# Section-by-Section Summary of the February 23, 2006, Specter Chairman's Mark of the "Comprehensive Immigration Reform Act of 2006"

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As released on February 23, 2006, the Specter Chairman's Mark of the "Comprehensive Immigration Reform Act of 2006" contains eight titles:

- Title I – Border Enforcement.
- Title II – Interior Enforcement.
- Title III – Unlawful Employment of Aliens
- Title IV – Nonimmigrant and Visa Reform
- Title V – Backlog Reduction
- Title VI – Conditional Nonimmigrant Workers
- Title VII – Immigration Litigation Reduction
- Title VIII - Miscellaneous

Section 1. Short Table; Table of Contents. Section 1(a) establishes the bill's short title as the "Comprehensive Immigration Reform Act of 2006". Section 1(b) sets forth the bill's table of contents.

Sec. 2. References to the Immigration and Nationality Act. Section 2 provides that whenever in the Act an amendment or repeal is expressed in terms of an amendment, to, or repeal, of a section or other provision, the reference shall be considered to be made to a section or provision of the Immigration and Nationality Act.

Sec. 3. Definitions. Section 3 contains several definitions of terms used later in the bill, including "Department" and "Secretary".

## TITLE I – BORDER ENFORCEMENT

### Subtitle A – Assets for Controlling United States Borders

Sec. 101 – Enforcement Personnel. Sec. 101 would, subject to the availability of appropriations, require the hiring of additional border personnel and authorize funding for such hires.

This preliminary section-by-section summary was prepared by the United States Conference of Catholic Bishops, the American Immigration Lawyers Association, Nancy Morawetz of NYU, the NYSDA Immigrant Defense Project, and the National Immigration Law Center on February 27, 2006. It is based on the Chairman's Mark of the "Comprehensive Immigration Reform Act of 2006" that was released on February 23, 2006 (O:\EAS\EAS06090.XML)

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- Section 101(a) would require in each year from fiscal year 2007 through fiscal year 2011 and increase of –

  1. 250 Customs and Border Protection officers
  2. 250 port of entry inspectors
  3. 200 personnel dedicated to the investigation of alien smuggling

- In addition, section 101(a) would require an increase of 1,000 each year (rather than current law, which requires an increase of 800 each year) in the number of full-time active duty investigators within the Department of Homeland Security investigating violations of immigration laws from fiscal years 2006 through 2010.

- Section 101(b) would authorize such sums as may be necessary for fiscal years 2007 through 2011 to carry out the increases in personnel required by section 101(a). It also would authorize such sums as may be necessary for fiscal years 2007 through 2011 for the increases in border patrol agents required by section 5202 of P.L. 108-458, the "Intelligence Reform and Terrorism Prevention Act of 2004".[1]

Sec. 102. Technological Assets. Sec. 102 would require an increase in technological assets on the U.S. border, as well as require reporting on the acquisition of such assets and authorize funding for the procurement of them, and authorize funding for the acquisition of such assets.

- Section 102(a) would require the Secretary of Homeland Security to procure additional technological assets so as to establish a security perimeter known as a "virtual fence" along U.S. international borders to provide a barrier to illegal immigration.[2]

- Section 102(b) would require the Secretary of Homeland Security and Secretary of Defense to develop and implement a plan to increase the use of Department of Defense equipment to assist the Secretary in carrying out surveillance conducted at or near U.S. international land borders to prevent illegal immigration.[3]

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[1] This compares to Section 107 of the House-passed version of H.R. 4437, which would require the Secretary of Homeland Security to increase the number of full-time active duty port of entry inspectors by 250 each year beginning in fiscal year 2007 and continuing through fiscal year 2010, subject to the availability of appropriations. Section 107 also would authorize such sums as may be necessary for each such fiscal year to hire, train, equip, and support the additional inspectors.

[2] This compares to Section 1002 of the House-passed version of H.R. 4437, which would require the Department of Homeland Security to construct an estimated 700 miles of double-layered fencing, along with physical barriers, lighting, roads, cameras, and sensors, in five areas along the southwest border of the United States between the Pacific Ocean to the Gulf of Mexico.

[3] This provision is similar, but not identical, to section 301(a) of the House-passed version of H.R. 4437.



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- Section 102(c) would require the Secretary of Homeland Security and Secretary of Defense to report to Congress within six months after the date of enactment of the Act to report on the use and planned use of Department of Defense equipment to conduct border surveillance.

- Section 102(d) would authorize such sums as may be necessary for fiscal years 2007 through 2010 to procure the "virtual fence" required by section 102(a)

Sec. 103. Infrastructure. Section 103(a) would require the Secretary of Homeland Security to construct all-weather roads and acquire additional vehicle barriers and facilities necessary to achieve operational control of the international borders of the United States. Section 103(b) would authorize such sums as may be necessary to carry out to carry out section 103(a)[2]

Sec. 104. Border Patrol Checkpoints. Section 104 would authorize the Secretary of Homeland Security to maintain temporary or permanent checkpoints on roadways in border patrol sectors that are located in proximity to the international border between the United States and Mexico.

