

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.

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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

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## 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

country refused nonimmigrant visas under section 101(a)(15)(B);

“(D) the country consistently cooperated with the Government of the United States on counterterrorism initiatives, information sharing, preventing terrorist travel, and extradition to the United States of individuals (including the country’s own nationals) who commit crimes that violate United States law before the date of its designation as a program country, and the Secretary of Homeland Security and the Secretary of State assess that such cooperation is likely to continue; and

“(E) the percentage of nationals of the country refused a nonimmigrant visa under section 101(a)(15)(B) during the previous full fiscal year was not more than 10 percent of the total number of nationals of that country who were granted or refused such nonimmigrant visas.”.

(d) TERMINATION OF DESIGNATION; PROBATION.—

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

“(f) TERMINATION OF DESIGNATION; PROBATION.—

“(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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