

112TH CONGRESS
1ST SESSION

S. 497

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

MARCH 7, 2011

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 “Secure Travel and
5 Counterterrorism Partnership Program Act of 2011”.

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) PROGRAM COUNTRY.—The term
23 ‘program country’ means a country des-
24 ignated as a program country under sub-
25 paragraph (A).

1 “(iii) VISA OVERSTAY RATE.—

2 “(I) IN GENERAL.—The term
3 ‘visa overstay rate’ means, with re-
4 spect to a country, the ratio of—

5 “(aa) the total number of
6 nationals of that country who
7 were admitted to the United
8 States on the basis of a non-
9 immigrant visa whose periods of
10 authorized stay ended during a
11 fiscal year but who remained un-
12 lawfully in the United States be-
13 yond such periods; to

14 “(bb) the total number of
15 nationals of that country who
16 were admitted to the United
17 States on the basis of a non-
18 immigrant visa during that fiscal
19 year.

20 “(iv) COMPUTATION OF VISA OVER-
21 STAY RATE.—In determining the visa over-
22 stay rate for a country the Secretary of
23 Homeland Security—

1 “(I) shall utilize information
2 from all available databases to ensure
3 the accuracy of such rate; and

4 “(II) shall not include any visa
5 overstay which incorporates any pro-
6 cedures based on, or are otherwise
7 based on, race, sex, or disability, un-
8 less otherwise specifically authorized
9 by law or regulation.”.

10 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

11 Section 217(c) of the Immigration and Nationality Act (8
12 U.S.C. 1187(c)) is amended as follows:

13 (1) In paragraph (2)(C)—

14 (A) in the matter preceding clause (i), by
15 striking “Attorney General,” and inserting
16 “Secretary of Homeland Security,”; and

17 (B) in clause (iii), by striking “Committee
18 on the Judiciary and the Committee on Inter-
19 national Relations of the House of Representa-
20 tives and the Committee on the Judiciary and
21 the Committee on Foreign Relations of the Sen-
22 ate” and inserting “appropriate congressional
23 committees”.

24 (2) In paragraph (5)(A)(i)(III), by striking
25 “the Committee on the Judiciary, the Committee on

1 Foreign Affairs, and the Committee on Homeland
2 Security, of the House of Representatives and the
3 Committee on the Judiciary, the Committee on For-
4 eign Relations, and the Committee on Homeland Se-
5 curity and Governmental Affairs of the Senate” and
6 inserting “appropriate congressional committees”.

7 (3) In paragraph (7)—

8 (A) in subparagraph (D), by striking “At-
9 torney General” both places that term appears
10 and inserting “Secretary of Homeland Secu-
11 rity”; and

12 (B) by striking subparagraph (E).

13 **SEC. 3. DESIGNATION OF PROGRAM COUNTRIES BASED ON**
14 **VISA OVERSTAY RATES.**

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

18 “(A) LOW NONIMMIGRANT VISA OVERSTAY
19 RATE.—The visa overstay rate for that country
20 was not more than 3 percent during the pre-
21 vious fiscal year.”.

22 (b) QUALIFICATION CRITERIA.—Section 217(c)(3) of
23 the Immigration and Nationality Act (8 U.S.C.
24 1187(c)(3)) is amended to read as follows:

1 “(3) QUALIFICATION CRITERIA.—For each fis-
2 cal year after the initial period, a country may not
3 be designated as a program country unless require-
4 ments of paragraph (2)(A) are met.”.

5 (c) JUDICIAL REVIEW.—Section 217(c)(6) of the Im-
6 migration and Nationality Act (8 U.S.C. 1187(c)(6)) is
7 amended to read as follows:

8 “(6) INAPPLICABILITY OF JUDICIAL REVIEW.—
9 No court shall have jurisdiction to review the denial
10 of admission to the United States of any alien by the
11 Secretary of Homeland Security, the Secretary’s
12 computation of a visa overstay rate, or the designa-
13 tion or nondesignation of a country as a program
14 country.”.

