenger Programs (APP), Office of Field Operations (OFO), U.S. Customs and Border Protection, U.S. Department of Homeland Security;
- Dr. Abdollah “Iman” Dehzangi, Assistant Professor at Morgan State University in Baltimore, MD;
- Ismail Ahmed Hezam Alghazali, a U.S. citizen born in Yemen who left his job to travel to Djibouti to be with his pregnant wife;
- Farhana Khara, President and Executive Director, Muslim Advocates; and
- Andrew Arthur, Resident Fellow in Law and Policy, Center for Immigration Studies.

The hearing explored the implementation of the ban, including the chaos that unfolded at airports around the country; the impact of the ban on American families, U.S. employers, and other institutions; and the lack of transparency around the waiver process. Witnesses shared stories of parents separated from children and spouses living apart from one another. Witnesses also discussed potential legislative fixes, including the NO BAN Act, in view of the Supreme Court’s ruling in *Trump v. Hawai’i*.

Committee Consideration

On February 12, 2020, the Committee met in open session and ordered the bill, H.R. 2214, favorably reported with an amendment in the nature of a substitute, by a rollcall vote of 22 to 10, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 2214:

1. An amendment by Mr. Biggs to amend the executive consultation process required before the President exercises authority under section 212(f) of the INA was defeated by a rollcall vote of 13 to 22.

Roll Call No. 2Date: 2/12/2020

COMMITTEE ON THE JUDICIARY

House of Representatives

116th CongressAmendment # 1 () to ~~ANS to~~ HR 2214 offered by Rep. Biggs☐ PASSED☐ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)			
Cedric Richmond (LA-02)		✓	
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)			
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Debbie Mucarsel-Powell (FL-26)		✓	
Veronica Escobar (TX-16)		✓	
	AYES	NOS	PRES.
Doug Collins (GA-27)	✓		
James F. Sensenbrenner (WI-05)	✓		
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)	✓		
Jim Jordan (OH-04)	✓		
Ken Buck (CO-04)	✓		
John Ratcliffe (TX-04)	✓		
Martha Roby (AL-02)	✓		
Matt Gaetz (FL-01)			
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)			
Debbie Lesko (AZ-08)			
Guy Reschenthaler (PA-14)	✓		
Ben Cline (VA-06)	✓		
Kelly Armstrong (ND-AL)	✓		
Greg Steube (FL-17)	✓		
	AYES	NOS	PRES.
TOTAL	13	22	

2. An amendment by Mr. Neguse to include Presidential Proclamation 9983 in the list of executive actions repealed by section 4 of H.R. 2214 was adopted by a rollcall vote of 19 to 8.

Roll Call No. 3

Date: 2/12/2020

COMMITTEE ON THE JUDICIARY

House of Representatives
116th Congress

Amendment #2 () to ANS to HR 2214 offered by Rep. Neguse

☒ PASSED☐ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)	✓		
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)	✓		
Steve Cohen (TN-09)	✓		
Hank Johnson (GA-04)			
Ted Deutch (FL-22)			
Karen Bass (CA-37)			
Cedric Richmond (LA-02)			
Hakeem Jeffries (NY-08)	✓		
David Cicilline (RI-01)	✓		
Eric Swalwell (CA-15)	✓		
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)	✓		
Pramila Jayapal (WA-07)	✓		
Val Demings (FL-10)	✓		
Lou Correa (CA-46)	✓		
Mary Gay Scanlon (PA-05)	✓		
Sylvia Garcia (TX-29)	✓		
Joseph Neguse (CO-02)	✓		
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)	✓		
Debbie Mucarsel-Powell (FL-26)	✓		
Veronica Escobar (TX-16)			
	AYES	NOS	PRES.
Doug Collins (GA-27)		✓	
James F. Sensenbrenner (WI-05)			
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)			
Jim Jordan (OH-04)			
Ken Buck (CO-04)		✓	
John Ratcliffe (TX-04)			
Martha Roby (AL-02)			
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)			
Debbie Lesko (AZ-08)			
Guy Reschenthaler (PA-14)		✓	
Ben Cline (VA-06)		✓	
Kelly Armstrong (ND-AL)		✓	
Greg Steube (FL-17)		✓	
	AYES	NOS	PRES.
TOTAL	19	8	

3. An amendment by Mr. Biggs to create a security-related exception to the requirement that the president narrowly tailor a 212(f) suspension or restriction using the least restrictive means to achieve a compelling government interest was defeated by a rollcall vote of 11 to 18.

Roll Call No. 4Date: 2/12/2020

COMMITTEE ON THE JUDICIARY

House of Representatives

116th CongressAmendment # 3 () to ANS 40 HR 2214 offered by Rep. Biggs☐ PASSED☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)			
Ted Deutch (FL-22)			
Karen Bass (CA-37)			
Cedric Richmond (LA-02)			
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)			
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Debbie Mucarsel-Powell (FL-26)		✓	
Veronica Escobar (TX-16)			
	AYES	NOS	PRES.
Doug Collins (GA-27)	✓		
James F. Sensenbrenner (WI-05)			
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)			
Jim Jordan (OH-04)	✓		
Ken Buck (CO-04)	✓		
John Ratcliffe (TX-04)			
Martha Roby (AL-02)			
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Debbie Lesko (AZ-08)	✓		
Guy Reschenthaler (PA-14)	✓		
Ben Cline (VA-06)	✓		
Kelly Armstrong (ND-AL)	✓		
Greg Steube (FL-17)	✓		
	AYES	NOS	PRES.
TOTAL	11	18	

4. Motion to report H.R. 2214, as amended, favorably was agreed to by a rollcall vote of 22 to 10.

Roll Call No. 5

Date: 2/12/2020

COMMITTEE ON THE JUDICIARY

House of Representatives
116th CongressFinal Passage on HR 2214☒ PASSED☐ FAILED

	AYES	NOS	PRES.	
Jerrold Nadler (NY-10)	✓			
Zoe Lofgren (CA-19)	✓			
Sheila Jackson Lee (TX-18)	✓			
Steve Cohen (TN-09)	✓			
Hank Johnson (GA-04)	✓			
Ted Deutch (FL-22)	✓			
Karen Bass (CA-37)	✓			
Cedric Richmond (LA-02)	✓			
Hakeem Jeffries (NY-08)	✓			
David Cicilline (RI-01)	✓			
Eric Swalwell (CA-15)	✓			
Ted Lieu (CA-33)	✓			
Jamie Raskin (MD-08)	✓			
Pramila Jayapal (WA-07)	✓			
Val Demings (FL-10)	✓			
Lou Correa (CA-46)	✓			
Mary Gay Scanlon (PA-05)	✓			
Sylvia Garcia (TX-29)	✓			
Joseph Neguse (CO-02)	✓			
Lucy McBath (GA-06)	✓			
Greg Stanton (AZ-09)	✓			
Madeleine Dean (PA-04)	✓			
Debbie Mucarsel-Powell (FL-26)				
Veronica Escobar (TX-16)				
	AYES	NOS	PRES.	
Doug Collins (GA-27)		✓		
James F. Sensenbrenner (WI-05)		✓		
Steve Chabot (OH-01)		✓		
Louie Gohmert (TX-01)				
Jim Jordan (OH-04)				
Ken Buck (CO-04)				
John Ratcliffe (TX-04)				
Martha Roby (AL-02)				
Matt Gaetz (FL-01)		✓		
Mike Johnson (LA-04)				
Andy Biggs (AZ-05)		✓		
Tom McClintock (CA-04)		✓		
Debbie Lesko (AZ-08)		✓		
Guy Reschenthaler (PA-14)		✓		
Ben Cline (VA-06)		✓		
Kelly Armstrong (ND-AL)		✓		
Greg Steube (FL-17)		✓		
	AYES	NOS	PRES.	
TOTAL	22	10		

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2214, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 4, 2020.

Hon. JERROLD NADLER, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2214, the National Origin-Based Antidiscrimination for Nonimmigrants Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is David Rafferty.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

cc: Honorable .006 Collins
Ranking Member

At a Glance			
H.R. 2214, National Origin-Based Antidiscrimination for Nonimmigrants Act			
As ordered reported by the House Committee on the Judiciary on February 12, 2020			
By Fiscal Year, Millions of Dollars	2020	2020-2025	2020-2030
Direct Spending (Outlays)	2	76	290
Revenues	*	-4	-17
Increase or Decrease (-) in the Deficit	2	80	307
Spending Subject to Appropriation (Outlays)	0	3	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	< \$5 billion	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between -\$500,000 and zero.			

The bill would

- Nullify several executive actions that restrict entry into the United States and govern eligibility for asylum or refugee status
- Narrow the President's authority to impose entry restrictions on a class of aliens (non-U.S. nationals) on the basis of their country of birth, nationality, and certain other characteristics

Estimated budgetary effects would primarily stem from

- Increased spending for health, nutrition, education, and disability benefits for newly arrived immigrants, who could receive those federal benefits if they meet eligibility criteria for those programs
- Increased fees from visa applicants

Areas of significant uncertainty include

- Estimating the number of aliens who will be affected by entry restrictions under current law
- Anticipating how the Administration would implement the legislation

Bill summary: H.R. 2214 would nullify several executive actions that restrict entry into the United States and govern eligibility for asylum or refugee status. The bill also would amend the Immigration and Nationality Act to narrow the President's authority to impose entry or visa restrictions on aliens (non-U.S. nationals) based on their country of birth, country of nationality, and certain other characteristics.

Estimated Federal cost: The estimated budgetary effects of H.R. 2214 are shown in Table 1. The costs of the legislation primarily fall within budget functions 500 (education, training, employment, and social services), 550 (health), and 600 (income security).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF H.R. 2214

	By fiscal year, millions of dollars—													
	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020–2025	2020–2030	
Increases in Direct Spending														
Estimated Budget Authority	2	7	10	14	19	24	30	37	43	50	54	76	290	
Estimated Outlays	2	7	10	14	19	24	30	37	43	50	54	76	290	
Decreases in Revenues														
Estimated Revenues	*	*	–1	–1	–1	–1	–2	–2	–3	–3	–3	–4	–17	
Net Increase in the Deficit From Changes in Direct Spending and Revenues														
Effect on the Deficit	2	7	11	15	20	25	32	39	46	53	57	80	307	

* = between –\$500,000 and zero.

In addition, CBO estimates that enacting the bill would increase discretionary costs for the Federal Pell Grant Program by \$3 million over the 2020–2025 period. Those costs would be subject to the availability of appropriated funds.

Basis of estimate: For this estimate, CBO assumes that H.R. 2214 will be enacted in fiscal year 2020 and that the Department of Homeland Security (DHS) and the Department of State will immediately begin to adjudicate applications without regard to the restrictions promulgated by the executive actions that would be nullified by the bill.

People affected by the legislation

H.R. 2214 would affect aliens who are subject to entry restrictions issued by the President, aliens crossing the U.S.-Mexico border between ports of entry and seeking asylum, and aliens seeking refugee status who are subject to enhanced vetting.

Entry Restrictions. The Immigration and Nationality Act “grants the President broad discretion to suspend the entry of aliens into the United States.”¹ The President may exercise that authority if he determines that their entry “would be detrimental to the interests of the United States.”² Separately, that act prevents discrimination in the issuance of an immigrant visa based on country of birth, country of nationality, and certain other characteristics. Those limitations do not apply to other aspects of immigration law such as those that govern the admission of temporary visitors.

The Administration has issued several executive orders and proclamations that, in many situations, restrict the ability of nationals of 13 countries to enter the United States either as immigrants (that is, with lawful permanent resident, or LPR, status) or as non-immigrants (that is, temporary visitors).^{3 4}

¹ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf (419 KB).

² Sec. 212(f) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1182(f) (2018)).

³ See “Protecting the Nation From Foreign Terrorist Entry Into the United States,” Executive Order 13769, 82 Fed. Reg. 8977 (February 1, 2017), <https://go.usa.gov/xdwmg>; and “Protecting the Nation From Foreign Terrorist Entry Into the United States,” Executive Order 13780, 82 Fed. Reg. 13209 (March 9, 2017), <https://go.usa.gov/xdwmE>.

⁴ “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” Proclamation 9645, 82 Fed. Reg. 45161 (September 27, 2017), <https://go.usa.gov/xdwmy>, affects nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. In April 2018, the Administration lifted the restrictions on nationals of Chad; see “Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” Proclamation 9723, 83 Fed. Reg. 15937 (April 13, 2018), <https://go.usa.gov/xdwyD>. “Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” Proclamation 9983, 85 Fed. Reg. 6699 (February 5, 2020), <https://go.usa.gov/xdwmw>, affects nationals of Burma, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania.

Section 2 of the bill would prohibit discrimination on the basis of country of birth, country of nationality, and certain other characteristics in the issuance of nonimmigrant visas, admission or entry into the United States, and the approval or revocation of any other immigration benefit. Section 3 would limit the President's authority under section 212(f) of the Immigration and Nationality Act to restrict the entry into the United States of a class of aliens. Section 4 would, among other things, lift the restrictions on entry into the United States by the nationals of the 13 countries by nullifying the orders and proclamations that promulgated those restrictions.

Allowing nationals of the affected countries to be admitted to the United States as nonimmigrants would have a relatively minor effect on the budget, CBO estimates, because those visitors are ineligible for most federal benefits. Additionally, allowing them to enter under most LPR categories (such as family-sponsored preferences, employment-based preferences, or the diversity visa lottery) would have no net budgetary effect because under current law the number that can be admitted each year in those categories is limited and current demand significantly exceeds those limitations. For those categories, the Administration's entry restrictions affect which aliens can be granted LPR status, but not the number. In contrast, there is no limit on the number of immediate relatives of U.S. citizens (that is, parents, spouses, or minor children of U.S. citizens) that can be admitted each year. For those aliens, eliminating the prohibitions in the proclamations would significantly increase the number of people admitted; thus, the U.S. population and spending on federal benefits would increase.

