

112TH CONGRESS
2D SESSION

S. 2046

To amend the Immigration and Nationality Act to modify the requirements of the visa waiver program and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 31, 2012

Ms. MIKULSKI (for herself and Mr. KIRK) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Immigration and Nationality Act to modify the requirements of the visa waiver program and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Visa Waiver Program
5 Enhanced Security and Reform Act”.

6 **SEC. 2. DEFINITIONS.**

7 (a) DEFINITIONS.—Section 217(c)(1) of the Immi-
8 gration and Nationality Act (8 U.S.C. 1187(c)(1)) is
9 amended to read as follows:

1 “(1) AUTHORITY TO DESIGNATE; DEFINI-
2 TIONS.—

3 “(A) AUTHORITY TO DESIGNATE.—The
4 Secretary of Homeland Security, in consultation
5 with the Secretary of State, may designate any
6 country as a program country if that country
7 meets the requirements under paragraph (2).

8 “(B) DEFINITIONS.—In this subsection:

9 “(i) APPROPRIATE CONGRESSIONAL
10 COMMITTEES.—The term ‘appropriate con-
11 gressional committees’ means—

12 “(I) the Committee on Foreign
13 Relations, the Committee on Home-
14 land Security and Governmental Af-
15 fairs, and the Committee on the Judi-
16 ciary of the Senate; and

17 “(II) the Committee on Foreign
18 Affairs, the Committee on Homeland
19 Security, and the Committee on the
20 Judiciary of the House of Representa-
21 tives.

22 “(ii) OVERSTAY RATE.—

23 “(I) INITIAL DESIGNATION.—The
24 term ‘overstay rate’ means, with re-
25 spect to a country being considered

1 for designation in the program, the
2 ratio of—

3 “(aa) the number of nation-
4 als of that country who were ad-
5 mitted to the United States on
6 the basis of a nonimmigrant visa
7 under section 101(a)(15)(B)
8 whose periods of authorized stay
9 ended during a fiscal year but
10 who remained unlawfully in the
11 United States beyond such peri-
12 ods; to

13 “(bb) the number of nation-
14 als of that country who were ad-
15 mitted to the United States on
16 the basis of a nonimmigrant visa
17 under section 101(a)(15)(B)
18 whose periods of authorized stay
19 ended during that fiscal year.

20 “(II) CONTINUING DESIGNA-
21 TION.—The term ‘overstay rate’
22 means, for each fiscal year after ini-
23 tial designation under this section
24 with respect to a country, the ratio
25 of—

1 “(aa) the number of nation-
2 als of that country who were ad-
3 mitted to the United States
4 under this section or on the basis
5 of a nonimmigrant visa under
6 section 101(a)(15)(B) whose pe-
7 riods of authorized stay ended
8 during a fiscal year but who re-
9 mained unlawfully in the United
10 States beyond such periods; to

11 “(bb) the number of nation-
12 als of that country who were ad-
13 mitted to the United States
14 under this section or on the basis
15 of a nonimmigrant visa under
16 section 101(a)(15)(B) whose pe-
17 riods of authorized stay ended
18 during that fiscal year.

19 “(III) COMPUTATION OF OVER-
20 STAY RATE.—In determining the over-
21 stay rate for a country, the Secretary
22 of Homeland Security may utilize in-
23 formation from any available data-
24 bases to ensure the accuracy of such
25 rate.

1 “(iii) PROGRAM COUNTRY.—The term
2 ‘program country’ means a country des-
3 ignated as a program country under sub-
4 paragraph (A).”.

5 (b) TECHNICAL AND CONFORMING AMENDMENTS.—
6 Section 217 of the Immigration and Nationality Act (8
7 U.S.C. 1187) is amended as follows:

8 (1) By striking “Attorney General” each place
9 the term appears and inserting “Secretary of Home-
10 land Security”, except in subsection (c)(11)(B).