15 (d) REPORTING REQUIREMENTS.—Section 217(c)(7)
16 of the Immigration and Nationality Act (8 U.S.C.
17 1187(c)(7)), as amended by section 2(b)(3), is further
18 amended—

19 (1) in the heading, by striking “VISA WAIVER
20 INFORMATION.—” and inserting “REPORTING RE-
21 QUIREMENT.—”;

22 (2) by striking subparagraph (A);

23 (3) by redesignating subparagraphs (B), (C),
24 and (D) as subparagraphs (A), (B), and (C), respec-
25 tively;

1 (4) in subparagraph (A), as so redesignated—

2 (A) in the heading, by striking “REPORT-
3 ING REQUIREMENT.—” and inserting “IN GEN-
4 ERAL.—”;

5 (B) in clause (iii), by striking “were re-
6 fused” and inserting “overstayed”;

7 (C) in clause (iv)—

8 (i) by striking “who were refused”
9 and inserting “who overstayed”; and

10 (ii) by striking “refused; and” and in-
11 sserting “issued.”; and

12 (D) by striking clause (v);

13 (5) in subparagraph (B), as so redesignated, by
14 striking “subparagraph (B)” and inserting “sub-
15 paragraph (A)”; and

16 (6) in subparagraph (C), as so redesignated, by
17 striking “subparagraph (B)” and inserting “sub-
18 paragraph (A)”.

19 (e) 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) for a country if—

1 “(A) the country meets all security re-
2 quirements of this section;

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; and

10 “(C) the country cooperated with the Gov-
11 ernment of the United States on counterter-
12 rorism initiatives, information sharing, and pre-
13 venting terrorist travel before the date of its
14 designation as a program country, and the Sec-
15 retary of Homeland Security and the Secretary
16 of State determine that such cooperation will
17 continue.”.

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

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

21 “(f) **TERMINATION OF DESIGNATION; PROBATION.**—

22 “(1) **DEFINITIONS.**—In this subsection:

23 “(A) **PROBATIONARY COUNTRY.**—The term
24 ‘probationary country’ means a program coun-

1 try placed in probationary status under para-
2 graph (2)(B).

3 “(B) PROBATIONARY PERIOD.—The term
4 ‘probationary period’ means the fiscal year in
5 which a probationary country is placed in pro-
6 bationary status under paragraph (2)(B).

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

10 “(D) VISA OVERSTAY RATE.—The term
11 ‘visa overstay rate’ has the meaning given that
12 term in subsection (c)(1)(B).

13 “(2) DETERMINATION AND NOTICE OF DIS-
14 QUALIFICATION.—

15 “(A) DETERMINATION.—Upon a deter-
16 mination by the Secretary of Homeland Secu-
17 rity that a program country’s visa overstay rate
18 was more than 3 percent for the preceding fis-
19 cal year or that the program country is not in
20 compliance with all other program requirements
21 under subsection (c)(2), the Secretary shall no-
22 tify the Secretary of State.

23 “(B) PROBATIONARY STATUS.—If the Sec-
24 retary of Homeland Security makes a deter-
25 mination under subparagraph (A) for a pro-

1 gram country, the Secretary of Homeland Secu-
2 rity shall place the program country in proba-
3 tionary status for the fiscal year following the
4 fiscal year for which such determination was
5 made.

6 “(3) ACTIONS AT TERMINATION OF THE PROBA-
7 TIONARY PERIOD.—At the end of the probationary
8 period of a probationary country, the Secretary of
9 Homeland Security shall take one of the following
10 actions:

11 “(A) COMPLIANCE DURING PROBATIONARY
12 PERIOD.—The Secretary shall redesignate the
13 probationary country as a program country if
14 the Secretary determines that during the proba-
15 tionary period the probationary country—

16 “(i) had a visa overstay rate not more
17 than 3 percent; and

18 “(ii) was in compliance with all other
19 program requirements under subsection
20 (c)(2).

21 “(B) COMPLIANCE WITH VISA OVERSTAY
22 RATE.—The Secretary may redesignate the pro-
23 bationary country as a program country if the
24 Secretary determines that during the proba-

1 probationary period the probationary country had a
2 visa overstay rate of not more than 3 percent.

3 “(C) NONCOMPLIANCE WITH VISA OVER-
4 STAY RATE.—

5 “(i) IN GENERAL.—Subject to clause
6 (ii), the Secretary shall terminate the pro-
7 bationary country’s participation in the
8 program if the Secretary determines that
9 during the probationary period the proba-
10 tionary country had a visa overstay rate of
11 more than 3 percent.