Sec. 105. Ports of Entry. Section 105 would authorize the Secretary of Homeland Security to construct additional ports of entry along the U.S. international land border, as the Secretary deems necessary, as well as make improvements.

**Subtitle B – Border Security Plans, Strategies, Reports**

Sec. 111. Surveillance Plan. Section 111 would require the Secretary of Homeland Security, within six months of the date of enactment, to submit to the appropriate congressional committees a comprehensive plan for the systematic surveillance of the international land and maritime borders of the United States, including a detailed estimate of the costs associated with the implementation, deployment, and maintenance of technologies used for surveillance.[4]

Sec. 112. National Strategy for Border Security. Section 112 would require the Secretary of Homeland Security, within one year of the date of enactment, to submit a National Strategy for Border Security to the appropriate congressional committees, with the goal of achieving operational control over the international land and maritime borders of the United States. The section would require the Strategy to be updated as needed and sent to Congress within 30 days of any update.[5]

Sec. 113. Reports on Improving the Exchange of Information on North American Security. Section 113 would require the Secretary of State, in consultation with the Secretary of Defense, to submit a report to Congress every six months on improving the exchange of information between the United States, Canada, and Mexico related to the security of North America. Required elements in the report would include such subjects as security clearances and document integrity; immigration and visa management; visa policy coordination and immigration security;

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[4] This provision is nearly identical to section 101(a) of the House-passed version of H.R. 4437.

[5] This provision is similar to section 101(b) of the House-passed version of H.R. 4437.



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North American visitor overstayers; terrorist watch lists; money laundering, currency smuggling, and alien smuggling; and law enforcement cooperation.

Sec. 114. Improving the Security of Mexico's Southern Border. Section 114 would require the Secretary of State, in coordination with the Secretary of Homeland Security, to cooperate with Canadian and Mexican officials to establish a program to assess the needs of Guatemala and Belize in securing their international borders and to provide technical assistance to those two countries in securing their borders. It also would require the two secretaries to cooperate with officials in Guatemalan and Belize to increase their ability to dismantle human smuggling organizations and gain additional control of their borders. Finally, it would require the Secretary of State, Secretary of Homeland Security, and FBI to work with the governments of Mexico, Guatemala, Belize, and other Central American countries to share information and coordinate strategies relating to Central American gang members.

**Subtitle C – Other Border Security Initiatives**

Sec. 121. Biometric Data Enhancements. Section 121 would require that by October 1, 2007, the Secretary of Homeland Security, in consultation with the Attorney General of the United States, enhance connectivity between the IDENT and IAFIS fingerprint systems to ensure expeditious searches; as well as collect work with the Secretary of State to ensure that all fingers of aliens who must be fingerprinted are collected in the entry-exit system mandated by section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act.[6]

Sec. 122. Secure Communication. Section 122 would require the Secretary of Homeland Security, as expeditiously as possible, to develop and implement a plan to ensure clear and secure two-way communication capabilities, including the specific use of satellite capabilities, among all Border Patrol agents conducting operations between ports of entry, as well as between Border Patrol agents and their respective border patrol stations, between Border Patrol agents and residents in remote areas along the U.S. border who do not have mobile communications, and between all appropriate Department of Homeland Security border security agencies and State, local, and tribal law enforcement agencies.[7]

Sec. 123. Border Patrol Training Capacity Review. Section 123 would require the Government Accountability Office (GAO) to conduct a review of the basic training provided to Border Patrol agents by the Department of Homeland Security to ensure that such training is provided as efficiently and cost-effectively as possible.[8]

Sec. 124. US-VISIT System. Section 124 would require DHS to submit a timeline for equipping all land borders with the US-VISIT entry/exit system, developing and deploying the

[6] This provision is nearly identical to section 104 of the House-passed version of H.R. 4437

[7] This provision is nearly identical to section 106 of the House-passed version of H.R. 4437.

[8] This provision is nearly identical to section 110 of the House-passed version of H.R. 4437.



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exit component of the US-VISIT system at all land borders, and making all border screening systems operated by the Department interoperable.[9]

Sec. 125. Document Fraud Detection. Section 125 would require the Secretary of Homeland Security to provide training to CBP officers on identifying and detecting fraudulent travel documents; provide all CBP officers with access to the Forensic Documents Laboratory; require an assessment of and report to Congress on the Forensic Document Laboratory; and authorize the appropriation of such sums as may be necessary to carry out the section.

Sec. 126. Improved Document Integrity. Section 126 would require that all documents evidencing immigration status be machine-readable, tamper resistant, and include a biometric identifier.

