

113TH CONGRESS
1ST SESSION

S. 223

To amend section 217 of the Immigration and Nationality Act to modify the visa waiver program, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2013

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 section 217 of the Immigration and Nationality Act to modify 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. VISA WAIVER PROGRAM ENHANCED SECURITY AND**
7 **REFORM.**

8 (a) DEFINITIONS.—Section 217(c)(1) of the Immi-
9 gration and Nationality Act (8 U.S.C. 1187(c)(1)) is
10 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—

8 (1) by striking “Attorney General” each place
9 the term appears (except in subsection (c)(11)(B))
10 and inserting “Secretary of Homeland Security”;
11 and

12 (2) in subsection (c)—

13 (A) in paragraph (2)(C)(iii), by striking
14 “Committee on the Judiciary and the Com-
15 mittee on International Relations of the House
16 of Representatives and the Committee on the
17 Judiciary and the Committee on Foreign Rela-
18 tions of the Senate” and inserting “appropriate
19 congressional committees”;

20 (B) in paragraph (5)(A)(i)(III), by striking
21 “Committee on the Judiciary, the Committee on
22 Foreign Affairs, and the Committee on Home-
23 land Security, of the House of Representatives
24 and the Committee on the Judiciary, the Com-
25 mittee on Foreign Relations, and the Com-

mittee on Homeland Security and Govern-
 mental Affairs of the Senate” and inserting
 “appropriate congressional committees”; and
 (C) in paragraph (7), by striking subpara-
 graph (E).

(c) DESIGNATION OF PROGRAM COUNTRIES BASED
 ON OVERSTAY RATES.—

(1) 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:

“(A) GENERAL NUMERICAL LIMITA-
 TIONS.—

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

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

1 (2) QUALIFICATION CRITERIA.—Section
 2 217(c)(3) of such Act (8 U.S.C. 1187(c)(3)) is
 3 amended to read as follows:

4 “(3) QUALIFICATION CRITERIA.—After designa-
 5 tion as a program country under section 217(c)(2),
 6 a country may not continue to be designated as a
 7 program country unless the Secretary of Homeland
 8 Security, in consultation with the Secretary of State,
 9 determines, pursuant to the requirements under
 10 paragraph (5), that the designation will be contin-
 11 ued.”.

12 (3) INITIAL PERIOD.—Section 217(c) is further
 13 amended by striking subsection (c)(4).

14 (4) CONTINUING DESIGNATION.—Section
 15 217(c)(5)(A)(i)(II) of such Act (8 U.S.C.
 16 1187(c)(5)(A)(i)(II)) is amended to read as follows:

17 “(II) shall determine,
 18 based upon the evaluation in
 19 subclause (I), whether any
 20 such designation under sub-
 21 section (d) or (f), or proba-
 22 tion under subsection (f),
 23 ought to be continued or ter-
 24 minated;”.

1 (5) COMPUTATION OF VISA REFUSAL RATES;
 2 JUDICIAL REVIEW.—Section 217(c)(6) of such Act
 3 (8 U.S.C. 1187(c)(6)) is amended to read as follows:

4 “(6) COMPUTATION OF VISA REFUSAL RATES
 5 AND JUDICIAL REVIEW.—

6 “(A) COMPUTATION OF VISA REFUSAL
 7 RATES.—For purposes of determining the eligi-
 8 bility of a country to be designated as a pro-
 9 gram country, the calculation of visa refusal
 10 rates shall not include any visa refusals which
 11 incorporate any procedures based on, or are
 12 otherwise based on, race, sex, or disability, un-
 13 less otherwise specifically authorized by law or
 14 regulation.

15 “(B) JUDICIAL REVIEW.—No court shall
 16 have jurisdiction under this section to review
 17 any visa refusal, the Secretary of State’s com-
 18 putation of a visa refusal rate, the Secretary of
 19 Homeland Security’s computation of an over-
 20 stay rate, or the designation or nondesignation
 21 of a country as a program country.”.

22 (6) VISA WAIVER INFORMATION.—Section
 23 217(c)(7) of such Act (8 U.S.C. 1187(c)(7)) is
 24 amended—

1 (A) by striking subparagraphs (B) through
2 (D); and

3 (B) by striking “WAIVER INFORMATION.—
4 ” and all that follows through “In refusing”
5 and inserting “WAIVER INFORMATION.—In re-
6 fusing”.

7 (7) WAIVER AUTHORITY.—Section 217(c)(8) of
8 such Act (8 U.S.C. 1187(c)(8)) is amended to read
9 as follows:

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

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

16 “(B) the Secretary of Homeland Security
17 determines that the totality of the country’s se-
18 curity risk mitigation measures provide assur-
19 ance that the country’s participation in the pro-
20 gram would not compromise the law enforce-
21 ment, security interests, or enforcement of the
22 immigration laws of the United States;

23 “(C) there has been a general downward
24 trend in the percentage of nationals of the

1 country refused nonimmigrant visas under sec-
2 tion 101(a)(15)(B);

3 “(D) the country consistently cooperated
4 with the Government of the United States on
5 counterterrorism initiatives, information shar-
6 ing, preventing terrorist travel, and extradition
7 to the United States of individuals (including
8 the country’s own nationals) who commit
9 crimes that violate United States law before the
10 date of its designation as a program country,
11 and the Secretary of Homeland Security and
12 the Secretary of State assess that such coopera-
13 tion is likely to continue; and

14 “(E) the percentage of nationals of the
15 country refused a nonimmigrant visa under sec-
16 tion 101(a)(15)(B) during the previous full fis-
17 cal year was not more than 10 percent of the
18 total number of nationals of that country who
19 were granted or refused such nonimmigrant
20 visas.”.