12 “(ii) ADDITIONAL PROBATIONARY PE-
13 RIOD.—The Secretary may waive the appli-
14 cation of clause (i) for the probationary
15 country if the Secretary, in consultation
16 with the Director of National Intelligence,
17 certifies that the probationary country’s
18 continued participation in the program
19 does not pose a threat to law enforcement,
20 security, or enforcement of immigration
21 laws, and place the country in probationary
22 status for one additional fiscal year.

23 “(4) ACTIONS AT THE END OF ADDITIONAL
24 PROBATIONARY PERIOD.—At the end of the addi-
25 tional 1-year period of probation granted to a proba-

1 tionary country pursuant to subparagraph (C)(ii),
2 the Secretary shall take one of the following actions:

3 “(A) COMPLIANCE DURING ADDITIONAL
4 PERIOD.—The Secretary shall redesignate the
5 probationary country as a program country if
6 the Secretary determines that during such addi-
7 tional period the probationary country had a
8 visa overstay rate not more than 3 percent.

9 “(B) NONCOMPLIANCE DURING ADDI-
10 TIONAL PERIOD.—The Secretary shall termi-
11 nate the probationary country’s participation in
12 the program if the Secretary determines that
13 during such additional period the probationary
14 country had a visa overstay rate of more than
15 3 percent.

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

24 “(6) NONAPPLICABILITY OF CERTAIN PROVI-
25 SIONS.—Paragraphs (3) and (4) shall not apply to

1 a program country unless the total number of na-
2 tionals of the program country that entered the
3 United States during the prior fiscal year exceeds
4 100.

5 “(7) EMERGENCY TERMINATION.—

6 “(A) IN GENERAL.—In the case of a pro-
7 gram country in which an emergency occurs
8 that the Secretary of Homeland Security, in
9 consultation with the Secretary of State, deter-
10 mines threatens the law enforcement or security
11 interests of the United States (including the in-
12 terest in enforcement of the immigration laws
13 of the United States), the Secretary of Home-
14 land Security shall immediately terminate the
15 designation of the country as a program coun-
16 try.

17 “(B) EMERGENCY DEFINED.—In this
18 paragraph, the term ‘emergency’ means—

19 “(i) the overthrow of a democratically
20 elected government in the program coun-
21 try;

22 “(ii) war (including undeclared war,
23 civil war, or other military activity) on the
24 territory of the program country;

1 “(iii) a severe breakdown in law and
2 order affecting a significant portion of the
3 program country’s territory;

4 “(iv) a severe economic collapse in the
5 program country; or

6 “(v) any other extraordinary event in
7 the program country that threatens the
8 law enforcement or security interests of the
9 United States (including the interest in en-
10 forcement of the immigration laws of the
11 United States) and where the country’s
12 participation in the program could con-
13 tribute to that threat.

14 “(C) REDESIGNATION.—The Secretary of
15 Homeland Security may redesignate the coun-
16 try as a program country, without regard to
17 paragraph (3) or (4) or subsection (c)(2), if the
18 Secretary, in consultation with the Secretary of
19 State, determines that—

20 “(i) at least 6 months have elapsed
21 since the effective date of the emergency
22 termination under subparagraph (A);

23 “(ii) the emergency that caused the
24 termination has ended; and

1 “(iii) the average visa overstay rate
2 for that country during the period of ter-
3 mination under this subparagraph was not
4 more than 3 percent.

5 “(D) PROGRAM SUSPENSION AUTHOR-
6 ITY.—The Director of National Intelligence
7 shall immediately inform the Secretary of
8 Homeland Security of any current and credible
9 threat which poses an imminent danger to the
10 United States or its citizens and originates
11 from a country participating in the visa waiver
12 program. Upon receiving such notification, the
13 Secretary, in consultation with the Secretary of
14 State—

15 “(i) may suspend a program country
16 from the visa waiver program without prior
17 notice;

18 “(ii) shall notify any country sus-
19 pended under clause (i) and, to the extent
20 practicable without disclosing sensitive in-
21 telligence sources and methods, provide
22 justification for the suspension; and

23 “(iii) shall restore the suspended
24 country’s participation in the visa waiver
25 program upon a determination that the

1 threat no longer poses an imminent danger
2 to the United States or its citizens.

3 “(8) TREATMENT OF NATIONALS AFTER TERMI-
4 NATION.—For purposes of this subsection and sub-
5 section (d)—

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

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

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

18 Not later than 180 days after the date of the enact-
19 ment of this Act, the Comptroller General of the United
20 States shall conduct a review of the methods used by the
21 Secretary of Homeland Security—

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

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

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