Additional Lawful Permanent Residents. Using information from the Department of State about how it is implementing the current restrictions on entry (which were implemented in 2018) for nationals of Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen, CBO estimates that about 6,000 immediate relatives of U.S. citizens have already been denied entry (and have not subsequently received a waiver of that denial) and about 2,500 such applications will be denied each year that the restrictions are in effect. Using information from DHS and the Department of State about newly arrived lawful permanent residents in recent years, CBO anticipates that about 2,000 nationals from Burma, Eritrea, Kyrgyzstan, and Nigeria who are immediate relatives of U.S. citizens (who are affected by restrictions put in place in February 2020) will be denied entry each year that the entry restrictions for people from those countries are in effect.⁵ CBO expects that under H.R. 2214, the immediate relatives already denied entry will arrive in the United States during fiscal years 2020 and 2021.

Citizen Children. Some aliens who would be admitted into the United States as lawful permanent residents would have children after arriving in the country. Those children would be U.S. citizens. Using information from the Census Bureau about fertility rates for foreign born women in the United States and demographic information from DHS, CBO estimates that enacting H.R. 2214 would result in 3,500 additional births in the United States over the

⁵Proclamation 9983 does not restrict the entry of nationals of Sudan and Tanzania who qualify for LPR status as immediate relatives of U.S. citizens. Therefore, the discussion below does include nationals of Sudan and Tanzania.

2020–2030 period. (More births would be expected after that period.)

Subsequent Family-Based Immigration. Some of the lawful permanent residents admitted under H.R. 2214 eventually would become U.S. citizens and sponsor their own parents for admission as lawful permanent residents. On the basis of data from DHS about rates of naturalization and sponsorship, CBO estimates that enacting H.R. 2214 would result in just over 1,600 lawful permanent residents arriving in the U.S. through family-based immigration over the 2024–2030 period. (Additional sponsorships would be expected after that period.)

Uncertainty About the Administration’s Subsequent Actions. The number of immediate relatives of U.S. citizens who would be admitted as a result of H.R. 2214, the number of children who would be born to those lawful permanent residents, and the amount of subsequent family-based immigration would depend on how the Administration implemented the bill.

- H.R. 2214 would nullify the executive orders and proclamations containing the entry restrictions but would not eliminate the President’s authority to implement new restrictions. If the Administration quickly imposed new restrictions that are similar to those currently in effect, enacting H.R. 2214 would result in very little change in the U.S. population relative to current law.
- In contrast, if the Administration did not impose new entry restrictions or if it reissued significantly narrowed restrictions, enacting H.R. 2214 could result in the admission of immediate relatives of U.S. citizens who have been or will be affected by the current restrictions.

CBO has no basis for predicting how the Administration would implement H.R. 2214. For this estimate, CBO assumes a 50 percent probability that the Administration would impose new entry restrictions similar to those currently in effect and a 50 percent probability that the Administration would not impose such restrictions. On that basis, CBO estimates that, under the bill, 27,000 immediate relatives (that is, half of those who are subject to the current entry restrictions) would be admitted into the United States as lawful permanent residents over the 2020–2030 period. CBO expects that nearly 2,000 citizen children would be born to them and that they would sponsor nearly 1,000 relatives for admission over the same period.

Asylum Applicants. Under current policies, aliens who attempt to enter the United States across the southern border with Mexico between ports of entry are ineligible for asylum.⁶ Section 4 would eliminate that restriction.

CBO expects that change would have a minimal effect on the size or immigration status of the foreign-born population of the United States for the following reasons:

- Many aliens who are ineligible for asylum under that restriction also are ineligible for asylum under a regulation that

⁶That policy was given effect in “Addressing Mass Migration Through the Southern Border of the United States,” Proclamation 9822, 83 Fed. Reg. 57661 (November 15, 2018), <https://go.usa.gov/xdwy7>.

DHS and DOJ issued in July 2019.⁷ That regulation makes most aliens (other than Mexican nationals) ineligible for asylum if they enter the United States across the international border with Mexico and have not applied for protection in a third country through which they traveled on the way to the United States. That regulation would not be affected by H.R. 2214, so many of those people would still be ineligible for asylum under H.R. 2214.

- Mexican nationals who wish to apply for asylum are eligible under current law if they arrive at a port of entry. Data from DHS and DOJ show that in recent years, only 200 to 300 Mexican nationals encountered at the international border each year have received asylum.

Collectively, those factors suggest that enacting section 4 would have little effect on the number of aliens receiving asylum.

Enhanced Vetting of Refugees. In November 2017, the President resumed the U.S. Refugee Admissions Program (which had been suspended), with the requirement that certain classes of applicants be subject to enhanced vetting.⁸ Section 4 would end that requirement.

The President sets the number of refugees who may be admitted into the United States each year and the bill would not change that authority. Thus, if the President does not increase the total number of refugees who may be admitted as a result of enacting the bill, any increase in refugees admitted because they were no longer subject to enhanced vetting procedures would correspondingly decrease the admission of other refugees who were never subject to the enhanced vetting. In contrast, if the President increased the total number of refugees who may be admitted in response to the enactment of H.R. 2214, the U.S. population—and, consequently spending on federal benefits—also would increase, relative to current law. CBO has no basis for predicting whether the President would increase the number of refugees that may be admitted into the country if the bill were enacted.

Direct Spending and Revenues

In total, CBO and the staff of the Joint Committee on Taxation (JCT) estimate, enacting H.R. 2214 would increase direct spending by \$290 million (see Table 2) and reduce revenues by \$17 million over the 2020–2030 period. Most of those effects would be for premium tax credits.⁹

TABLE 2.—DIRECT SPENDING EFFECTS OF H.R. 2214

	By fiscal year, millions of dollars—														2020–2025	2020–2030
	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030					
Increases in Direct Spending Outlays ^a																
Premium Tax Credits	2	6	9	13	16	18	21	24	28	32	35	64	204			
Medicaid and CHIP	*	1	1	1	2	4	6	7	9	11	11	9	53			

⁷ See “Asylum Eligibility and Procedural Modifications,” 84 Fed. Reg. 33829 (July 16, 2019), <https://go.usa.gov/xdwy6>.

⁸ “Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities,” Executive Order 13815, 82 Fed. Reg. 50055 (October 27, 2017), <https://go.usa.gov/xdwy6>.

⁹ Premium tax credits are federal subsidies for health insurance purchased through the marketplaces established by the Affordable Care Act.

TABLE 2.—DIRECT SPENDING EFFECTS OF H.R. 2214—Continued

	By fiscal year, millions of dollars—													
	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020– 2025	2020– 2030	
SNAP	*	*	*	*	1	2	2	3	3	4	5	3	20	
Other Federal Benefits	*	*	*	*	*	*	1	3	3	3	3	*	13	
Total Changes in Direct Spend- ing	2	7	10	14	19	24	30	37	43	50	54	76	290	

CHIP = Children's Health Insurance Program; SNAP= Supplemental Nutrition Assistance Program; * = between zero and \$500,000.

^a Estimated increases in budget authority equal the estimated increases in outlays.

^b Other programs include child nutrition, higher education assistance, Supplemental Security Income, Social Security, and Medicare. The spending for Social Security is off-budget but CBO estimates that the increased spending would not be significant over the 2020–2030 period.

Premium Tax Credits. People with LPR status are generally eligible to receive premium tax credits if their household income is between 100 percent and 400 percent of the federal poverty guidelines—or if their income is below 100 percent of the guidelines but they are ineligible for Medicaid because of their immigration status—and if they do not have access to health insurance coverage through certain other sources.

CBO and JCT estimate that about 600 people who receive LPR status under H.R. 2214 would purchase health insurance through the marketplaces in 2021 and would have income that was low enough to qualify for premium tax credits. That number would rise to 1,800 in 2030. We estimate that the average cost of those tax credits would be about \$12,600 per person in 2021 and about \$21,300 in 2030. The per-person cost of those tax credits depends on the age and income of the enrollees; many of the new enrollees under H.R. 2214 would be older, which would increase the average per-person cost. In total, CBO and JCT estimate that enacting H.R. 2214 would increase spending for health insurance tax credits by \$204 million over the 2020–2030 period.

Additionally, we estimate that the nonrefundable portion—that is, the portion that reduces tax liabilities—of the premium tax credits would reduce revenues by \$17 million over the 2020–2030 period.

Medicaid and the Children's Health Insurance Program. Under current law, lawful permanent residents are ineligible for coverage under Medicaid, except for emergencies, during the first five years after receiving LPR status. However, some children or pregnant women who would otherwise qualify for Medicaid can obtain coverage after a shorter period. CBO estimates that beginning in 2020, between 100 and 300 people each year would receive such coverage. In addition, beginning in 2025, CBO expects that some people who would be admitted into the United States under the bill and had been in LPR status for five years would receive comprehensive coverage from Medicaid. In that year, CBO estimates that about 800 people would enroll in Medicaid. That number would rise to about 2,000 people in 2030. CBO estimates that the average federal cost per beneficiary would increase from about \$1,900 per person in 2020 to about \$4,400 in 2030. In addition, we estimate that each year an average of 450 citizen children would be enrolled in Medicaid and the Children's Health Insurance Program by their parents with LPR status. In total, CBO estimates, enacting H.R. 2214 would increase spending for those programs by \$53 million over the 2020–2030 period.

Supplemental Nutrition Assistance Program. Under current law, lawful permanent residents are eligible for benefits under the Supplemental Nutrition Assistance Program (SNAP) if they have been in that status for at least five years and meet the program's income and asset requirements. Those who are under the age of 18 are eligible for benefits immediately. CBO estimates that under H.R. 2214, fewer than 100 additional foreign-born people would receive SNAP benefits in 2020. That number would rise to about 2,200 people in 2030. In addition, under the bill, CBO expects that SNAP benefits would be paid to the parents of about 100 citizen children, on average, throughout the 2020–2030 period. CBO estimates that the average federal cost per beneficiary would increase from nearly \$1,500 per person in 2020 to about \$1,940 in 2030. Therefore, enacting H.R. 2214 would increase direct spending for SNAP benefits by \$20 million over the 2020–2030 period.

Other Federal Benefits. CBO estimates that spending for other federal benefits programs would increase slightly because few people affected by H.R. 2214 would become eligible for those benefits over the budget window. In total, CBO estimates that spending would increase by \$13 million over the 2020–2030 period.

Child Nutrition. Students are eligible for federally subsidized meals at school, regardless of immigration status. CBO estimates that enacting H.R. 2214 would increase spending for child nutrition programs by \$5 million over the 2020–2030 period.

Supplemental Security Income. The Supplemental Security Income program provides a monthly cash benefit to people who are disabled, age 65 or older, or both, and who have low income and few assets. Lawful permanent residents must meet additional qualifications. CBO estimates that enacting H.R. 2214 would increase direct spending for those benefits by \$4 million over the 2020–2030 period.

Higher Education Assistance. Lawful permanent residents are eligible for the Federal Pell Grant Program and the Federal Direct Loan Program. CBO estimates that direct spending on assistance for higher education would increase by about \$4 million over the 2020–2030 period. A portion of those grants would be funded through discretionary spending; see the section on “Spending Subjection to Appropriation.”

Social Security and Medicare. Lawful permanent residents are eligible to receive Social Security and Medicare benefits, if they otherwise qualify. Under H.R. 2214, CBO expects that the lawful permanent residents who qualify for those programs during the 2020–2030 period would do so on the basis of disability, not old age. CBO estimates that enacting H.R. 2214 would increase spending on Social Security (which is off-budget) and Medicare by an insignificant amount over the 2020–2030 period.

Immigration Fees. Enacting H.R. 2214 would increase collections of various immigration fees by DHS and the Department of State. Most of those fees are classified as offsetting receipts (that is, as reductions in direct spending) and are available for spending without further appropriation. Some visa application fees paid to the Department of State are classified as revenues and are deposited in the Treasury. CBO estimates that the net reduction in direct spending attributable to the collection and spending of immigration application fees would be less than \$500,000 over the 2020–2030

period. Additionally, CBO estimates that the increase in revenues attributable to increased visa application fees would be less than \$500,000 over the 2020–2030 period.

Spending Subject to Appropriation

Lawful permanent residents are eligible for Pell grants. Most of each grant award is paid from discretionary appropriations (about \$3,700 of the average award of \$4,400 in 2025, CBO estimates). CBO estimates that under H.R. 2214, discretionary costs for Pell grants would increase by \$3 million over the 2020–2025 period; any spending would be subject to the availability of appropriated funds (see “Higher Education Assistance” above). Under current law, the Federal Pell Grant Program is authorized through fiscal year 2020; for this estimate, CBO has estimated costs over the 2021–2030 period.

Uncertainty

CBO considered several areas of uncertainty in estimating the effects of H.R. 2214.

- The number of people who would gain admission as lawful permanent residents under H.R. 2214 could differ from CBO’s projection, in which case costs could be higher or lower than estimated here.
- The Administration could, under current law, narrow the scope of the entry restrictions during the 2020–2030 period (as happened in 2018 when it removed Chad from the list of countries whose nationals are subject to entry restrictions). In that case, the budgetary effects of H.R. 2214 relative to current law would be lower than shown in this estimate.
- The Administration could implement H.R. 2214 in a number of ways; CBO has no basis for predicting how it would do so. If the Administration implemented the bill in a manner that increased the number of people admitted into the United States as refugees or the number of people granted asylum, spending would be higher than the amounts estimated here.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in Table 3. Only on-budget changes to outlays or revenues are subject to pay-as-you-go procedures.