Sec. 127. Cancellation of Visas. Section 127 would expand the consular authority to re-issue non-immigrant visas of individuals, previously overstayed, to consular posts in other than the country of nationality and to include the country of foreign residence.

Sec. 128. Biometric Entry-Exit System. Section 128 would make a number of changes in requirements and authorities relating to the entry/exit system.

- Section 128(a) would authorize the Secretary of Homeland Security to require biometric data and other information relating to the immigration status of aliens departing the United States.

- Section 128(b) would authorize immigration officers to collect biometric data from aliens who are either seeking admission to the United States or who are seeking to transit through the United States, as well as from lawful permanent residents who are seeking to enter the United States.

- Section 128(c) would authorize immigration officers to collect biometric data from alien crewmen seeking permission to temporarily land in the United States.

- Section 128(d) would make refusal to provide biometric information when it is requested of an alien a ground of inadmissibility but permit the Secretary to waive the ground of inadmissibility.

- Section 128(e) would waive the Administrative Procedure Act and other laws relating to the issuance of regulations with respect to the implementation of an automated entry and exit system. It also would authorize the appropriation of such sums as may be necessary for fiscal years 2007 and 2008 to implement the automated biometric entry and exit data system at all land border ports of entry.

[9] This provision is nearly identical to section 120 of the House-passed version of H.R. 4437.



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Sec. 129. Border Study. Section 129 would require the Secretary of Homeland Security, in consultation with other officials, to conduct a study of the construction of a system of physical barriers along the U.S. border.

- Section 129(a) would require a study of the construction of a system of physical barriers along the southern international land and maritime border of the United States. The study would be required to assess the necessity; feasibility; environmental impact; necessity for ports of entry; assessment of impact of such a system on trade, commerce, and tourism; effect on private property rights; estimate of costs; and effect on Indian reservations and National Parks of building such a system.

- Section 129(b) would require a study of the construction of a system of physical barriers along the northern international land and maritime border of the United States. The study would be required to assess the necessity and feasibility of building such a system. It also could, if the Secretary so desired, contain elements required of the study mandated for the southern border.

- Section 129(c) would require that a report on the study of construction of barriers on the southern border be submitted to Congress within nine months after the date of enactment of the Act; and that the report on the study of construction of barriers on the northern border be submitted to Congress within two years after the date of enactment of the Act.

## TITLE II -- INTERIOR ENFORCEMENT

Sec. 201. Removal and Denial of Benefits to Terrorist Aliens. Section 201 would amend the INA to deny various immigration benefits, including asylum, cancellation of removal, voluntary departure, withholding of removal, and registry to various classes of non-citizens whom the Attorney General suspects of having engaged in "terrorist activity" or falling within other security-related grounds, and would make these amendments retroactive to acts or conditions occurring or existing before enactment of these amendments.[10] [11] [12]

Sec. 202. Detention and Removal of Aliens Ordered Removed. Section 202 would modify the detention and removal procedures of the Department of Homeland Security ("DHS") after a final removal order has been entered.[13] [14]

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[10] Section 201(a) of H.R. 4437 contains elements of section 601(a)(2) of the House-passed version of H.R. 4437 but is substantively different in some respects.

[11] Section 201(b) of the Specter Chairman's Mark is identical to section 601(a)(3) of the House-passed version of H.R. 4437.

[12] Section 201(c) of the Specter Chairman's Mark is similar to section 601(a)(4) of the House-passed version of H.R. 4437.

[13] Section 202(a) of the Specter Chairman's Mark contains elements of section 602 of the House-passed version of H.R. 4437 but is substantively different in some respects.



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Under the modified procedures, DHS would—

- Calculating, Tolling and Extending the 90-Day Removal Period.

  1. calculate the detention and removal period to start at the latest of (1) the date the removal order becomes final; (ii) if a stay of removal has been granted, the date that stay expires; and (iii) if the person is confined (except for immigration purposes), the date of release from that confinement.

  2. extend detention and the removal period beyond 90 days where a person fails to make reasonable efforts to comply with the removal order or fully cooperate with the DHS to execute the removal.

  3. freeze the commencement of the removal period until such time that a person is in the actual custody, and remains in such custody, of the DHS.

  4. toll the removal period during any period that DHS transfers custody to another federal or state agency.

- Authorizing Detention Beyond Removal Period.

  1. authorize the DHS to detain an individual with a court issued stay of removal during the pendency of such stay.

  2. authorize DHS to require that an individual on supervised release from removal perform undefined affirmative acts for purposes related to the enforcement of the immigration laws.

  3. authorize the detention of most individuals (those described in INA 241(a)(6) beyond the removal period at the discretion of the DHS "without any limitations other than those specified."

