

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.

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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

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## 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                             ign 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 Immigration and Nationality Act (8 U.S.C. 1187(c)(2)(A)) is 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), whether  
10 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.

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 subparagraphs (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—

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 TERMINATION.—For purposes of this subsection and sub-  
2                 section (d)—

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

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11                 termination, be deemed to have been rescinded  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

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

20                 **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—

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