11 (2) In subsection (c)(2)(C)(iii), by striking
12 “Committee on the Judiciary and the Committee on
13 International Relations of the House of Representa-
14 tives and the Committee on the Judiciary and the
15 Committee on Foreign Relations of the Senate” and
16 inserting “appropriate congressional committees”.

17 (3) In subsection (c)(5)(A)(i)(III), by striking
18 “Committee on the Judiciary, the Committee on
19 Foreign Affairs, and the Committee on Homeland
20 Security, of the House of Representatives and the
21 Committee on the Judiciary, the Committee on For-
22 eign Relations, and the Committee on Homeland Se-
23 curity and Governmental Affairs of the Senate” and
24 inserting “appropriate congressional committees”.

25 (4) By striking subsection (c)(7)(E).

1 **SEC. 3. DESIGNATION OF PROGRAM COUNTRIES BASED ON**
2 **OVERSTAY RATES.**

3 (a) IN GENERAL.—Section 217(c)(2)(A) of the Immi-
4 gration and Nationality Act (8 U.S.C. 1187(c)(2)(A)) is
5 amended to read as follows:

6 “(A) GENERAL NUMERICAL LIMITA-
7 TIONS.—

8 “(i) LOW NONIMMIGRANT VISA RE-
9 FUSAL RATE.—The percentage of nationals
10 of that country refused nonimmigrant visas
11 under section 101(a)(15)(B) during the
12 previous full fiscal year was not more than
13 3 percent of the total number of nationals
14 of that country who were granted or re-
15 fused nonimmigrant visas under such sec-
16 tion during such year.

17 “(ii) LOW NONIMMIGRANT OVERSTAY
18 RATE.—The overstay rate for that country
19 was not more than 3 percent during the
20 previous fiscal year.”.

21 (b) QUALIFICATION CRITERIA.—Section 217(c)(3) of
22 the Immigration and Nationality Act (8 U.S.C.
23 1187(c)(3)) is amended to read as follows:

24 “(3) QUALIFICATION CRITERIA.—After the ini-
25 tial period, a country may not be designated as a
26 program country unless the Secretary of Homeland

1 Security, in consultation with the Secretary of State,
2 determines, pursuant to the requirements of para-
3 graph (5), that designation will be continued.”.

4 (c) CONTINUING DESIGNATION.—Section
5 217(c)(5)(A)(i)(II) of the Immigration and Nationality
6 Act (8 U.S.C. 1187(c)(5)(A)(i)(II)) is amended to read
7 as follows:

8 “(II) shall determine, based upon
9 the evaluation in subclause (I), wheth-
10 er any such designation under sub-
11 section (d) or (f), or probation under
12 subsection (f), ought to be continued
13 or terminated;”.

14 (d) COMPUTATION OF VISA REFUSAL RATES; JUDI-
15 CIAL REVIEW.—Section 217(c)(6) of the Immigration and
16 Nationality Act (8 U.S.C. 1187(c)(6)) is amended to read
17 as follows:

18 “(6) COMPUTATION OF VISA REFUSAL RATES
19 AND JUDICIAL REVIEW.—

20 “(A) COMPUTATION OF VISA REFUSAL
21 RATES.—For purposes of determining the eligi-
22 bility of a country to be designated as a pro-
23 gram country, the calculation of visa refusal
24 rates shall not include any visa refusals which
25 incorporate any procedures based on, or are

1 otherwise based on, race, sex, or disability, un-
2 less otherwise specifically authorized by law or
3 regulation.

4 “(B) JUDICIAL REVIEW.—No court shall
5 have jurisdiction under this section to review
6 any visa refusal, the Secretary of State’s com-
7 putation of a visa refusal rate, the Secretary of
8 Homeland Security’s computation of an over-
9 stay rate, or the designation or nondesignation
10 of a country as a program country.”.