  4. allow the DHS to parole certain individuals detained beyond the removal period if they are applicants for admission based on humanitarian grounds.

  5. require that a detention review process be established for certain detained individuals with final orders of removal. Individuals eligible for such detention review must have (1) effected an entry into the U.S., (2) made reasonable efforts to comply with removal order, (3) cooperated fully with the DHS's efforts to carry out removal order and (4) not act to prevent removal.

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[14] Section 202(b) of the Specter Chairman's Mark is similar to section 214 of the House-passed version of H.R. 4437.



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In the detention review process DHS would have to consider evidence offered by the individual and any other information pertaining to removal. This provision would allow DHS, without limitation, to detain such an individual for 90-days beyond the 90 day removal period and would allow DHS to detain such an individual beyond the removal period and through actual removal, where there is a likelihood of removal in the reasonably foreseeable future or upon DHS written certification that the individual is within certain classes.

This provision would allow the certification to be made based on information available to the Secretary, including classified information. The provision would also authorize DHS to renew detention by certification every six-months, without limitation, and it would authorize the re-detention of individuals on supervised release.

6. require the detention of certain individuals with removal orders where such individual fails to cooperate with the removal process or the DHS certifies the detention.

7. allow DHS, at its discretion, to conduct custody reviews under current regulations or by use of the proposed review process for other individuals.

8. restrict judicial review of any action or decision regarding detention and review to habeas petitions in the U.S. District Courts and only where all administrative remedies have been satisfied.

- Custody Determinations in Federal Criminal Cases

1. modify Title 18 U.S. Code, Section 3142 to allow as judicial officer in federal criminal proceedings to consider immigration status when determining whether the defendant is a flight risk or danger to the community, for the purposes of setting bail.

2. For bail hearings in certain federal criminal cases, modify Title 18 U.S.C. Section 3142 to create a presumption that no conditions of release will assure the defendant's appearance, if the judicial officer has probable cause to believe that the defendant is undocumented; has a final order of removal; or is an "alien" who has committed enumerated federal offenses (including e.g., certain offenses related to document fraud, false representation of citizenship, firearm shipment, illegal entry and reentry, harboring, or presence in violation of immigration laws or conditions (a crime created by section 206 in this bill)).

Sec. 203. Aggravated Felons. Section 203 would expand the definition and negative consequences of an aggravated felony.

- Section 203(a)(2) and (3) would amend the INA definition of "aggravated felony" to add additional conduct broadly relating to participation in the smuggling, movement, and residence of unauthorized non-citizens in the United States (as added by Section 205(c)), and



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to unlawful entry or unlawful presence or unlawful re-entry of non-citizens in the United States (as added by Sections 206 and 207).[15]

- Section 203(a)(4) would amend the definition of "aggravated felony" to add accessory roles in aggravated felony offenses, such as aiding and abetting, soliciting, counseling, procuring, commanding, or inducing another to commit an aggravated felony.[15]

- Section 203(b) would amend the INA Section 209(c) waiver of inadmissibility for asylees to bar such waiver to an alien convicted of an "aggravated felony."[16]

- Section 203(c) would make these changes retroactive to acts occurring before the enactment of these amendments.[17]

Sec. 204. Terrorist Bars. Section 204 would add "terrorist activity" and security-related grounds for barring a good moral character finding for naturalization and make other changes to the good moral character bars currently existing in the statue. It also would impose limitations on judicial review of naturalization denials.

More specifically --

- Section 204(a) would amend the INA bars on a finding of "good moral character" necessary for naturalization to include non-citizens the Attorney General suspects of having engaged in "terrorist activity" or falling within other security-related grounds; to include non-citizens convicted of an aggravated felony at any time regardless of whether the crime was defined as an aggravated felony at the time of the conviction (unless the person completed his or her sentence no later than 10 years before the date of application for naturalization and obtains a waiver); and to allow the government to take into consideration the applicant's conduct at any time even before the time period for which good moral character is required to be shown.[18]

- Section 204(b) would amend the INA immigrant visa provisions to preclude approval of a visa petition when the petitioner is in denaturalization or removal proceedings.[19]

- Section 204(d) would amend the INA provisions relating to federal court review of naturalization denials to impose a statutory 120 day time limit on seeking such review, to

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[15] Section 203(a) of the Specter Chairman's Mark is similar to section 201 of the House-passed version of H.R. 4437.

[16] Section 203(b) of the Specter Chairman's Mark is identical to section 605(a) of the House-passed version of H.R. 4437.

[17] Section 203(c) of the Specter Chairman's Mark is identical to section 605(b) of the House-passed version of H.R. 4437.

[18] Section 204(a) of the Specter Chairman's Mark contains elements of section 612(a) of the House-passed version of H.R. 4437 but is substantively different in some respects.