21 (d) TERMINATION OF DESIGNATION; PROBATION.—

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

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

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

1 “(A) PROBATIONARY PERIOD.—The term
 2 ‘probationary period’ means the fiscal year in
 3 which a probationary country is placed in pro-
 4 bationary status under this subsection.

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

8 “(2) DETERMINATION, NOTICE, AND INITIAL
 9 PROBATIONARY PERIOD.—

10 “(A) DETERMINATION OF PROBATIONARY
 11 STATUS AND NOTICE OF NONCOMPLIANCE.—As
 12 part of each program country’s periodic evalua-
 13 tion required by subsection (c)(5)(A), the Sec-
 14 retary of Homeland Security shall determine
 15 whether a program country is in compliance
 16 with the program requirements under subpara-
 17 graphs (A)(ii) through (F) of subsection (c)(2).

18 “(B) INITIAL PROBATIONARY PERIOD.—If
 19 the Secretary of Homeland Security determines
 20 that a program country is not in compliance
 21 with the program requirements under subpara-
 22 graphs (A)(ii) through (F) of subsection (c)(2),
 23 the Secretary of Homeland Security shall place
 24 the program country in probationary status for

1 the fiscal year following the fiscal year in which
2 the periodic evaluation is completed.

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

8 “(A) COMPLIANCE DURING INITIAL PROBA-
9 TIONARY PERIOD.—If the Secretary determines
10 that all instances of noncompliance with the
11 program requirements under subparagraphs
12 (A)(ii) through (F) of subsection (c)(2) that
13 were identified in the latest periodic evaluation
14 have been remedied by the end of the initial
15 probationary period, the Secretary shall end the
16 country’s probationary period.

17 “(B) NONCOMPLIANCE DURING INITIAL
18 PROBATIONARY PERIOD.—If the Secretary de-
19 termines that any instance of noncompliance
20 with the program requirements under subpara-
21 graphs (A)(ii) through (F) of subsection (c)(2)
22 that were identified in the latest periodic eval-
23 uation has not been remedied by the end of the
24 initial probationary period—

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

3 “(ii) on an annual basis, the Secretary
4 may continue the country’s probationary
5 status if the Secretary, in consultation
6 with the Secretary of State, determines
7 that the country’s continued participation
8 in the program is in the national interest
9 of the United States.

10 “(4) ACTIONS AT THE END OF ADDITIONAL
11 PROBATIONARY PERIODS.—At the end of all proba-
12 tionary periods granted to a country pursuant to
13 paragraph (3)(B)(ii), the Secretary shall take 1 of
14 the following actions:

15 “(A) COMPLIANCE DURING ADDITIONAL
16 PERIOD.—The Secretary shall end the country’s
17 probationary status if the Secretary determines
18 during the latest periodic evaluation required by
19 subsection (c)(5)(A) that the country is in com-
20 pliance with the program requirements under
21 subparagraphs (A)(ii) through (F) of subsection
22 (c)(2).

23 “(B) NONCOMPLIANCE DURING ADDI-
24 TIONAL PERIODS.—The Secretary shall termi-
25 nate the country’s participation in the program

1 if the Secretary determines during the latest
2 periodic evaluation required by subsection
3 (c)(5)(A) that the program country continues to
4 be in non-compliance with the program require-
5 ments under subparagraphs (A)(ii) through (F)
6 of subsection (c)(2).

7 “(5) EFFECTIVE DATE.—The termination of a
8 country’s participation in the program under para-
9 graph (3)(B) or (4)(B) shall take effect on the first
10 day of the first fiscal year following the fiscal year
11 in which the Secretary determines that such partici-
12 pation shall be terminated. Until such date, nation-
13 als of the country shall remain eligible for a waiver
14 under subsection (a).

15 “(6) TREATMENT OF NATIONALS AFTER TERMI-
16 NATION.—For purposes of this subsection and sub-
17 section (d)—

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

23 “(B) a waiver under this section that is
24 provided to such a national for a period de-
25 scribed in subsection (a)(1) shall not, by such

1 termination, be deemed to have been rescinded
2 or otherwise rendered invalid, if the waiver is
3 granted prior to such termination.

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

10 (e) REVIEW OF OVERSTAY TRACKING METHOD-
11 OLOGY.—Not later than 180 days after the date of the
12 enactment of this Act, the Comptroller General of the
13 United States shall conduct a review of the methods used
14 by the Secretary of Homeland Security—

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

17 (2) to detect any such alien who stays longer
18 than such alien’s period of authorized admission.

19 (f) EVALUATION OF ELECTRONIC SYSTEM FOR
20 TRAVEL AUTHORIZATION.—Not later than 90 days after
21 the date of the enactment of this Act, the Secretary of
22 Homeland Security shall submit to Congress—

23 (1) an evaluation of the security risks of aliens
24 who enter the United States without an approved

1 Electronic System for Travel Authorization
2 verification; and

3 (2) a description of any improvements needed
4 to minimize the number of aliens who enter the
5 United States without the verification described in
6 paragraph (1).

7 (g) SENSE OF CONGRESS ON PRIORITY FOR REVIEW
8 OF PROGRAM COUNTRIES.—It is the sense of Congress
9 that the Secretary of Homeland Security, in the process
10 of conducting evaluations of countries participating in the
11 visa waiver program under section 217 of the Immigration
12 and Nationality Act (8 U.S.C. 1187), should prioritize the
13 reviews of countries in which circumstances indicate that
14 such a review is necessary or desirable.

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