TABLE 3.—CBO’S ESTIMATE OF THE STATUTORY PAY-AS-YOU-GO EFFECTS OF H.R. 2214, THE NATIONAL ORIGIN-BASED ANTIDISCRIMINATION FOR NONIMMIGRANTS ACT, AS ORDERED REPORTED BY THE HOUSE COMMITTEE ON THE JUDICIARY ON FEBRUARY 12, 2020

	By fiscal year, millions of dollars—													
	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2020– 2025	2020– 2030	
	Net Increase in the On-Budget Deficit													
Pay-As-You-Go Effect	2	7	11	15	20	25	32	39	46	53	57	80	307	
Memorandum:														
Changes in Outlays	2	7	10	14	19	24	30	37	43	50	54	76	290	
Changes in Revenues	0	0	–1	–1	–1	–1	–2	–2	–3	–3	–3	–4	–17	

Increase in long-term deficits: CBO estimates that enacting H.R. 2214 would not increase on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2031. Mandates: None.

Estimate prepared by: Federal costs: David Rafferty (population estimates; disability and retirement programs), Sunita D'Monte (Department of State), Kate Fritzsche (low-income health programs), Jennifer Gray (nutrition programs), Justin Humphrey (education programs), Leah Koestner (education programs), Lisa Ramirez-Branum (low-income health programs), Jon Sperl (Department of Homeland Security), Emily Vreeland (low-income health programs); Staff of the Joint Committee on Taxation (low-income health programs); Federal revenues: Staff of the Joint Committee on Taxation—Kate Fritzsche, Emily Vreeland, Sunita D'Monte, David Rafferty; Mandates: Rachel Austin.

Estimate reviewed by: David Newman, Chief, Defense, International Affairs, and Veterans' Affairs Cost Estimates Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis; Theresa Gullo, Director of Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 2214 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2214 would modify the President's authority to suspend or restrict classes of aliens from entering the United States, expand the Immigration and Nationality Act's nondiscrimination provision, and terminate certain actions taken by President Trump, including Presidential Proclamations 9645 and 9983.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2214 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

Section 1. Short Titles. Section 1 sets forth the short titles of the Act as the “National Origin-Based Antidiscrimination for Non-immigrants Act” or the “NO BAN Act.”

Section 2. Expansion of Nondiscrimination Provision. Section 2 broadens section 202(a)(1) of the Immigration and Nationality Act (INA), which currently prohibits discrimination in the issuance of immigrant visas (i.e., green cards) based on race, sex, nationality, place of birth, or place of residence. This provision is expanded to include religion as a prohibited basis for discrimination and ex-

tends the prohibition on discrimination to the issuance of non-immigrant visas, entry and admission into the United States, and the approval or revocation of any immigration benefit. An exception allows such factors to be considered if otherwise authorized by statute (e.g., religious-based persecution is a valid basis for asylum).

Section 3. Transfer and Limitations on Authority to Suspend or Restrict the Entry of a Class of Aliens. Section 3 amends section 212(f) of the INA to:

- allow the president to suspend or restrict the entry of any aliens or class of aliens only if the Secretary of State, in consultation with the Secretary of Homeland Security, determines, based on credible facts, that the entry of such aliens would undermine the security or public safety of the United States, human rights, democratic processes or institutions, or international stability; and
- establish procedural safeguards with respect to the exercise of 212(f) authority, including requiring specific evidence to support the suspension or restriction, as well as the proposed duration; requiring that the suspension or restriction be narrowly tailored, using the least restrictive means, to address a compelling governmental interest; and requiring waivers for class-based restrictions and suspensions, with a rebuttable presumption in favor of granting family-based and humanitarian waivers.

Section 3 requires the President, the Secretary of State, and the Secretary of Homeland Security to consult with Congress before exercising section 212(f) authority, and to brief and provide a written report to Congress within 48 hours of exercising such authority. If such briefing is not provided and updated every 30 days thereafter, the suspension or restriction will terminate absent congressional action.

Section 3 ensures transparency and accountability by requiring the Secretary of State and the Secretary of Homeland Security to publish information regarding the suspension or termination in the Federal Register and provides for judicial review for individuals or classes of individuals who are injured.

Finally, section 3 includes a “Rule of Construction” to further clarify that section 212(f) does not allow the President, the Secretary of State, or the Secretary of Homeland Security to act in a manner that is inconsistent with the policy decisions expressed by Congress in the immigration laws.

Section 4. Termination of Certain Executive Actions. Section 4 repeals all iterations of the Trump Administration’s Muslim Ban: Executive Orders 13769 and 13780, and Presidential Proclamations 9645 and 9983. It also repeals Executive Order 13815, which requires enhanced vetting of refugees, and Presidential Proclamation 9822, which bars individuals who enter the United States across the southern border between ports of entry from seeking asylum.

Section 5. Visa Applicants Report. Section 5 requires the Secretary of State to submit a report to Congress, not later than 90 days after the date of enactment, describing the implementation of each of the Executive Orders and Presidential Proclamations described in Section 4, as well as data on the number of individuals impacted by Presidential Proclamation 9645 and 9983. With re-

spect to any future use of section 212(f), Section 5 also requires periodic reporting to Congress on impacted individuals.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 2214, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

IMMIGRATION AND NATIONALITY ACT

* * * * *

TITLE II—IMMIGRATION

CHAPTER 1—SELECTION SYSTEM

* * * * *

NUMERICAL LIMITATION TO ANY SINGLE FOREIGN STATE

SEC. 202. (a) PER COUNTRY LEVEL.—

(1) **NONDISCRIMINATION.**—(A) Except as specifically provided in paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa or a nonimmigrant visa, admission or other entry into the United States, or the approval or revocation of any immigration benefit because of the person's race, sex, religion, nationality, place of birth, or place of residence, *except if expressly required by statute, or if a statutorily authorized benefit takes into consideration such factors.*

(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

(2) **PER COUNTRY LEVELS FOR FAMILY-SPONSORED AND EMPLOYMENT-BASED IMMIGRANTS.**—Subject to paragraphs (3), (4), and (5), the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

(3) **EXCEPTION IF ADDITIONAL VISAS AVAILABLE.**—If because of the application of paragraph (2) with respect to one or more foreign states or dependent areas, the total number of visas available under both subsections (a) and (b) of section 203 for

a calendar quarter exceeds the number of qualified immigrants who otherwise may be issued such a visa, paragraph (2) shall not apply to visas made available to such states or areas during the remainder of such calendar quarter.

(4) SPECIAL RULES FOR SPOUSES AND CHILDREN OF LAWFUL PERMANENT RESIDENT ALIENS.—

(A) 75 PERCENT OF 2ND PREFERENCE SET-ASIDE FOR SPOUSES AND CHILDREN NOT SUBJECT TO PER COUNTRY LIMITATION.—

(i) IN GENERAL.—Of the visa numbers made available under section 203(a) to immigrants described in section 203(a)(2)(A) in any fiscal year, 75 percent of the 2–A floor (as defined in clause (ii)) shall be issued without regard to the numerical limitation under paragraph (2).

(ii) 2–A FLOOR DEFINED.—In this paragraph, the term “2–A floor” means, for a fiscal year, 77 percent of the total number of visas made available under section 203(a) to immigrants described in section 203(a)(2) in the fiscal year.

(B) TREATMENT OF REMAINING 25 PERCENT FOR COUNTRIES SUBJECT TO SUBSECTION (e).—

(i) IN GENERAL.—Of the visa numbers made available under section 203(a) to immigrants described in section 203(a)(2)(A) in any fiscal year, the remaining 25 percent of the 2–A floor shall be available in the case of a state or area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign state or area is less than the subsection (e) ceiling (as defined in clause (ii)).

(ii) SUBSECTION (e) CEILING DEFINED.—In clause (i), the term “subsection (e) ceiling” means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 203(a) to immigrants who are natives of the state or area under section 203(a)(2) consistent with subsection (e).

(C) TREATMENT OF UNMARRIED SONS AND DAUGHTERS IN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, the number of immigrant visas that may be made available to natives of the state or area under section 203(a)(2)(B) may not exceed—

(i) 23 percent of the maximum number of visas that may be made available under section 203(a) to immigrants of the state or area described in section 203(a)(2) consistent with subsection (e), or

(ii) the number (if any) by which the maximum number of visas that may be made available under section 203(a) to immigrants of the state or area described in section 203(a)(2) consistent with subsection (e) exceeds the number of visas issued under section 203(a)(2)(A),

whichever is greater.

(D) LIMITING PASS DOWN FOR CERTAIN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 203(a)(2) exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 203(a)(2) consistent with subsection (e) (determined without regard to this paragraph), in applying paragraphs (3) and (4) of section 203(a) under subsection (e)(2) all visas shall be deemed to have been required for the classes specified in paragraphs (1) and (2) of such section.

(5) RULES FOR EMPLOYMENT-BASED IMMIGRANTS.—

(A) EMPLOYMENT-BASED IMMIGRANTS NOT SUBJECT TO PER COUNTRY LIMITATION IF ADDITIONAL VISAS AVAILABLE.—If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 203(b) for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

(B) LIMITING FALL ACROSS FOR CERTAIN COUNTRIES SUBJECT TO SUBSECTION (e).—In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 203(b) exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 203(b) consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 203(b).

(b) RULES FOR CHARGEABILITY.—Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship system of the United Nations, other than the United States and its outlying possessions, shall be treated as a separate foreign state for the purposes of a numerical level established under subsection (a)(2) when approved by the Secretary of State. All other inhabited lands shall be attributed to a foreign state specified by the Secretary of State. For the purposes of this Act the foreign state to which an immigrant is chargeable shall be determined by birth within such foreign state except that (1) an alien child, when accompanied by or following to join his alien parent or parents, may be charged to the foreign state of either parent if such parent has received or would be qualified for an immigrant visa, if necessary to prevent the separation of the child from the parent or parents, and if immigration charged to the foreign state to which such parent has been or would be chargeable has not reached a numerical level established under subsection (a)(2) for that fiscal year; (2) if an alien is chargeable to a different foreign state from that of his spouse, the foreign state to which such alien is chargeable may, if necessary to prevent the separation of husband and wife, be determined by the foreign state of the spouse he is accompanying or following to join, if such spouse has received or would be qualified for an immigrant visa and if immigration charged to the foreign state to which such spouse has been or

would be chargeable has not reached a numerical level established under subsection (a)(2) for that fiscal year; (3) an alien born in the United States shall be considered as having been born in the country of which he is a citizen or subject, or, if he is not a citizen or subject of any country, in the last foreign country in which he had his residence as determined by the consular officer; and (4) an alien born within any foreign state in which neither of his parents was born and in which neither of his parents had a residence at the time of such alien's birth may be charged to the foreign state of either parent.

(c) CHARGEABILITY FOR DEPENDENT AREAS.—Any immigrant born in a colony or other component or dependent area of a foreign state overseas from the foreign state, other than an alien described in section 201(b), shall be chargeable for the purpose of the limitation set forth in subsection (a), to the foreign state.

(d) CHANGES IN TERRITORY.—In the case of any change in the territorial limits of foreign states, the Secretary of State shall, upon recognition of such change, issue appropriate instructions to all diplomatic and consular offices.

(e) SPECIAL RULES FOR COUNTRIES AT CEILING.—If it is determined that the total number of immigrant visas made available under subsections (a) and (b) of section 203 to natives of any single foreign state or dependent area will exceed the numerical limitation specified in subsection (a)(2) in any fiscal year, in determining the allotment of immigrant visa numbers to natives under subsections (a) and (b) of section 203, visa numbers with respect to natives of that state or area shall be allocated (to the extent practicable and otherwise consistent with this section and section 203) in a manner so that—

(1) the ratio of the visa numbers made available under section 203(a) to the visa numbers made available under section 203(b) is equal to the ratio of the worldwide level of immigration under section 201(c) to such level under section 201(d);

(2) except as provided in subsection (a)(4), the proportion of the visa numbers made available under each of paragraphs (1) through (4) of section 203(a) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(a), and

(3) except as provided in subsection (a)(5), the proportion of the visa numbers made available under each of paragraphs (1) through (5) of section 203(b) is equal to the ratio of the total number of visas made available under the respective paragraph to the total number of visas made available under section 203(b).

Nothing in this subsection shall be construed as limiting the number of visas that may be issued to natives of a foreign state or dependent area under section 203(a) or 203(b) if there is insufficient demand for visas for such natives under section 203(b) or 203(a), respectively, or as limiting the number of visas that may be issued under section 203(a)(2)(A) pursuant to subsection (a)(4)(A).

* * * * *

CHAPTER 2—QUALIFICATIONS FOR ADMISSION OF ALIENS; TRAVEL
CONTROL OF CITIZENS AND ALIENS

* * * * *

GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND
INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILITY

SEC. 212. (a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.—Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) HEALTH-RELATED GROUNDS.—

(A) IN GENERAL.—Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) WAIVER AUTHORIZED.—For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) EXCEPTION FROM IMMUNIZATION REQUIREMENT FOR ADOPTED CHILDREN 10 YEARS OF AGE OR YOUNGER.—Clause

(ii) of subparagraph (A) shall not apply to a child who—

(i) is 10 years of age or younger,

(ii) is described in subparagraph (F) or (G) of section 101(b)(1); and

(iii) is seeking an immigrant visa as an immediate relative under section 201(b),

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) CRIMINAL AND RELATED GROUNDS.—

(A) CONVICTION OF CERTAIN CRIMES.—

(i) IN GENERAL.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

(ii) EXCEPTION.—Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) MULTIPLE CRIMINAL CONVICTIONS.—Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) CONTROLLED SUBSTANCE TRAFFICKERS.—Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,
is inadmissible.