[19] Section 204(b) of the Specter Chairman's Mark is similar to section 609(c) of the House-passed version of H.R. 4437.



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preclude review of good moral character determinations, and to require a person seeking review to show that the Secretary's determination was contrary to law.[20]

- Section 204(e) would bar naturalization of any person if the Secretary of Homeland Security determines that the person was once a person engaged in "terrorist activity" or falling within other security-related grounds.[21]

- Section 204(g) would limit district court jurisdiction in cases of delay to remanding the proceeding.[22]

- Section 204(h) would make these changes retroactive to any act occurring before the enactment of these amendments.[23]

Sec. 205. Increased Criminal Penalties Related to Gang Violence, Removal, and Alien Smuggling. Section 205 would increase penalties relating to alleged gang membership and association, failure to depart after removal, and alien smuggling, and would also make changes to rules for Temporary Protected Status.

- Section 205(a) would amend the INA inadmissibility and deportability grounds, and the rules and requirements for temporary protected status, to add grounds or bars for alleged members or participants in the activities of "criminal street gangs."[24]

- Section 205(a) would also authorize the Secretary of Homeland Security to terminate temporary protected status for national security reasons or any other reason immediately upon publication of notice in the Federal Register, and would strike the current prohibition on immigration detention of non-citizens granted temporary protected status to authorize the Secretary of Homeland Security to detain non-citizens provided temporary protected status whenever appropriate under any other provision of law.[24]

- Section 205(b) would amend INA 243(a) penalties for failure to depart after removal to extend them to non-citizens found removable based on inadmissibility grounds, and imposes a minimum sentence of imprisonment of six months and a maximum of five years. This Section also imposes a minimum sentence of imprisonment of six months and a maximum of

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[20] Section 204(d) of the Specter Chairman's Mark is similar to section 609(f) of the House-passed version of H.R. 4437.

[21] Section 204(e) of the Specter Chairman's Mark is similar to section 609(a) of the House-passed version of H.R. 4437.

[22] Section 204(g) of the Specter Chairman's Mark is similar to section 609(e) of the House-passed version of H.R. 4437.

[23] Section 204(h) of the Specter Chairman's Mark is similar to section 609(g) of the House-passed version of H.R. 4437.

[24] Section 205(a) of the Specter Chairman's Mark contains elements of sections 608(a) and 608(b) of the House-passed version of H.R. 4437 but contains substantive differences.



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five or ten years for the INA 243(b) offense of willful failure to comply with the terms of release under post-removal order supervised release.[25]

- Section 205(c) would expand the scope of the federal criminal code penalties for "alien smuggling" and related offenses to add additional conduct broadly relating to participation in the smuggling, movement, and residence of unauthorized non-citizens in the United States, and adds additional penalties for such offenses, including for the employment of "unauthorized aliens."[26]

Sec. 206. Illegal Entry or Unlawful Presence of an Alien. Section 206 would make presence in the United States, knowing that such presence violates the terms and conditions of any admission, parole, immigration status, or authorized stay, a crime punishable by a fine or imprisonment of up to 6 months, or both. A second or subsequent violation of that offense or of unlawful entry, or following an order of voluntary departure, would be punishable by a fine or imprisonment of up to two years, or both. The penalty for this offense and for unlawful entry would be further increased to (1) up to 10 years imprisonment if the violation occurred after conviction for 3 or more misdemeanors or a felony; (2) up to 15 years imprisonment if after conviction for a felony for which the sentence imposed was 30 months or more; (3) up to 20 years imprisonment if after conviction for a felony for which the sentence imposed was 60 months or more. The prior convictions would be elements of the crime that must be pled and proven beyond a reasonable doubt or admitted by the defendant.

Sec. 207. Illegal Reentry. Section 207 would amend the current penalty enhancements for the crime of reentry after removal to (1) up to 10 years imprisonment for a person who was previously convicted of 3 or more misdemeanors or a felony; (2) up to 15 years imprisonment for a person who was previously convicted of a felony for which the sentence imposed was 30 months or more; (3) up to 20 years imprisonment for a person who was previously convicted of 3 felonies, or a felony for which the sentence imposed was 60 months or more, or murder, rape, kidnapping, a felony offense described in 18 U.S.C. Chapter 77 (relating to peonage and slavery) or 113B (relating to terrorism). The prior convictions would be elements of the crime that must be pled and proven beyond a reasonable doubt or admitted by the defendant. Section 207 would also provide that in making a collateral attack on the underlying removal order, a defendant would be required to prove by "clear and convincing evidence" his exhaustion of administrative remedies, deprivation of judicial review, and fundamental unfairness of the removal order. It would also mandate, upon a person's unlawful reentry after removal, the re-incarceration of that person if he had been removed upon release from prison on parole, supervised release, or probation, for the remainder of the sentence of imprisonment which was pending at the time of removal.