11 (e) VISA WAIVER INFORMATION.—Section 217(c)(7)
12 of the Immigration and Nationality Act (8 U.S.C.
13 1187(c)(7)) is amended—

14 (1) by striking subparagraphs (B) through (E);
15 and

16 (2) by striking “WAIVER INFORMATION—” and
17 all that follows through “In refusing” and inserting
18 “WAIVER INFORMATION—In refusing”.

19 (f) WAIVER AUTHORITY.—Section 217(c)(8) of the
20 Immigration and Nationality Act (8 U.S.C. 1187(c)(8))
21 is amended to read as follows:

22 “(8) WAIVER AUTHORITY.—The Secretary of
23 Homeland Security, in consultation with the Sec-
24 retary of State, may waive the application of para-
25 graph (2)(A)(i) for a country if—

1 “(A) the country meets all other require-
2 ments of paragraph (2);

3 “(B) the Secretary of Homeland Security
4 determines that the totality of the country’s se-
5 curity risk mitigation measures provide assur-
6 ance that the country’s participation in the pro-
7 gram would not compromise the law enforce-
8 ment, security interests, or enforcement of the
9 immigration laws of the United States;

10 “(C) there has been a general downward
11 trend in the percentage of nationals of the
12 country refused nonimmigrant visas under sec-
13 tion 101(a)(15)(B);

14 “(D) the country consistently cooperated
15 with the Government of the United States on
16 counterterrorism initiatives, information shar-
17 ing, preventing terrorist travel, and extradition
18 of the country’s nationals to the United States
19 before the date of its designation as a program
20 country, and the Secretary of Homeland Secu-
21 rity and the Secretary of State assess that such
22 cooperation is likely to continue; and

23 “(E) the percentage of nationals of the
24 country refused a nonimmigrant visa under sec-
25 tion 101(a)(15)(B) during the previous full fis-

1 cal year was not more than 10 percent of the
2 total number of nationals of that country who
3 were granted or refused such nonimmigrant
4 visas.”.

5 **SEC. 4. TERMINATION OF DESIGNATION; PROBATION.**

6 Section 217(f) of the Immigration and Nationality
7 Act (8 U.S.C. 1187(f)) is amended to read as follows:

8 “(f) TERMINATION OF DESIGNATION; PROBATION.—

9 “(1) DEFINITIONS.—In this subsection:

10 “(A) PROBATIONARY PERIOD.—The term
11 ‘probationary period’ means the fiscal year in
12 which a probationary country is placed in pro-
13 bationary status under this subsection.

14 “(B) PROGRAM COUNTRY.—The term ‘pro-
15 gram country’ has the meaning given that term
16 in subsection (c)(1)(B).

17 “(2) DETERMINATION, NOTICE, AND INITIAL
18 PROBATIONARY PERIOD.—

19 “(A) DETERMINATION OF PROBATIONARY
20 STATUS AND NOTICE OF NONCOMPLIANCE.—As
21 part of each program country’s periodic evalua-
22 tion required by subsection (c)(5)(A), the Sec-
23 retary of Homeland Security shall determine
24 whether a program country is in compliance

1 with the program requirements under subpara-
2 graphs (A)(ii) through (F) of subsection (c)(2).

3 “(B) INITIAL PROBATIONARY PERIOD.—If
4 the Secretary of Homeland Security determines
5 that a program country visa is not in compli-
6 ance with the program requirements under sub-
7 paragraphs (A)(ii) through (F) of subsection
8 (c)(2), the Secretary of Homeland Security
9 shall place the program country in probationary
10 status for the fiscal year following the fiscal
11 year in which the periodic evaluation is com-
12 pleted.