(D) PROSTITUTION AND COMMERCIALIZED VICE.—Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, entry, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,
is inadmissible.

(E) CERTAIN ALIENS INVOLVED IN SERIOUS CRIMINAL ACTIVITY WHO HAVE ASSERTED IMMUNITY FROM PROSECUTION.—Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h)),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,
is inadmissible.

(F) WAIVER AUTHORIZED.—For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM.—Any alien who, while serving as a foreign gov-

ernment official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is inadmissible.

(H) SIGNIFICANT TRAFFICKERS IN PERSONS.—

(i) IN GENERAL.—Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act, is inadmissible.

(ii) BENEFICIARIES OF TRAFFICKING.—Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) EXCEPTION FOR CERTAIN SONS AND DAUGHTERS.—Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) MONEY LAUNDERING.—Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) SECURITY AND RELATED GROUNDS.—

(A) IN GENERAL.—Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) TERRORIST ACTIVITIES.—

(i) IN GENERAL.—Any alien who—

(I) has engaged in a terrorist activity;
 (II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.

(ii) EXCEPTION.—Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) TERRORIST ACTIVITY DEFINED.—As used in this Act, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in

the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) ENGAGE IN TERRORIST ACTIVITY DEFINED.—As used in this Act, the term “engage in terrorist activity” means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) REPRESENTATIVE DEFINED.—As used in this paragraph, the term “representative” includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) TERRORIST ORGANIZATION DEFINED.—As used in this section, the term “terrorist organization” means an organization—

(I) designated under section 219;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) FOREIGN POLICY.—

(i) IN GENERAL.—An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have poten-

tially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) EXCEPTION FOR OFFICIALS.—An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) EXCEPTION FOR OTHER ALIENS.—An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) NOTIFICATION OF DETERMINATIONS.—If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) IMMIGRANT MEMBERSHIP IN TOTALITARIAN PARTY.—

(i) IN GENERAL.—Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) EXCEPTION FOR INVOLUNTARY MEMBERSHIP.—Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) EXCEPTION FOR PAST MEMBERSHIP.—Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) EXCEPTION FOR CLOSE FAMILY MEMBERS.—The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) PARTICIPANTS IN NAZI PERSECUTION, GENOCIDE, OR THE COMMISSION OF ANY ACT OF TORTURE OR EXTRAJUDICIAL KILLING.—

(i) PARTICIPATION IN NAZI PERSECUTIONS.—Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) PARTICIPATION IN GENOCIDE.—Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, United States Code, is inadmissible

(iii) COMMISSION OF ACTS OF TORTURE OR EXTRAJUDICIAL KILLINGS.—Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18, United States Code; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) ASSOCIATION WITH TERRORIST ORGANIZATIONS.—Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) RECRUITMENT OR USE OF CHILD SOLDIERS.—Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code, is inadmissible.

(4) PUBLIC CHARGE.—

(A) IN GENERAL.—Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) FACTORS TO BE TAKEN INTO ACCOUNT.—(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—

- (I) age;
- (II) health;
- (III) family status;
- (IV) assets, resources, and financial status; and
- (V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 213A for purposes of exclusion under this paragraph.

(C) FAMILY-SPONSORED IMMIGRANTS.—Any alien who seeks admission or adjustment of status under a visa number issued under section 201(b)(2) or 203(a) is inadmissible under this paragraph unless—

(i) the alien has obtained—

- (I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A), or
- (II) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B); or
- (III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 213A with respect to such alien.

(D) CERTAIN EMPLOYMENT-BASED IMMIGRANTS.—Any alien who seeks admission or adjustment of status under a visa number issued under section 203(b) by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless

such relative has executed an affidavit of support described in section 213A with respect to such alien.

(E) SPECIAL RULE FOR QUALIFIED ALIEN VICTIMS.—Subparagraphs (A), (B), and (C) shall not apply to an alien who—

- (i) is a VAWA self-petitioner;
- (ii) is an applicant for, or is granted, nonimmigrant status under section 101(a)(15)(U); or
- (iii) is a qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641(c)).

(5) LABOR CERTIFICATION AND QUALIFICATIONS FOR CERTAIN IMMIGRANTS.—

(A) LABOR CERTIFICATION.—

(i) IN GENERAL.—Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that—

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) CERTAIN ALIENS SUBJECT TO SPECIAL RULE.—For purposes of clause (i)(I), an alien described in this clause is an alien who—

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) PROFESSIONAL ATHLETES.—

(I) IN GENERAL.—A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) DEFINITION.—For purposes of subclause (I), the term “professional athlete” means an individual who is employed as an athlete by—

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) LONG DELAYED ADJUSTMENT APPLICANTS.—A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) UNQUALIFIED PHYSICIANS.—An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) UNCERTIFIED FOREIGN HEALTH-CARE WORKERS.—Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that—

(i) the alien's education, training, license, and experience—

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standard-

ized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) APPLICATION OF GROUNDS.—The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 203(b).

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.—

(A) ALIENS PRESENT WITHOUT ADMISSION OR PAROLE.—

(i) IN GENERAL.—An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) EXCEPTION FOR CERTAIN BATTERED WOMEN AND CHILDREN.—Clause (i) shall not apply to an alien who demonstrates that—

(I) the alien is a VAWA self-petitioner;

(II)(a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) FAILURE TO ATTEND REMOVAL PROCEEDING.—Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) MISREPRESENTATION.—

(i) IN GENERAL.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) FALSELY CLAIMING CITIZENSHIP.—

(I) IN GENERAL.—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

(II) EXCEPTION.—In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) WAIVER AUTHORIZED.—For provision authorizing waiver of clause (i), see subsection (i).

(D) STOWAWAYS.—Any alien who is a stowaway is inadmissible.

(E) SMUGGLERS.—

(i) IN GENERAL.—Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) SPECIAL RULE IN THE CASE OF FAMILY REUNIFICATION.—Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) WAIVER AUTHORIZED.—For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) SUBJECT OF CIVIL PENALTY.—

(i) IN GENERAL.—An alien who is the subject of a final order for violation of section 274C is inadmissible.

(ii) WAIVER AUTHORIZED.—For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) STUDENT VISA ABUSERS.—An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) and who violates a term or condition of such status under section 214(l) is inadmissible until the alien has been out-

side the United States for a continuous period of 5 years after the date of the violation.

(7) DOCUMENTATION REQUIREMENTS.—

(A) IMMIGRANTS.—

(i) IN GENERAL.—Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a), or

(II) whose visa has been issued without compliance with the provisions of section 203, is inadmissible.

(ii) WAIVER AUTHORIZED.—For provision authorizing waiver of clause (i), see subsection (k).

(B) NONIMMIGRANTS.—

(i) IN GENERAL.—Any nonimmigrant who—

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is inadmissible.

(ii) GENERAL WAIVER AUTHORIZED.—For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) GUAM AND NORTHERN MARIANA ISLANDS VISA WAIVER.—For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (l).

(iv) VISA WAIVER PROGRAM.—For authority to waive the requirement of clause (i) under a program, see section 217.

(8) INELIGIBLE FOR CITIZENSHIP.—

(A) IN GENERAL.—Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) DRAFT EVADERS.—Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) ALIENS PREVIOUSLY REMOVED.—

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.—

(i) **ARRIVING ALIENS.**—Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) **OTHER ALIENS.**—Any alien not described in clause (i) who—

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) **EXCEPTION.**—Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) ALIENS UNLAWFULLY PRESENT.—

(i) **IN GENERAL.**—Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) **CONSTRUCTION OF UNLAWFUL PRESENCE.**—For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) **EXCEPTIONS.**—

(I) **MINORS.**—No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) ASYLEES.—No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) FAMILY UNITY.—No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) BATTERED WOMEN AND CHILDREN.—Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if “violation of the terms of the alien’s nonimmigrant visa” were substituted for “unlawful entry into the United States” in subclause (III) of that paragraph.

(V) VICTIMS OF A SEVERE FORM OF TRAFFICKING IN PERSONS.—Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102)) was at least one central reason for the alien’s unlawful presence in the United States.

(iv) TOLLING FOR GOOD CAUSE.—In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) WAIVER.—The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) ALIENS UNLAWFULLY PRESENT AFTER PREVIOUS IMMIGRATION VIOLATIONS.—

(i) IN GENERAL.—Any alien who—

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) EXCEPTION.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) WAIVER.—The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

(10) MISCELLANEOUS.—

(A) PRACTICING POLYGAMISTS.—Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) GUARDIAN REQUIRED TO ACCOMPANY HELPLESS ALIEN.—Any alien—

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 232(c), and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i),

is inadmissible.

(C) INTERNATIONAL CHILD ABDUCTION.—

(i) IN GENERAL.—Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

(ii) ALIENS SUPPORTING ABDUCTORS AND RELATIVES OF ABDUCTORS.—Any alien who—

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) EXCEPTIONS.—Clauses (i) and (ii) shall not apply—

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) UNLAWFUL VOTERS.—

(i) IN GENERAL.—Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) EXCEPTION.—In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) FORMER CITIZENS WHO RENOUNCED CITIZENSHIP TO AVOID TAXATION.—Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

(b) NOTICES OF DENIALS.—

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible

under subsection (a), the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is excludable or ineligible for entry or adjustment of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a).

(d)(1) The Attorney General shall determine whether a ground for inadmissible exists with respect to a nonimmigrant described in section 101(a)(15)(S). The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(S), if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 101(a)(15)(S) for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 101(a)(15)(S).

(3)(A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may determine in such Secretary's sole unreviewable discretion that subsection (a)(3)(B) shall not apply with respect to an alien within the scope of that subsection or that subsection (a)(3)(B)(vi)(III) shall not apply to a group within the scope of that subsection, except that no such waiver may be extended to an alien who is within the scope of subsection (a)(3)(B)(i)(II), no such waiver may be extended to an alien who is

a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization that is described in subclause (I) or (II) of subsection (a)(3)(B)(vi), and no such waiver may be extended to a group that has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians. Such a determination shall neither prejudice the ability of the United States Government to commence criminal or civil proceedings involving a beneficiary of such a determination or any other person, nor create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in section 1252(a)(2)(D). The Secretary of State may not exercise the discretion provided in this clause with respect to an alien at any time during which the alien is the subject of pending removal proceedings under section 1229a of this title.

(ii) Not later than 90 days after the end of each fiscal year, the Secretary of State and the Secretary of Homeland Security shall each provide to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on International Relations of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Homeland Security of the House of Representatives a report on the aliens to whom such Secretary has applied clause (i). Within one week of applying clause (i) to a group, the Secretary of State or the Secretary of Homeland Security shall provide a report to such Committees.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 238(c).

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 214(f), in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

(7) The provisions of subsection (a) (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. Any alien described in this paragraph, who is denied admission to the United States, shall be immediately removed in the manner provided by section 241(c) of this Act.

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F)—

(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 211(b), and

(B) in the case of an alien seeking admission or adjustment of status under section 201(b)(2)(A) or under section 203(a), if no previous civil money penalty was imposed against the alien under section 274C and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.

(13)(A) The Secretary of Homeland Security shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(T), except that the ground for inadmissibility described in subsection (a)(4) shall not apply with respect to such a nonimmigrant.

(B) In addition to any other waiver that may be available under this section, in the case of a nonimmigrant described in section 101(a)(15)(T), if the Secretary of Homeland Security considers it to

be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's discretion, may waive the application of—

- (i) subsection (a)(1); and
- (ii) any other provision of subsection (a) (excluding paragraphs (3), (4), (10)(C), and (10(E))) if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I).

(14) The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(U). The Secretary of Homeland Security, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(U), if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

(e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: *Provided*, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): *And provided further*, That, except in the

case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

[(f) Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.]

(f) *AUTHORITY TO SUSPEND OR RESTRICT THE ENTRY OF A CLASS OF ALIENS.*—

(1) *IN GENERAL.*—*Subject to paragraph (2), if the Secretary of State, in consultation with the Secretary of Homeland Security, determines, based on specific and credible facts, that the entry of any aliens or any class of aliens into the United States would undermine the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability, the President may temporarily—*

(A) *suspend the entry of such aliens or class of aliens as immigrants or nonimmigrants; or*

(B) *impose any restrictions on the entry of such aliens that the President deems appropriate.*

(2) *LIMITATIONS.*—*In carrying out paragraph (1), the President, the Secretary of State, and the Secretary of Homeland Security shall—*

(A) *only issue a suspension or restriction when required to address specific acts implicating a compelling government interest in a factor identified in paragraph (1);*

(B) *narrowly tailor the suspension or restriction, using the least restrictive means, to achieve such compelling government interest;*

(C) *specify the duration of the suspension or restriction; and*

(D) *consider waivers to any class-based restriction or suspension and apply a rebuttable presumption in favor of granting family-based and humanitarian waivers.*

(3) *CONGRESSIONAL NOTIFICATION.*—

(A) *IN GENERAL.*—*Prior to the President exercising the authority under paragraph (1), the Secretary of State and the Secretary of Homeland Security shall consult Congress and provide Congress with specific evidence supporting the need for the suspension or restriction and its proposed duration.*

(B) *BRIEFING AND REPORT.*—Not later than 48 hours after the President exercises the authority under paragraph (1), the Secretary of State and the Secretary of Homeland Security shall provide a briefing and submit a written report to Congress that describes—

(i) the action taken pursuant to paragraph (1) and the specified objective of such action;

(ii) the estimated number of individuals who will be impacted by such action;

(iii) the constitutional and legislative authority under which such action took place; and

(iv) the circumstances necessitating such action, including how such action complies with paragraph (2), as well as any intelligence informing such actions.

(C) *TERMINATION.*—If the briefing and report described in subparagraph (B) are not provided to Congress during the 48 hours that begin when the President exercises the authority under paragraph (1), the suspension or restriction shall immediately terminate absent intervening congressional action.