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[25] Section 205(b) of the Specter Chairman's Mark is similar to section 603 of the House-passed version of H.R. 4437.

[26] Section 205(c) of the Specter Chairman's Mark contains elements of section 202(a) of the House-passed version of H.R. 4437 but is substantively different in some respects.



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Sec. 208. Reform of Passport, Visa, and Immigration Fraud Offenses. Section 208 would amend 18 U.S.C., Chapter 75 to include a host of new passport, document-related, and marriage fraud offenses and, in some instances, would reduce the level of intent required (which, by extension, expands the number of people who can be prosecuted). Examples of the kinds of activities that would be made criminal under this section include:

- knowingly uses any passport to enter or to attempt to enter the United States;
- knowingly uses ANY immigration document issued or designed for the use of another;
- knowingly makes a false statement or representation in an application for a U.S. passport (including supporting documentation); and
- knowingly furnishes a passport to a person for the use when such person is not the person for whom the passport was designed or issued.

Section 208 also would create a new chapter of definitions in chapter 75. For example, "falsely make" would mean to prepare or complete an immigration document with "knowledge or in reckless disregard" of the fact that the document contains a statement that is false. "False statement or representation" would be defined to include "a personation or an omission."

In addition, section 208 would add new sections to 18 U.S.C., Chapter 75, including "seizures and forfeiture," "marriage fraud," and "additional jurisdiction" (punishing anyone who commits a crime within the special maritime and territorial jurisdiction of the United States. Similarly, this section would punish people who commit offenses outside the U.S. covered in chapter 75 if it relates to an immigration document, commerce, etc.

Finally, read together with Section 221 (a "Conforming Amendment" that would amend INA § 101(a)(43)(P)), Section 208 would expand the definition of "aggravated felony" at INA § 101(a)(43)(P) to include any of the above described offenses that have been added to 18 U.S.C., Chapter 75 for which the term of imprisonment is at least 12 months.[27]

Sec. 209. Inadmissibility and Removal for Passport and Immigration Fraud Offenses. Section 209 would amend the INA inadmissibility and removal grounds to add convictions or admissions of conduct relating to passport, visa, and immigration fraud. (as added by Section 208(a)), and Section 209(c) would make these changes applicable in any pending or future proceedings regardless of whether the conduct at issue occurred before the enactment of these amendments.[28]

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[27] Section 208 of the Specter Chairman's Mark contains elements of section 213 of the House-passed version of H.R. 4437 but is substantively different in some respects.

[28] Section 209 of the Specter Chairman's Mark is similar to sections 217 and 218 of the House-passed version of H.R. 4437.



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Sec. 210. Incarceration of Criminal Aliens. Section 210 would mandate the continuation of the Institutional Removal Program (IRP) or the development of and implementation of another program to identify removable persons in federal and state correctional facilities and detain and remove them upon completion of their sentence. It would authorize expanding the IRP to all 50 states. It would allow state and local enforcement officers to hold a person for up to 14 days after the completion of his state prison sentence if he is removable or not lawfully present in the United States. It would also allow such local law enforcement to issue a detainer to hold aliens beyond the completion of their sentences and until ICE takes them into custody. Section 210 would require the use of technology such as videoconferencing to the maximum extent practicable to make IRP available in remote locations. IRP money would be authorized in "such sums as may be necessary" from 2007 through 2011.[29]

Sec. 211. Encouraging Aliens to Depart Voluntarily. Section 211 would make a series of changes to voluntary departure. Any voluntary departure agreement would be void if the noncitizen files an appeal, for example, from denial of a motion to terminate proceedings. In addition, section 211 would reduce from 120 days to 60 days the period of voluntary departure that can be granted prior to the conclusion of proceedings; would reduce from 60 to 45 days the period of voluntary departure that can be granted at the conclusion of proceedings; would permit the Secretary of DHS to agree to a reduction of period of inadmissibility under INA 212(a)(9) regarding unlawful presence and persons previously removed; and would require the noncitizen to post a bond absent a finding of compelling evidence that posting the bond would pose serious financial hardship and that the bond is unnecessary to secure a timely departure. For voluntary departure granted after the commencement of proceedings, section 211 would require an advisal by an immigration judge of the consequences of failing to abide by a voluntary departure agreement, including a statement on the record of the amount of the civil penalty. Section 211 would also authorize the Secretary to promulgate regulations imposing additional conditions on voluntary departure.

Section 211 would preclude judicial review affecting or tolling voluntary departure, and contains express language precluding review of legal and constitutional questions under INA 242(a)(2)(D), as well as habeas corpus, mandamus and the All Writs Act.