13 “(3) ACTIONS AT THE END OF THE INITIAL
14 PROBATIONARY PERIOD.—At the end of the initial
15 probationary period of a country under paragraph
16 (2)(B), the Secretary of Homeland Security shall
17 take 1 of the following actions:

18 “(A) COMPLIANCE DURING INITIAL PROBA-
19 TIONARY PERIOD.—If the Secretary determines
20 that all instances of noncompliance with the
21 program requirements under subparagraphs
22 (A)(ii) through (F) of subsection (c)(2) that
23 were identified in the latest periodic evaluation
24 have been remedied by the end of the initial

1 probationary period, the Secretary shall end the
2 country’s probationary period.

3 “(B) NONCOMPLIANCE DURING INITIAL
4 PROBATIONARY PERIOD.—If the Secretary de-
5 termines that any instance of noncompliance
6 with the program requirements under subpara-
7 graphs (A)(ii) through (F) of subsection (c)(2)
8 that were identified in the latest periodic eval-
9 uation has not been remedied by the end of the
10 initial probationary period—

11 “(i) the Secretary may terminate the
12 country’s participation in the program; or

13 “(ii) on an annual basis, the Secretary
14 may continue the country’s probationary
15 status if the Secretary, in consultation
16 with the Secretary of State, determines
17 that the country’s continued participation
18 in the program is in the national interest
19 of the United States.

20 “(4) ACTIONS AT THE END OF ADDITIONAL
21 PROBATIONARY PERIODS.—At the end of all proba-
22 tionary periods granted to a country pursuant to
23 paragraph (3)(B)(ii), the Secretary shall take one of
24 the following actions:

1 “(A) COMPLIANCE DURING ADDITIONAL
2 PERIOD.—The Secretary shall end the country’s
3 probationary status if the Secretary determines
4 during the latest periodic evaluation required by
5 subsection (c)(5)(A) that the country is in com-
6 pliance with the program requirements under
7 subparagraphs (A)(ii) through (F) of subsection
8 (c)(2).

9 “(B) NONCOMPLIANCE DURING ADDI-
10 TIONAL PERIODS.—The Secretary shall termi-
11 nate the country’s participation in the program
12 if the Secretary determines during the latest
13 periodic evaluation required by subsection
14 (c)(5)(A) that the program country continues to
15 be in non-compliance with the program require-
16 ments under subparagraphs (A)(ii) through (F)
17 of subsection (c)(2).

18 “(5) EFFECTIVE DATE.—The termination of a
19 country’s participation in the program under para-
20 graph (3)(B) or (4)(B) shall take effect on the first
21 day of the first fiscal year following the fiscal year
22 in which the Secretary determines that such partici-
23 pation shall be terminated. Until such date, nation-
24 als of the country shall remain eligible for a waiver
25 under subsection (a).

1 “(6) TREATMENT OF NATIONALS AFTER TERMI-
2 NATION.—For purposes of this subsection and sub-
3 section (d)—

4 “(A) nationals of a country whose designa-
5 tion is terminated under paragraph (3) or (4)
6 shall remain eligible for a waiver under sub-
7 section (a) until the effective date of such ter-
8 mination; and

9 “(B) a waiver under this section that is
10 provided to such a national for a period de-
11 scribed in subsection (a)(1) shall not, by such
12 termination, be deemed to have been rescinded
13 or otherwise rendered invalid, if the waiver is
14 granted prior to such termination.

15 “(7) CONSULTATIVE ROLE OF THE SECRETARY
16 OF STATE.—In this subsection, references to sub-
17 paragraphs (A)(ii) through (F) of subsection (c)(2)
18 and subsection (c)(5)(A) carry with them the con-
19 sultative role of the Secretary of State as provided
20 in those provisions.”.

21 **SEC. 5. REVIEW OF OVERSTAY TRACKING METHODOLOGY.**

22 Not later than 180 days after the date of the enact-
23 ment of this Act, the Comptroller General of the United
24 States shall conduct a review of the methods used by the
25 Secretary of Homeland Security—

1 (1) to track aliens entering and exiting the
2 United States; and

3 (2) to detect any such alien who stays longer
4 than such alien's period of authorized admission.

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