(D) *CONGRESSIONAL COMMITTEES.*—The term “Congress”, as used in this paragraph, refers to the Select Committee on Intelligence of the Senate, the Committee on Foreign Relations of the Senate, the Committee on the Judiciary of the Senate, the Committee on Homeland Security and Governmental Affairs of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on Foreign Affairs of the House of Representatives, the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security of the House of Representatives.

(4) *PUBLICATION.*—The Secretary of State and the Secretary of Homeland Security shall publicly announce and publish an unclassified version of the report described in paragraph (3)(B) in the Federal Register.

(5) *JUDICIAL REVIEW.*—

(A) *IN GENERAL.*—Notwithstanding any other provision of law, an individual or entity who is present in the United States and has been harmed by a violation of this subsection may file an action in an appropriate district court of the United States to seek declaratory or injunctive relief.

(B) *CLASS ACTION.*—Nothing in this Act may be construed to preclude an action filed pursuant to subparagraph (A) from proceeding as a class action.

(6) *TREATMENT OF COMMERCIAL AIRLINES.*—Whenever the Secretary of Homeland Security finds that a commercial airline has failed to comply with regulations of the Secretary of Homeland Security relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Secretary of Homeland Security may suspend the entry of some or all aliens transported to the United States by such airline.

(7) *RULE OF CONSTRUCTION.*—Nothing in this section may be construed as authorizing the President, the Secretary of State,

or the Secretary of Homeland Security to act in a manner inconsistent with the policy decisions expressed in the immigration laws.

(g) The Attorney General may waive the application of—

(1) subsection (a)(1)(A)(i) in the case of any alien who—

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; or

(C) is a VAWA self-petitioner,

in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe;

(2) subsection (a)(1)(A)(ii) in the case of any alien—

(A) who receives vaccination against the vaccine-preventable disease or diseases for which the alien has failed to present documentation of previous vaccination,

(B) for whom a civil surgeon, medical officer, or panel physician (as those terms are defined by section 34.2 of title 42 of the Code of Federal Regulations) certifies, according to such regulations as the Secretary of Health and Human Services may prescribe, that such vaccination would not be medically appropriate, or

(C) under such circumstances as the Attorney General provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions; or

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or re-applying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(i)(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

(j)(1) The additional requirements referred to in section 101(a)(15)(J) for an alien who is coming to the United States under a program under which he will receive graduate medical education or training are as follows:

(A) A school of medicine or of one of the other health professions, which is accredited by a body or bodies approved for the purpose by the Secretary of Education, has agreed in writing to provide the graduate medical education or training under the program for which the alien is coming to the United States or to assume responsibility for arranging for the provision thereof by an appropriate public or nonprofit private institution or agency, except that, in the case of such an agreement by a school of medicine, any one or more of its affiliated hospitals which are to participate in the provision of the graduate medical education or training must join in the agreement.

(B) Before making such agreement, the accredited school has been satisfied that the alien (i) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States); or (ii) (I) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), (II) has competency in oral and written English, (III) will be able to adapt to the educational and cultural environment in which he will be receiving his education or training, and (IV) has adequate prior education and training to participate satisfactorily in the program for which he is coming to the United States. For the purposes of this subparagraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) The alien has made a commitment to return to the country of his nationality or last residence upon completion of the education or training for which he is coming to the United States, and the government of the country of his nationality or last residence has provided a written assurance, satisfactory to the Secretary of Health and Human Services, that there is a need in that country for persons with the skills the alien will acquire in such education or training.

(D) The duration of the alien's participation in the program of graduate medical education or training for which the alien is coming to the United States is limited to the time typically required to complete such program, as determined by the Director of the United States Information Agency at the time of the alien's admission into the United States, based on criteria which are established in coordination with the Secretary of Health and Human Services and which take into consideration the published requirements of the medical specialty board which administers such education or training program; except that—

(i) such duration is further limited to seven years unless the alien has demonstrated to the satisfaction of the Director that the country to which the alien will return at the end of such specialty education or training has an exceptional need for an individual trained in such specialty, and

(ii) the alien may, once and not later than two years after the date the alien is admitted to the United States as an exchange visitor or acquires exchange visitor status, change the alien's designated program of graduate medical education or training if the Director approves the change and if a commitment and written assurance with respect to the alien's new program have been provided in accordance with subparagraph (C).

(E) The alien furnishes the Attorney General each year with an affidavit (in such form as the Attorney General shall prescribe) that attests that the alien (i) is in good standing in the program of graduate medical education or training in which

the alien is participating, and (ii) will return to the country of his nationality or last residence upon completion of the education or training for which he came to the United States.

(2) An alien who is a graduate of a medical school and who is coming to the United States to perform services as a member of the medical profession may not be admitted as a nonimmigrant under section 101(a)(15)(H)(i)(b) unless—

(A) the alien is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency, or

(B)(i) the alien has passed the Federation licensing examination (administered by the Federation of State Medical Boards of the United States) or an equivalent examination as determined by the Secretary of Health and Human Services, and

(ii)(I) has competency in oral and written English or (II) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States).

(3) The Director of the United States Information Agency annually shall transmit to the Congress a report on aliens who have submitted affidavits described in paragraph (1)(E), and shall include in such report the name and address of each such alien, the medical education or training program in which such alien is participating, and the status of such alien in that program.

(k) Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

(l) GUAM AND NORTHERN MARIANA ISLANDS VISA WAIVER PROGRAM.—

(1) IN GENERAL.—The requirement of subsection (a)(7)(B)(i) may be waived by the Secretary of Homeland Security, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay in Guam or the Commonwealth of the Northern Mariana Islands for a period not to exceed 45 days, if the Secretary of Homeland Security, after consultation with the Secretary of the Interior, the Secretary of State, the Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands, determines that—

(A) an adequate arrival and departure control system has been developed in Guam and the Commonwealth of the Northern Mariana Islands; and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) **ALIEN WAIVER OF RIGHTS.**—An alien may not be provided a waiver under this subsection unless the alien has waived any right—

(A) to review or appeal under this Act an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam or the Commonwealth of the Northern Mariana Islands; or

(B) to contest, other than on the basis of an application for withholding of removal under section 241(b)(3) of this Act or under the Convention Against Torture, or an application for asylum if permitted under section 208, any action for removal of the alien.

(3) **REGULATIONS.**—All necessary regulations to implement this subsection shall be promulgated by the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, on or before the 180th day after the date of enactment of the Consolidated Natural Resources Act of 2008. The promulgation of such regulations shall be considered a foreign affairs function for purposes of section 553(a) of title 5, United States Code. At a minimum, such regulations should include, but not necessarily be limited to—

(A) a listing of all countries whose nationals may obtain the waiver also provided by this subsection, except that such regulations shall provide for a listing of any country from which the Commonwealth has received a significant economic benefit from the number of visitors for pleasure within the one-year period preceding the date of enactment of the Consolidated Natural Resources Act of 2008, unless the Secretary of Homeland Security determines that such country's inclusion on such list would represent a threat to the welfare, safety, or security of the United States or its territories; and

(B) any bonding requirements for nationals of some or all of those countries who may present an increased risk of overstays or other potential problems, if different from such requirements otherwise provided by law for non-immigrant visitors.

(4) **FACTORS.**—In determining whether to grant or continue providing the waiver under this subsection to nationals of any country, the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, shall consider all factors that the Secretary deems relevant, including electronic travel authorizations, procedures for reporting lost and stolen passports, repatriation of aliens, rates of refusal for nonimmigrant visitor visas, overstays, exit systems, and information exchange.

(5) **SUSPENSION.**—The Secretary of Homeland Security shall monitor the admission of nonimmigrant visitors to Guam and the Commonwealth of the Northern Mariana Islands under this subsection. If the Secretary determines that such admissions have resulted in an unacceptable number of visitors from a country remaining unlawfully in Guam or the Commonwealth of the Northern Mariana Islands, unlawfully obtaining entry to other parts of the United States, or seeking withholding of removal or asylum, or that visitors from a country

pose a risk to law enforcement or security interests of Guam or the Commonwealth of the Northern Mariana Islands or of the United States (including the interest in the enforcement of the immigration laws of the United States), the Secretary shall suspend the admission of nationals of such country under this subsection. The Secretary of Homeland Security may in the Secretary's discretion suspend the Guam and Northern Mariana Islands visa waiver program at any time, on a country-by-country basis, for other good cause.

(6) ADDITION OF COUNTRIES.—The Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands may request the Secretary of the Interior and the Secretary of Homeland Security to add a particular country to the list of countries whose nationals may obtain the waiver provided by this subsection, and the Secretary of Homeland Security may grant such request after consultation with the Secretary of the Interior and the Secretary of State, and may promulgate regulations with respect to the inclusion of that country and any special requirements the Secretary of Homeland Security, in the Secretary's sole discretion, may impose prior to allowing nationals of that country to obtain the waiver provided by this subsection.

(m)(1) The qualifications referred to in section 101(a)(15)(H)(i)(c), with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien—

(A) has obtained a full and unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States;

(B) has passed an appropriate examination (recognized in regulations promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

(2)(A) The attestation referred to in section 101(a)(15)(H)(i)(c), with respect to a facility for which an alien will perform services, is an attestation as to the following:

(i) The facility meets all the requirements of paragraph (6).

(ii) The employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.

(iii) The alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(iv) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as

quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.

(v) There is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(vi) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(c), notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to the registered nurses employed at the facility through posting in conspicuous locations.

(vii) The facility will not, at any time, employ a number of aliens issued visas or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(c) that exceeds 33 percent of the total number of registered nurses employed by the facility.

(viii) The facility will not, with respect to any alien issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(c)—

- (I) authorize the alien to perform nursing services at any worksite other than a worksite controlled by the facility; or
- (II) transfer the place of employment of the alien from one worksite to another.

Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999. A copy of the attestation shall be provided, within 30 days of the date of filing, to registered nurses employed at the facility on the date of filing.

(B) For purposes of subparagraph (A)(iv), each of the following shall be considered a significant step reasonably designed to recruit and retain registered nurses:

(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses.

The steps described in this subparagraph shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of subparagraph (A)(iv). Nothing in this subparagraph shall require a facility to take more than one step if the facility can demonstrate that taking a second step is not reasonable.

(C) Subject to subparagraph (E), an attestation under subparagraph (A)—

(i) shall expire on the date that is the later of—

(I) the end of the one-year period beginning on the date of its filing with the Secretary of Labor; or

(II) the end of the period of admission under section 101(a)(15)(H)(i)(c) of the last alien with respect to whose admission it was applied (in accordance with clause (ii)); and

(ii) shall apply to petitions filed during the one-year period beginning on the date of its filing with the Secretary of Labor if the facility states in each such petition that it continues to comply with the conditions in the attestation.

(D) A facility may meet the requirements under this paragraph with respect to more than one registered nurse in a single petition.

(E)(i) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying facilities which have filed petitions for non-immigrants under section 101(a)(15)(H)(i)(c) and, for each such facility, a copy of the facility's attestation under subparagraph (A) (and accompanying documentation) and each such petition filed by the facility.

(ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. Subject to the time limits established under this clause, this subparagraph shall apply regardless of whether an attestation is expired or unexpired at the time a complaint is filed.

(iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

(iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per nurse per violation, with the total penalty not to exceed \$10,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least one year for nurses to be employed by the facility.

(v) In addition to the sanctions provided for under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under

subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

(F)(i) The Secretary of Labor shall impose on a facility filing an attestation under subparagraph (A) a filing fee, in an amount prescribed by the Secretary based on the costs of carrying out the Secretary's duties under this subsection, but not exceeding \$250.

(ii) Fees collected under this subparagraph shall be deposited in a fund established for this purpose in the Treasury of the United States.

(iii) The collected fees in the fund shall be available to the Secretary of Labor, to the extent and in such amounts as may be provided in appropriations Acts, to cover the costs described in clause (i), in addition to any other funds that are available to the Secretary to cover such costs.

(3) The period of admission of an alien under section 101(a)(15)(H)(i)(c) shall be 3 years.

(4) The total number of nonimmigrant visas issued pursuant to petitions granted under section 101(a)(15)(H)(i)(c) in each fiscal year shall not exceed 500. The number of such visas issued for employment in each State in each fiscal year shall not exceed the following:

(A) For States with populations of less than 9,000,000, based upon the 1990 decennial census of population, 25 visas.

(B) For States with populations of 9,000,000 or more, based upon the 1990 decennial census of population, 50 visas.

(C) If the total number of visas available under this paragraph for a fiscal year quarter exceeds the number of qualified nonimmigrants who may be issued such visas during those quarters, the visas made available under this paragraph shall be issued without regard to the numerical limitation under subparagraph (A) or (B) of this paragraph during the last fiscal year quarter.

(5) A facility that has filed a petition under section 101(a)(15)(H)(i)(c) to employ a nonimmigrant to perform nursing services for the facility—

(A) shall provide the nonimmigrant a wage rate and working conditions commensurate with those of nurses similarly employed by the facility;

(B) shall require the nonimmigrant to work hours commensurate with those of nurses similarly employed by the facility; and

(C) shall not interfere with the right of the nonimmigrant to join or organize a union.

(6) For purposes of this subsection and section 101(a)(15)(H)(i)(c), the term "facility" means a subsection (d) hospital (as defined in section 1886(d)(1)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(1)(B))) that meets the following requirements:

(A) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 332 of the Public Health Service Act (42 U.S.C. 254e)).