Section 211 would also establish penalties for failure to comply with a voluntary departure agreement. It would provide that the Secretary can extend voluntary departure, but that no court and no motion of any form can extend the time for voluntary departure. If the terms of the agreement are violated, the noncitizen would be subject to a civil penalty of $3,000, which can be collected immediately. The noncitizen would also be ineligible for voluntary departure, adjustment, cancellation of removal, change in nonimmigrant classification, or registry for the time that s/he remains in the United States plus an additional ten years. Motions to reopen would be precluded except for motions based on an application for withholding of removal or torture relief if the motion presents material evidence of changed country conditions arising after

[29] Section 210 of the Specter Chairman's Mark contains elements of section 223 of the House-passed version of H.R. 4437 but is substantively different in some respects.



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the order granting voluntary departure and there is a sufficient showing of eligibility for such protection.

This section would apply to voluntary departure orders made on or after 180 days following enactment, except that the portion on judicial review applies to any petition for review "entered" after enactment. It is unclear what this provision means.

The conditions of voluntary departure are also affected by changes to section 206(a)(2), which would penalize reentry following a voluntary departure order with a sentence of up to two years in prison, irrespective of whether the agreement was before an immigration judge or was entered into in lieu of proceedings.[30]

Sec. 212. Deterring Aliens Ordered Removed from Remaining in the United States Unlawfully. Section 212(b) would amend the INA to bar non-citizens who are subject to a final removal order, and who willfully fail or refuse to depart from the United States, or to make timely application for travel documents necessary for departure, from eligibility for any discretionary relief from removal during the time the non-citizen remains in the United States and for a period of 10 years after the non-citizen's departure from the United States. The only exceptions would be for a non-citizen who has filed a timely motion to reopen under INA 240(c)(6), or who has filed a motion to reopen to seek withholding of removal under INA 241(b)(3) or protection against torture but only if the non-citizen presents proof of changed country conditions arising after the date of the final removal order.[31]

Sec. 213. Prohibition of Sale of Firearms to, or the Possession of Firearms by Certain Aliens. Section 213 would expand the existing federal crimes of sale of firearms to and possession of firearms by any person unlawfully present or on a non-immigrant visa, to prohibit such sale to or possession by anyone paroled into the United States for urgent humanitarian reasons or significant public benefit.

Sec. 214. Uniform Statute of Limitations for Certain Immigration, Naturalization, and Peonage Offenses. Section 214 would establish a statute of limitations for all immigration crimes, including willful failure to register or to provide a change of address, as well as crimes involving trafficking in persons, of ten years. Section 214 also would extend the same statute of limitations to attempts at such crimes.[32]

Sec. 215. Diplomatic Security Services. Section 215 would expand the authority of special agents of the Department of State and the Foreign Service to investigate identity theft and

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[30] Section 211 of the Specter Chairman's Mark contains elements of sections 208(a), 208(c)(2), and 208(d) of the House-passed version of H.R. 4437 but is substantively different in some respects.

[31] Section 212 of the Specter Chairman's Mark contains elements of section 209(a), 209(b), and 209(d) of the House-passed version of H.R. 4437 but is substantively different in some respects.

[32] Section 214 of the Specter Chairman's Mark is similar to section 215 of the House-passed version of H.R. 4437.



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document fraud relating to the programs of the Department of State, peonage and slavery and federal offenses committed in the special maritime and territorial jurisdiction of the United States.

Sec. 216. Completion of Background and Security Checks. Section 216 would amend the INA to require the Secretary of Homeland Security to complete and assess background and security checks and to investigate and resolve any suspected or alleged fraud before the Secretary or the Attorney General may grant adjustment of status, or other relief, protection from removal, or other benefit or documentation under the immigration laws, without any time limit on when such background and security check or investigation must be completed.[33]

Sec. 217. Denial of Benefits to Terrorists and Criminals. Section 217 would amend the INA to provide that nothing in the INA or any other statute shall be construed to require the federal government from granting any application, approving any petition, or granting or continuing any status or benefit under the immigration laws to non-citizens suspected of having engaged in "terrorist activity" or falling within other security-related grounds, or with respect to whom a criminal or other investigation or law enforcement check has not been completed.

Sec. 218. State Criminal Alien Assistance Program. Section 218 would provide for reimbursement of state and local governments for costs associated with the prosecution and incarceration of undocumented criminal aliens. "Undocumented criminal aliens" would be defined as persons who have been convicted of a felony or two misdemeanors, and who either entered without inspection or failed to maintain status or comply with the terms of status. At the request of the chief executive of a state or local government, the Secretary of DHS would have to contract to compensate the State or locality for the incarceration or shall take the person into federal custody. Priority would have to be given to persons who have committed aggravated felonies.