(B) Based on its settled cost report filed under title XVIII of the Social Security Act for its cost reporting period beginning during fiscal year 1994—

- (i) the hospital has not less than 190 licensed acute care beds;
 - (ii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of such title is not less than 35 percent of the total number of such hospital's acute care inpatient days for such period; and
 - (iii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act, is not less than 28 percent of the total number of such hospital's acute care inpatient days for such period.
- (7) For purposes of paragraph (2)(A)(v), the term "lay off", with respect to a worker—

(A) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(B) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer. Nothing in this paragraph is intended to limit an employee's or an employer's rights under a collective bargaining agreement or other employment contract.

(n)(1) No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least—

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the application—

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

(D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(E)(i) In the case of an application described in clause (ii), the employer did not displace and will not displace a United States worker (as defined in paragraph (4)) employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.

(ii) An application described in this clause is an application filed on or after the date final regulations are first promulgated to carry out this subparagraph, and before by an H-1B-dependent employer (as defined in paragraph (3)) or by an employer that has been found, on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998, under paragraph (2)(C) or (5) to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application. An application is not described in this clause if the only H-1B nonimmigrants sought in the application are exempt H-1B nonimmigrants.

(F) In the case of an application described in subparagraph (E)(ii), the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where—

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer;

unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.

(G)(i) In the case of an application described in subparagraph (E)(ii), subject to clause (ii), the employer, prior to filing the application—

(I) has taken good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and

(II) has offered the job to any United States worker who applies and is equally or better qualified for the job for

which the nonimmigrant or nonimmigrants is or are sought.

- (ii) The conditions described in clause (i) shall not apply to an application filed with respect to the employment of an H-1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 203(b)(1).

The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). The Secretary shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of intended employment, and date of need. The Secretary shall make such list available for public examination in Washington, D.C. The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i)(b) within 7 days of the date of the filing of the application. The application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer described in such subparagraph displaces a United States worker as described in such subparagraph. Nothing in subparagraph (G) shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.

(2)(A) Subject to paragraph (5)(A), the Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under such process, the Secretary shall provide, within 30 days after the date such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of title 5, United States Code, within 60 days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary may consolidate the hearings under this subparagraph on such complaints.

(C)(i) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), (1)(E), or (1)(F), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(G)(i)(I), or a misrepresentation of material fact in an application—

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)—

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application—

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$35,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Attorney General shall devise a process under which an H-1B nonimmigrant who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi)(I) It is a violation of this clause for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 214(c)(1), for which a fee is imposed under section 214(c)(9), to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien.

(III) If the Secretary finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary may impose a civil monetary penalty of \$1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a full-time employee on the petition filed under section 214(c)(1) by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a part-time employee on the petition filed under section 214(c)(1) by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on such petition consistent with the rate of pay identified on such petition.

(III) In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection, and a petition under section 214(c)(1), with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case

of a nonimmigrant who is present in the United States on the date of the approval of the petition).

(IV) This clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to an H-1B nonimmigrant an established salary practice of the employer, under which the employer pays to H-1B nonimmigrants and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if—

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this Act to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) If an H-1B-dependent employer places a nonexempt H-1B nonimmigrant with another employer as provided under paragraph (1)(F) and the other employer has displaced or displaces a United States worker employed by such other employer during the period described in such paragraph, such displacement shall be considered for purposes of this paragraph a failure, by the placing employer, to meet a condition specified in an application submitted under paragraph (1); except that the Attorney General may impose a sanction described in subclause (II) of subparagraph (C)(i), (C)(ii), or (C)(iii) only if the Secretary of Labor found that such placing employer—

(i) knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer; or

(ii) has been subject to a sanction under this subparagraph based upon a previous placement of an H-1B nonimmigrant with the same other employer.

(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date (on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998) on which the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) (or has been found under paragraph (5) to have committed a willful failure to meet the condition of paragraph (1)(G)(i)(II)) or to have made a willful misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether or not the employer is an H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(G)(i) The Secretary of Labor may initiate an investigation of any employer that employs nonimmigrants described in section 101(a)(15)(H)(i)(b) if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this subsection. In the case of an investigation under this clause, the Secretary of Labor (or the acting Secretary in the case of the absence of disability of the Secretary of Labor) shall personally certify that reasonable cause exists and shall approve commencement of the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer in complying with this subsection.

(ii) If the Secretary of Labor receives specific credible information from a source who is likely to have knowledge of an employer's practices or employment conditions, or an employer's compliance with the employer's labor condition application under paragraph (1), and whose identity is known to the Secretary of Labor, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor may conduct an investigation into the alleged failure or failures. The Secretary of Labor may withhold the identity of the source from the employer, and the source's identity shall not be subject to disclosure under section 552 of title 5, United States Code.

(iii) The Secretary of Labor shall establish a procedure for any person desiring to provide to the Secretary of Labor information described in clause (ii) that may be used, in whole or in part, as the basis for the commencement of an investigation described in such clause, to provide the information in writing on a form developed and provided by the Secretary of Labor and completed by or on behalf of the person. The person may not be an officer or employee of the Department of Labor, unless the information satisfies the requirement of clause (iv)(II) (although an officer or employee of the Department of Labor may complete the form on behalf of the person).

(iv) Any investigation initiated or approved by the Secretary of Labor under clause (ii) shall be based on information that satisfies the requirements of such clause and that—

(I) originates from a source other than an officer or employee of the Department of Labor; or

(II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this Act of any other Act.

(v) The receipt by the Secretary of Labor of information submitted by an employer to the Attorney General or the Secretary of Labor for purposes of securing the employment of a nonimmigrant described in section 101(a)(15)(H)(i)(b) shall not be considered a receipt of information for purposes of clause (ii).

(vi) No investigation described in clause (ii) (or hearing described in clause (viii) based on such investigation) may be conducted with respect to information about a failure to meet a condition described in clause (ii), unless the Secretary of Labor receives the information not later than 12 months after the date of the alleged failure.

(vii) The Secretary of Labor shall provide notice to an employer with respect to whom there is reasonable cause to initiate an investigation described in clauses (i) or (ii), prior to the commencement of an investigation under such clauses, of the intent to conduct an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced. The Secretary of Labor is not required to comply with this clause if the Secretary of Labor determines that to do so would interfere with an effort by the Secretary of Labor to secure compliance by the employer with the requirements of this subsection. There shall be no judicial review of a determination by the Secretary of Labor under this clause.

(viii) An investigation under clauses (i) or (ii) may be conducted for a period of up to 60 days. If the Secretary of Labor determines after such an investigation that a reasonable basis exists to make a finding that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing in accordance with section 556 of title 5, United States Code, within 120 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 120 days after the date of the hearing.

(H)(i) Except as provided in clauses (ii) and (iii), a person or entity is considered to have complied with the requirements of this subsection, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith attempt to comply with the requirements.

(ii) Clause (i) shall not apply if—

(I) the Department of Labor (or another enforcement agency) has explained to the person or entity the basis for the failure;

(II) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure; and

(III) the person or entity has not corrected the failure voluntarily within such period.

(iii) A person or entity that, in the course of an investigation, is found to have violated the prevailing wage requirements set forth in paragraph (1)(A), shall not be assessed fines or other penalties for such violation if the person or entity can establish that the manner in which the prevailing wage was calculated was consistent with recognized industry standards and practices.

(iv) Clauses (i) and (iii) shall not apply to a person or entity that has engaged in or is engaging in a pattern or practice of willful violations of this subsection.

(I) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act (such as the authorities under section 274B), or any other Act.

(3)(A) For purposes of this subsection, the term “H-1B-dependent employer” means an employer that—

(i)(I) has 25 or fewer full-time equivalent employees who are employed in the United States; and (II) employs more than 7 H-1B nonimmigrants;

(ii)(I) has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States; and (II) employs more than 12 H-1B nonimmigrants; or

(iii)(I) has at least 51 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(B) For purposes of this subsection—

(i) the term “exempt H-1B nonimmigrant” means an H-1B nonimmigrant who—

(I) receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least \$60,000; or

(II) has attained a master’s or higher degree (or its equivalent) in a specialty related to the intended employment; and

(ii) the term nonexempt H-1B nonimmigrant means an H-1B nonimmigrant who is not an exempt H-1B nonimmigrant.

(C) For purposes of subparagraph (A)—

(i) in computing the number of full-time equivalent employees and the number of H-1B nonimmigrants, exempt H-1B nonimmigrants shall not be taken into account during the longer of—

(I) the 6-month period beginning on the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998; or

(II) the period beginning on the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 and ending on the date final regulations are issued to carry out this paragraph; and

(ii) any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer.

(4) For purposes of this subsection:

(A) The term “area of employment” means the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an application with respect to one or more H-1B nonimmigrants by an employer, the employer is considered to “displace” a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C) The term “H-1B nonimmigrant” means an alien admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(b).

(D)(i) The term “lays off”, with respect to a worker—

(I) means to cause the worker’s loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in subparagraph (E) or (F) of paragraph (1)); but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer (or, in the case of a placement of a worker with another employer under paragraph (1)(F), with either employer described in such paragraph) at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee’s rights under a collective bargaining agreement or other employment contract.

(E) The term “United States worker” means an employee who—

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207, is granted asylum under section 208, or is an immigrant otherwise authorized, by this Act or by the Attorney General, to be employed.

(5)(A) This paragraph shall apply instead of subparagraphs (A) through (E) of paragraph (2) in the case of a violation described in subparagraph (B), but shall not be construed to limit or affect the

authority of the Secretary or the Attorney General with respect to any other violation.

(B) The Attorney General shall establish a process for the receipt, initial review, and disposition in accordance with this paragraph of complaints respecting an employer's failure to meet the condition of paragraph (1)(G)(i)(II) or a petitioner's misrepresentation of material facts with respect to such condition. Complaints may be filed by an aggrieved individual who has submitted a résumé or otherwise applied in a reasonable manner for the job that is the subject of the condition. No proceeding shall be conducted under this paragraph on a complaint concerning such a failure or misrepresentation unless the Attorney General determines that the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

(C) If the Attorney General finds that a complaint has been filed in accordance with subparagraph (B) and there is reasonable cause to believe that such a failure or misrepresentation described in such complaint has occurred, the Attorney General shall initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of such Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings. The Attorney General shall pay the fee and expenses of the arbitrator.

(D)(i) The arbitrator shall make findings respecting whether a failure or misrepresentation described in subparagraph (B) occurred. If the arbitrator concludes that failure or misrepresentation was willful, the arbitrator shall make a finding to that effect. The arbitrator may not find such a failure or misrepresentation (or that such a failure or misrepresentation was willful) unless the complainant demonstrates such a failure or misrepresentation (or its willful character) by clear and convincing evidence. The arbitrator shall transmit the findings in the form of a written opinion to the parties to the arbitration and the Attorney General. Such findings shall be final and conclusive, and, except as provided in this subparagraph, no official or court of the United States shall have power or jurisdiction to review any such findings.

(ii) The Attorney General may review and reverse or modify the findings of an arbitrator only on the same bases as an award of an arbitrator may be vacated or modified under section 10 or 11 of title 9, United States Code.

(iii) With respect to the findings of an arbitrator, a court may review only the actions of the Attorney General under clause (ii) and may set aside such actions only on the grounds described in subparagraph (A), (B), or (C) of section 706(a)(2) of title 5, United States Code. Notwithstanding any other provision of law, such judicial review may only be brought in an appropriate United States court of appeals.

(E) If the Attorney General receives a finding of an arbitrator under this paragraph that an employer has failed to meet the condition of paragraph (1)(G)(i)(II) or has misrepresented a material fact with respect to such condition, unless the Attorney General reverses or modifies the finding under subparagraph (D)(ii)—

(i) the Attorney General may impose administrative remedies (including civil monetary penalties in an amount not to

exceed \$1,000 per violation or \$5,000 per violation in the case of a willful failure or misrepresentation) as the Attorney General determines to be appropriate; and

(ii) the Attorney General is authorized to not approve petitions filed, with respect to that employer and for aliens to be employed by the employer, under section 204 or 214(c)—

(I) during a period of not more than 1 year; or

(II) in the case of a willful failure or willful misrepresentation, during a period of not more than 2 years.

(F) The Attorney General shall not delegate, to any other employee or official of the Department of Justice, any function of the Attorney General under this paragraph, until 60 days after the Attorney General has submitted a plan for such delegation to the Committees on the Judiciary of the United States House of Representatives and the Senate.

(o) An alien who has been physically present in the United States shall not be eligible to receive an immigrant visa within ninety days following departure therefrom unless—

(1) the alien was maintaining a lawful nonimmigrant status at the time of such departure, or

(2) the alien is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(A) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986;

(B) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(C) applied for benefits under section 301(a) of the Immigration Act of 1990.

(p)(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) in the case of an employee of—

(A) an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization,

the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment.

(2) With respect to a professional athlete (as defined in subsection (a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.

(3) The prevailing wage required to be paid pursuant to subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.

(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

(q) Any alien admitted under section 101(a)(15)(B) may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities (lasting not longer than 9 days at any single institution), as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment or expenses from more than 5 institutions or organizations in the previous 6-month period.

(r) Subsection (a)(5)(C) shall not apply to an alien who seeks to enter the United States for the purpose of performing labor as a nurse who presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certified statement from the Commission on Graduates of Foreign Nursing Schools (or an equivalent independent credentialing organization approved for the certification of nurses under subsection (a)(5)(C) by the Attorney General in consultation with the Secretary of Health and Human Services) that—

(1) the alien has a valid and unrestricted license as a nurse in a State where the alien intends to be employed and such State verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(2) the alien has passed the National Council Licensure Examination (NCLEX);

(3) the alien is a graduate of a nursing program—

(A) in which the language of instruction was English;

(B) located in a country—

(i) designated by such commission not later than 30 days after the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999, based on such commission's assessment that the quality of nursing education in that country, and the English language proficiency of those who complete such programs in that country, justify the country's designation; or

(ii) designated on the basis of such an assessment by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection; and

(C)(i) which was in operation on or before the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999; or

(ii) has been approved by unanimous agreement of such commission and any equivalent credentialing organizations

which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection.

(s) In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 501 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1641(c)).

(t)(1) No alien may be admitted or provided status as a non-immigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) in an occupational classification unless the employer has filed with the Secretary of Labor an attestation stating the following:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) wages that are at least—

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the attestation; and

(ii) will provide working conditions for such a non-immigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the attestation—

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought; or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which nonimmigrants under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) are sought.

(D) A specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(2)(A) The employer shall make available for public examination, within one working day after the date on which an attestation under this subsection is filed, at the employer's principal place of business or worksite, a copy of each such attestation (and such accompanying documents as are necessary).

(B)(i) The Secretary of Labor shall compile, on a current basis, a list (by employer and by occupational classification) of the attestations filed under this subsection. Such list shall include, with respect to each attestation, the wage rate, number of aliens sought, period of intended employment, and date of need.

(ii) The Secretary of Labor shall make such list available for public examination in Washington, D.C.

(C) The Secretary of Labor shall review an attestation filed under this subsection only for completeness and obvious inaccuracies. Unless the Secretary of Labor finds that an attestation is incomplete or obviously inaccurate, the Secretary of Labor shall provide the certification described in section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) within 7 days of the date of the filing of the attestation.

(3)(A) The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting the failure of an employer to meet a condition specified in an attestation submitted under this subsection or misrepresentation by the employer of material facts in such an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary of Labor shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under the process described in subparagraph (A), the Secretary of Labor shall provide, within 30 days after the date a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary of Labor determines that such a reasonable basis exists, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of title 5, United States Code, within 60 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary of Labor may consolidate the hearings under this subparagraph on such complaints.

(C)(i) If the Secretary of Labor finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraph (1)(C) or (1)(D), or a misrepresentation of material fact in an attestation—

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 204, 214(c), 101(a)(15)(H)(i)(b1), or 101(a)(15)(E)(iii) or section

101(a)(15)(E)(iii) during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an attestation, or a violation of clause (iv)—

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$5,000 per violation as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 204, 214(c), 101(a)(15)(H)(i)(b1), or 101(a)(15)(E)(iii) or section 101(a)(15)(E)(iii) during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an attestation, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition or application supported by the attestation—

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$35,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 204, 214(c), 101(a)(15)(H)(i)(b1), or 101(a)(15)(E)(iii) or section 101(a)(15)(E)(iii) during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an attestation under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Secretary of Homeland Security shall devise a process under which a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek

other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such non-immigrant classification.

(vi)(I) It is a violation of this clause for an employer who has filed an attestation under this subsection to require a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary of Labor shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary of Labor may impose a civil monetary penalty of \$1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii)(I) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) designated as a full-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the non-immigrant's lack of a permit or license, to fail to pay the non-immigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) designated as a part-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on the attestation consistent with the rate of pay identified on the attestation.

(III) In the case of a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) who has not yet entered into employment with an employer who has had approved an attestation under this subsection with respect to the non-immigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States, or 60 days after the date the nonimmigrant becomes eligible to work for the employer in the case of a nonimmigrant who is present in the United States on the date of the approval of the attestation filed with the Secretary of Labor.

(IV) This clause does not apply to a failure to pay wages to a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) an established salary practice of the employer, under which the employer pays to nonimmigrants under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if—

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this Act to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection to fail to offer to a nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii), during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified in the attestation and required under paragraph (1), the Secretary of Labor shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) The Secretary of Labor may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date on which the employer is found by the Secretary of Labor to have committed a willful failure to meet a condition of paragraph (1) or to have made a willful misrepresentation of material fact in an attestation. The authority of the Secretary of Labor under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(F) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act (such as the authorities under section 274B), or any other Act.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the nonimmigrant under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an attestation with respect to one or more nonimmigrants under section 101(a)(15)(H)(i)(b1) or section 101(a)(15)(E)(iii) by an employer, the employer is considered to “displace” a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C)(i) The term “lays off”, with respect to a worker—

(I) means to cause the worker’s loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee’s rights under a collective bargaining agreement or other employment contract.

(D) The term “United States worker” means an employee who—

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207 of this title, is granted asylum under section 208, or is an immigrant otherwise authorized, by this Act or by the Secretary of Homeland Security, to be employed.

(t)(1) Except as provided in paragraph (2), no person admitted under section 101(a)(15)(Q)(ii)(I), or acquiring such status after admission, shall be eligible to apply for nonimmigrant status, an immigrant visa, or permanent residence under this Act until it is established that such person has resided and been physically present in the person’s country of nationality or last residence for an aggregate of at least 2 years following departure from the United States.

(2) The Secretary of Homeland Security may waive the requirement of such 2-year foreign residence abroad if the Secretary determines that—

(A) departure from the United States would impose exceptional hardship upon the alien’s spouse or child (if such spouse or child is a citizen of the United States or an alien lawfully admitted for permanent residence); or

(B) the admission of the alien is in the public interest or the national interest of the United States.

* * * * *

Committee Correspondence

ENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN



MIKE ROGERS, ALABAMA
RANKING MEMBER

One Hundred Sixteenth Congress
Committee on Homeland Security
U.S. House of Representatives
Washington, DC 20515

January 30, 2020

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Nadler:

I write to you regarding H.R. 2214, the "National Origin-Based Antidiscrimination for Nonimmigrants Act."

H.R. 2214 contains provisions that fall within the jurisdiction of the Committee on Homeland Security. I recognize and appreciate your desire to bring this legislation before the House in an expeditious manner and, accordingly, I will not seek a sequential referral of the bill. However, agreeing to waive consideration of this bill should not be construed as the Committee on Homeland Security waiving, altering, or otherwise affecting its jurisdiction over subject matters contained in the bill which fall within its Rule X jurisdiction.

Further, I request your support for the appointment of Homeland Security conferees during any House-Senate conference convened on this or similar legislation. I also ask that a copy of this letter and your response be included in the legislative report on H.R. 2214 and in the *Congressional Record* during floor consideration of this bill.

I look forward to working with you as we prepare to pass this important legislation.

Sincerely,


BENNIE G. THOMPSON
Chairman

cc: The Honorable Nancy Pelosi, Speaker
The Honorable Michael Rogers, Ranking Member
The Honorable Tom Wickham, Parliamentarian

JERROLD NADLER, New York
CHAIRMAN

DOUG COLLINS, Georgia
RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515-6216
One Hundred Sixteenth Congress

February 3, 2020

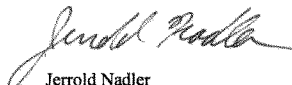
The Honorable Bennie G. Thompson
Chairman
Committee on Homeland Security
U.S. House of Representatives
H2-176 Ford House Office Building
Washington, DC 20515

Dear Chairman Thompson:

I am writing to acknowledge your letter dated January 30, 2020 responding to our request to your Committee that it waive any jurisdictional claims over the matters contained in H.R. 2214, the "National Origin-Based Antidiscrimination for Nonimmigrants Act," that fall within your Committee's Rule X jurisdiction. The Committee on the Judiciary confirms our mutual understanding that your Committee does not waive any jurisdiction over the subject matter contained in this or similar legislation, and your Committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any remaining issues within your Committee's jurisdiction.

I will ensure that this exchange of letters is included in the *Congressional Record* during floor consideration of the bill. I appreciate your cooperation regarding this legislation and look forward to continuing to work with you as this measure moves through the legislative process.

Sincerely,


Jerrold Nadler
Chairman

- c: The Honorable Doug Collins, Ranking Member, Committee on the Judiciary
The Honorable Mike Rogers, Ranking Member, Committee on Homeland Security
The Honorable Thomas J. Wickham, Jr., Parliamentarian

ELIOT L. ENGEL, NEW YORK
CHAIRMAN

JASON STEINBAUM
STAFF DIRECTOR

MICHAEL T. McCaul, TEXAS
RANKING REPUBLICAN MEMBER

BRENDAN P. SHIELDS
REPUBLICAN STAFF DIRECTOR



One Hundred Sixteenth Congress
U.S. House of Representatives
Committee on Foreign Affairs
2170 Rayburn House Office Building
Washington, DC 20515
www.foreignaffairs.house.gov

March 3, 2020

The Honorable Jerrold Nadler
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Nadler:

In recognition of the desire to expedite consideration of H.R. 2214, the "National Origin-Based Antidiscrimination for Nonimmigrants Act" or the "NO BAN Act," the Committee on Foreign Affairs agrees to waive formal consideration of the bill as to provisions that fall within the Rule X jurisdiction of the Committee on Foreign Affairs.

The Committee on Foreign Affairs takes this action with the mutual understanding that we do not waive any jurisdiction over the subject matter contained in this or similar legislation, and the Committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any issues within our jurisdiction. I ask you to support the appointment of Committee on Foreign Affairs conferees during any House-Senate conference convened on this legislation.

Finally, thank you for agreeing to include of a copy of our exchange of letters in the *Congressional Record* during floor consideration of H.R. 2214.

Sincerely,

ELIOT L. ENGEL
Chairman

Cc: The Honorable Michael T. McCaul, Committee on Foreign Affairs
The Honorable Doug Collins, Committee on the Judiciary
The Honorable Thomas J. Wickham Jr., Parliamentarian

JERROLD NADLER, New York
CHAIRMAN

DOUG COLLINS, Georgia
RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
One Hundred Sixteenth Congress

March 4, 2020

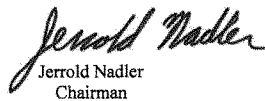
The Honorable Eliot L. Engel
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
2170 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Engel:

I am writing to acknowledge your letter dated March 4, 2020 responding to our request to your Committee that it waive any jurisdictional claims over the matters contained in H.R. 2214, the "National Origin-Based Antidiscrimination for Nonimmigrants Act," that fall within your Committee's Rule X jurisdiction. The Committee on the Judiciary confirms our mutual understanding that your Committee does not waive any jurisdiction over the subject matter contained in this or similar legislation, and your Committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any remaining issues within your Committee's jurisdiction.

I will ensure that this exchange of letters is included in the *Congressional Record* during floor consideration of the bill. I appreciate your cooperation regarding this legislation and look forward to continuing to work with you as this measure moves through the legislative process.

Sincerely,


Jerrold Nadler
Chairman

c: The Honorable Doug Collins, Ranking Member, Committee on the Judiciary
The Honorable Michael T. McCaul, Ranking Member, Committee on Foreign Affairs
The Honorable Thomas J. Wickham, Jr., Parliamentarian

Dissenting Views

H.R. 2214¹ terminates presidential actions taken under the authority to suspend entry of certain aliens pursuant to INA 212(f) to make our country safer. In addition, H.R. 2214 places further restrictions on the use of 212(f) authority, some so onerous that it appears the legislation was crafted to discourage the President from ever exercising such authority, even in instances where national security compels the issuance of travel restrictions. In addition to restricting the president's authority, H.R. 2214 is a recipe for litigation, opening up determinations for federal court review by any individual, entity, or class present in the United States who claims to have been harmed by any perceived violation of the bill's many vaguely worded requirements.

H.R. 2214 TERMINATES LAWFUL PRESIDENTIAL ACTIONS TAKEN TO SAFEGUARD THE NATIONAL SECURITY

H.R. 2214 terminates Executive Orders 13769, 13780, 13815 and Presidential Proclamations 9645, 9822, and—as amended by Mr. Neguse—Proclamation 9983. These presidential actions were proper uses of 212(f) authority, and are making the U.S. and the world a safer place by inducing foreign governments to come into compliance with international standards of information sharing and identity management practices.

Section 212(f) of the Immigration and Nationality Act, codified in 1952, provides the President broad latitude to impose restrictions on the entry of aliens or classes of aliens to the United States. Specifically the provision states, “Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”²

On January 27, 2017, President Donald Trump signed Executive Order 13769, which was then superseded by the March 6, 2017, Executive Order 13780. In Section 2(c) of EO 13780, the President utilized INA 212(f) and 215(a)³ authorities stating,

“the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States.

¹ Amendment in the Nature of a Substitute to H.R. 2214, as amended at markup, 116th Cong. (National Origin-Based Antidiscrimination for Nonimmigrants Act).

² 8 U.S.C. § 1182(f).

³ INA § 215(a) provides authority for the President to impose reasonable restrictions on entering or departing from the United States, stating that “it shall be unlawful—(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . .”.

I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3”

The EO also required that the Secretary of DHS, in consultation with the Secretary of State and the Director of National Intelligence (ODNI), “conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat.”⁴ A report on that review was to be presented to the President within 20 days of the EO’s signing,⁵ and countries noted in the report would have 50 days within which to begin providing the additional information needed to properly adjudicate applications for a visa, admission, or other immigration benefit.⁶

The EO then required that the Secretaries and ODNI “submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.”⁷

Based on the information received pursuant to the EO 13780 requirements, Presidential Proclamation 9645 (PP 9645) was issued on September 27, 2017. PP 9645 stated:⁸

The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.

⁴ Executive Order 13780, Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States, Mar. 6, 2017, Sec. 2(a).

⁵ *Id.* at Sec. 2(b).

⁶ *Id.* at Sec. 2(d).

⁷ *Id.* at Sec. 2(e).

⁸ Presidential Proclamation 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Sept. 27, 2017.

Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.

... I have determined, on the basis of recommendations from the Secretary of Homeland Security and other members of my Cabinet, to impose certain conditional restrictions and limitations, as set forth more fully below, on entry into the United States of nationals of the countries identified in section 2 of this proclamation.

Pursuant to 212(f) and 215(a) authority as well as Constitutional powers, President Trump imposed restrictions on the receipt of immigrant or nonimmigrant visas by nationals of Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia.⁹ On April 10, 2018, visa restrictions were lifted for Chad, because “the Republic of Chad has improved its identity-management and information sharing practices sufficiently to meet the baseline security standard of the United States.”¹⁰ The other visa restrictions remain in place.

PP 9645 also directed the Secretary of Homeland Security to continually assess whether changes (further limitations or removal of limitations) should be made to the visa restrictions based on the interests of such restrictions to the United States.¹¹ And the Secretary must report such findings to the President every 180 days.

On January 31, 2019, President Trump issued Presidential Proclamation 9983, an update to PP 9645. Pursuant to the requirements in section 4 of PP 9645 that DHS continually assess the potential national security and public safety threat vulnerabilities to the U.S. if the U.S. admits foreign nationals of other countries, DHS conducted such assessments. While doing so, DHS also improved upon its assessment criteria, including by asking more strategic questions of the other countries, by using additional data from the U.S. intelligence community, and by increasing the amount of information obtained from U.S. Embassies abroad.¹² DHS concentrated on three categories in its assessment: (1) identity management; (2) information sharing; and (3) terrorism and public safety risk. The countries deemed to be lowest performing and from which the U.S. would be most at risk were then assessed for the potential impact of visa restrictions.

⁹*Id.* at Sec. 2.

¹⁰Statement by the Press Secretary Regarding the Presidential Proclamation to Lift Entry Restrictions for Nationals of the Republic of Chad, Apr. 10, 2018.

¹¹Presidential Proclamation 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Sept. 27, 2019, Sec. 4(a).

¹²*Improving Enhanced Vetting Capabilities and Detection Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Presidential Proclamation 9983 (Jan. 31, 2020), available at <https://www.govinfo.gov/content/pkg/DCPD-202000052/pdf/DCPD-202000052.pdf>.

In September 2019, a report was submitted to the President recommending that the existing restrictions remain in place for the countries named in PP 9645 (other than Chad) and that restrictions be added for 12 other countries. The USG continued to engage with those countries to address deficiencies and in January 2020, PP 9983 instituted travel restrictions for only six countries—“Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania—until those countries address their identified deficiencies.”¹³

The DHS and other relevant USG officials continue to engage with the governments of the affected countries to work toward compliance. Just as he did with Chad after PP 9645, the President can—at any time—remove travel restrictions. Evidence shows that some of the affected countries are already working toward compliance. For instance, according to press reports, the Foreign Minister of Nigeria has stated, “We’ve identified all those requirements and we have actually started working on all them. . . . It is actually very straightforward and it was very gratifying to come here and meet with U.S. officials and to understand more clearly the reasoning behind it. . . .”¹⁴

Despite the successes of these presidential actions, section 4 of H.R. 2214 explicitly terminates President Trump’s exercises of 212(f) authority in Presidential Proclamations 9645, 9822, and 9983 as well as Executive Orders 13769, 13780, and 13815, stating that they “shall be void beginning on the date of the enactment of this Act.”¹⁵ Section 4 also curiously states that “[a]ll actions made pursuant to any proclamation or executive order terminated under subsection (a) shall cease on the date of the enactment of this Act.” This would apply not just to restrictions on entry for the aliens described, but would also include additional or more efficient vetting procedures developed in response to those presidential actions, as well as any other positive benefits that accrued to the United States as a result thereof. For example, as written, H.R. 2214 would require that an agreement by the United States with another country to facilitate that country’s sharing of known or suspected terrorist information or to share information about lost and stolen passports would have to “cease on the date of the enactment of this Act.” All actions taken to ensure countries comply with international standards of information sharing—ensuring that foreign countries report lost and stolen passports, report criminal information to Interpol, and adopt electronic passports—should not simply cease. The government shouldn’t have to go back to the old method of manually running every person through databases when the presidential actions led to a quicker and more robust automated process, and we shouldn’t have to back out of identity management and information sharing relationships established with foreign governments as a result of the President’s actions.

It is also curious that the bill only terminates actions undertaken by President Trump, and not exercises of 212(f) authority by prior

¹³ *Id.*

¹⁴ Humeyra Pamuk, Reuters, *Nigeria Working to Have U.S. Travel Ban Lifted-Foreign Minister*, <https://www.reuters.com/article/us-usa-immigration-ban-nigeria/nigeria-working-to-have-u-s-travel-ban-lifted-foreign-minister-idUSKBN1ZY2KD?feedType=RSS&feedName=worldNews>, (Feb. 4, 2020).

¹⁵ Amendment in the Nature of a Substitute to H.R. 2214, as amended at markup, 116th Cong. (National Origin-Based Antidiscrimination for Nonimmigrants Act).

presidents which remain in force. If the proponents of H.R. 2214 were indeed skeptical of presidential authority in the use of 212(f), presumably they would also have attempted to terminate those actions as well. This is further indication that H.R. 2214 is designed simply to malign positive efforts undertaken by the Trump administration.

H.R. 2214 CONTAINS AN UNNECESSARY NONDISCRIMINATION PROVISION THAT COULD LIMIT RECIPROCAL AGREEMENTS

Section 2 of the bill amends INA § 202(a)(1)(A), which currently prohibits discrimination based on race, sex, nationality, place of birth, or place of residence in the issuance of an immigrant visa. H.R. 2214 would amend this to include religion, and would expand it from only applying to immigrant visas to “a nonimmigrant visa, entry into the United States, or the approval or revocation of any immigration benefit.”¹⁶ In reality, there is no actual evidence that such discrimination is occurring, but these provisions would permit an additional avenue to limit the president’s authority from a litigation standpoint by opening up review by a federal court of any decision to issue a visa, deny entry, or approve or revoke an immigration benefit merely if the alien asserts that they were the victim of unlawful discrimination.

Furthermore, there are concerns that extending the non-discrimination provision to mere revocations of nonimmigrant visas could impact existing reciprocal agreements, including travel facilitation for U.S. and Chinese nationals. Chinese nationals issued visas with 10-year validity must periodically (every two years and prior to travel) register with the Electronic Visa Update System (EVUS) to facilitate travel to the United States.¹⁷ This is because of a 2016 agreement entered into on a reciprocal basis between the U.S. and China. Those who fail to enroll may have their visas automatically revoked. However, because this requirement is unique to China, it could be construed as a discriminatory practice on the basis of nationality. H.R. 2214 could thereby stymie the implementation of the reciprocal agreement between the U.S. and China and disrupt travel of nationals between those two countries.

H.R. 2214 Severely Curtails the President’s Ability to use 212(f) Authority in the Future Section 3 of H.R. 2214 removes the current 212(f) language and replaces it with more limiting language. Under H.R. 2214, the President may only exercise the authority to suspend the entry of aliens or any class of aliens if “the Secretary of State, after consultation with the Secretary of Homeland Security, determines, based on specific and credible facts, that the entry of any aliens or of any class of aliens into the United States would undermine the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability . . .”¹⁸

Requiring the Secretary of State to make such a determination in consultation with the Secretary of Homeland Security is both

¹⁶ *Id.* at 2.

¹⁷ <https://www.cbp.gov/travel/international-visitors/electronic-visa-update-system-evus/frequently-asked-questions>

¹⁸ Amendment in the Nature of a Substitute to H.R. 2214, as amended at markup, 116th Cong. (National Origin-Based Antidiscrimination for Nonimmigrants Act), at § 3.

over and underinclusive of the potential agencies with equities in any given decision to exercise 212(f) authority. For example, with respect to a 212(f) proclamation to suspend entry of certain aliens in the event of a disease outbreak—including coronavirus—the Centers for Disease Control would need to be consulted. If 212(f) authority is being used to implement visa sanctions against certain individuals with financial interests detrimental to the United States, the Treasury Department would need to be consulted. H.R. 2214 thus exhibits a misunderstanding of the appropriate uses of 212(f) authority.

Rep. Biggs offered an amendment at markup to restore the authority to the President in consultation with relevant Cabinet members, instead of having the authority originate in a subordinate as H.R. 2214 would require. However, Democrats defeated the amendment.

H.R. 2214 also provides that the authority can only be utilized if the entry of aliens would undermine the security or public safety of the United States or the preservation of human rights, democratic processes or institutions, or international stability, but the list of situations where a suspension on entry would be permitted is not comprehensive, and is underinclusive of potential scenarios or emergency situations that could confront the United States. For example, actions taken to protect U.S. businesses abroad, or to encourage foreign countries to comply with U.S. sanctions, would not appear to be permitted under the list of permissible reasons to use 212(f) authority in H.R. 2214.

These provisions also misunderstand the utility of 212(f) authority, which is only one potential tool to achieve U.S. interests. Under H.R. 2214, if other sanctions are available, the President would be prohibited from utilizing 212(f) authority as it would not be “the least restrictive means, to achieve such compelling government interest.” With respect to issues of national security, the President should be empowered to use all available means necessary, not the least restrictive means possible.

Rep. Biggs offered an amendment at markup to clarify that the President not be required to use the least restrictive means necessary when responding to issues implicating the national security of the United States. However, Democrats also defeated that amendment.

Likewise, the provision mandating that the President announce the duration of a 212(f) suspension of entry is inapposite. Where such authority is being used to compel foreign actors to pursue a course of action favorable to the United States, the suspension of entry should remain in effect indefinitely until the foreign actor complies. Requiring the President to announce a date-certain will only permit a foreign actor hostile to the United States to wait out the suspension on entry—if it isn’t enjoined first, of course.

However, *before* the President can even exercise this new 212(f) authority, the President, Secretary of State, and Secretary of Homeland Security must consult with Congress.¹⁹ Once the authority is exercised, the Secretaries of State and Homeland Security must provide a briefing and submit a written report to various

¹⁹*Id.*

House and Senate committees, and must update that report every 30 days or else the 212(f) authority terminates.²⁰ H.R. 2214 doesn't provide for officials designated by those Cabinet-level officials to consult with Congress, which could lead to scheduling delays. Such a requirement for prior consultation is not conducive to a scenario requiring an emergency response, particularly where national security requires the swift issuance of travel restrictions.

Furthermore, the 30-day ongoing reporting requirement—which includes reporting required by Section 5 of the bill—is so onerous that it would require the relevant personnel to spend the majority of their time compiling these reports instead of working to ameliorate the conditions which led to the 212(f) proclamation in the first place. Thus, the reporting requirement could mean that—in the case of a proclamation similar to the travel restrictions on certain countries with poor identity management standards—a country stays in restricted status even longer, as the relevant U.S. government personnel are unable to spend their time assisting them in achieving compliance.

H.R. 2214 further requires the Secretaries of State and Homeland Security to publish in the Federal Register an unclassified version of the report required to be submitted to Congress, which must include “the action taken . . . and the specified objective of such action” as well as “the circumstances necessitating such action . . . as well as any intelligence informing such actions.”²¹ Administration officials have expressed concern that such a reporting requirement could limit the use of 212(f), as officials do not want to broadcast to the public the deficiencies they have identified, as those would then be exploited by bad actors seeking to harm those foreign countries or the United States. Such a requirement also invites further litigation pursuant to the judicial review provision, as a perceived violation of the publication requirement could lead to declaratory or injunctive relief.

H.R. 2214 IS A RECIPE FOR LITIGATION

H.R. 2214 imposes multiple vaguely worded requirements onto the exercise of this new 212(f) authority that appear designed to maximize potential litigation. The President is required to “only issue a suspension or restriction when required to address specific acts implicating a compelling government interest . . .”, “specify the duration of the suspension or restriction”, and “narrowly tailor the suspension or restriction, using the least restrictive means, to achieve such compelling government interest.”²² These provisions will be used to challenge 212(f) authority in federal court.

In fact, H.R. 2214 provides an expansive judicial review provision in which any “individual or entity who is present in the United States and has been harmed by a violation of this subsection may file an action in an appropriate district court of the United States to seek declaratory or injunctive relief” and also explicitly allows class action lawsuits to proceed.²³ What constitutes “harm” is not

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

defined, which invites an expansive interpretation. For example, it is foreseeable that a hotel trade group could sue for an injunction arguing that their hotels are “harmed” by mere loss of revenue due to fewer travelers being admitted to the U.S. to stay in their hotels. Mere individualized “harm” shown by some individuals or special interest groups should not be a sufficient condition to override the President’s determination that a suspension of entry is necessary in the interests of national security. Furthermore, there are constitutional considerations that have not been fully considered, as the judicial review provision arguably purports to give federal courts jurisdiction over decisions relating to foreign affairs, which are generally non-justiciable.²⁴

H.R. 2214 requires that waivers be considered “to any class based restriction or suspension” and imposes “a rebuttable presumption in favor of granting family based and humanitarian waivers.” However, this provision is ripe for litigation, not only because there is a presumption in favor of granting the waiver, as the level of family relationship required is not defined, nor is what constitutes a “humanitarian” purpose. Again, any individual in the United States who believes they are harmed—perhaps a distant relative of an alien denied entry under a 212(f) proclamation—can go to federal court to litigate, challenging the denial of a waiver.

CONCLUSION

The President should continue to have the authority granted by section 212(f) of the Immigration and Nationality Act in order to safeguard the interests of the United States, especially in matters of national security. Insofar as H.R. 2214 would not only eliminate the President’s lawful—and appropriate—exercises of that authority, but would so curtail the future use of that authority by this President and any future president to the detriment of national security, I urge my colleagues to reject this bill.

Signed,

DOUG COLLINS,
Ranking Member.



²⁴ See e.g. *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979).