Sec. 219. Reducing Illegal Immigration and Alien Smuggling on Tribal Lands. Section 219 would authorize grants to Indian tribes with land adjacent to an international border that may have been adversely affected by illegal immigration. The grants may be used for law enforcement, health care, environmental restoration and preserving cultural resources. It would further provide that within 180 days of enactment, the Secretary of DHS shall submit a report, including information on the level of access of Border patrol agents on tribal lands, the extent to which enforcement could be improved through enhanced access, and a strategy for obtaining access and identifying grants provided to Indian tribes that relate to border security.

Sec. 220. Alternatives to Detention. Section 220 would require the Secretary of DHS to conduct a study of the effectiveness of alternatives to detention, the Intensive Supervision Appearance Program, and other alternatives to detention, including release on recognizance, appearance bonds and electronic monitoring devices.

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[33] Section 216 of the Specter Chairman's Mark contains elements of section 122 of House-passed version of H.R. 4437 but is substantively different in some respects.



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Sec. 221. Conforming Amendment. Section 221 would amend the INA definition of "aggravated felony" to add any passport, visa, and immigration fraud offense listed in chapter 75 of the federal criminal code, and would remove the exemption in certain cases for a first offense that the person committed to help a spouse, child, or parent enter or remain in the country.[34]

Sec. 222. Reporting Requirements. Section 222 would make changes to the address reporting and registration requirements under the Immigration and Nationality Act, and would impose new and expanded penalties for violations of these requirements.

Sec. 223. Severability. Section 223 would provide that a finding of invalidity of any provision of this title would not affect the remainder of the title.

## TITLE III – UNLAWFUL EMPLOYMENT OF ALIENS

Sec. 301. Unlawful Employment of Aliens. Section 301 would significantly re-write section 274A of the INA, relating to the unlawful employment of aliens, in a number of ways.

- Prohibition on Hiring, Recruiting, and Referring Illegal Aliens. Paragraphs (a)(1) and (2) of the amended section 274A track current law which prohibits the hiring, recruiting, or referral of any alien with knowledge or with reason to know of the alien's illegal status, as well as the hiring of an individual without complying with the identification and employment documentation verification requirements of subsection (c) and the Electronic Employment Verification System requirements of subsection (d).

- Liability for Unlawful Contract Hire of Illegal Alien. Paragraph (a)(3) would make an employer liable for unlawful hiring if the employer uses a contract or subcontract to obtain labor after the date of enactment knowing or having reason to know that the individual is unauthorized.

- Hiring Ten or More Unauthorized Aliens. Paragraph (a)(4) would establish a rebuttable presumption of unlawful hiring if an employer hires more than 10 unauthorized aliens during a calendar year.

- Good Faith Defense. Paragraph (a)(5) tracks current law, providing a defense for employers who comply in good faith with the requirements of subsections (c) and (d) and who voluntarily use the Electronic Employment Verification System.

- Reasonable Cause That Employer Has Failed to Comply. Subsection (b) would provide that if the Secretary has reasonable cause to believe an employer has failed to comply with the requirements of this section, the Secretary would be authorized to require the employer to certify under penalty of perjury within 60 days that the employer is in compliance or has

[34] Section 221 of the Specter Chairman's Mark is similar to section 216 of the House-passed version of H.R. 4437.



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instituted a program to come into compliance. The 60-day period could be extended for good cause.

- Nationwide Expansion of Basic Pilot Program. Subsection (c) would amend the current documentation and verification requirements and would expand the current basic pilot into a nationwide mandatory system for all employers within 5 years.

- Acceptable Documents for I-9s. Paragraph (c)(1) tracks the current I-9 system by requiring employers to attest under penalty of perjury that they have verified the identity and work authorization status of their employees by examining a document establishing both work authorization and identity. It would change current law by establishing a new "totality of the circumstances" test that employers would be required to meet when determining whether documents provided by a new hire are genuine. Paragraph (c)(1) would also reduce the documents that an individual may provide to employers to prove identity. The only acceptable documents would be a U.S. passport, permanent resident card (or other document designated that DHS that proves both identity and employment authorization), driver's license, military ID, or, for persons under 16, other documents designated by DHS. DHS may further limit this list if the Secretary determines that the documented is unreliable or being used fraudulently.

- Employee Attestation. Paragraph (c)(2) tracks current law by requiring employees to attest to being authorized to work as part of the I-9 system.

- Extension of Time for Mandatory Recordkeeping. Paragraph (c)(3) would lengthen the period that employers must keep records of compliance with the employment verification requirements 7 years. Currently employers must retain documents for only 3 years.

- Social Security No-Match Letters. Paragraph (c)(4) would require employers to maintain records of Social Security no-match letters and steps taken to resolve each issue described in a no-match notice. It would also require employers to maintain records of any actions or correspondence related to clarifying doubts about an individual's identity or employment authorization.

- Employer Penalties. Paragraph (c)(5) would subject an employer who fails to comply with the documentation, recordkeeping, and other requirements of subsection (c) to penalties pursuant to subsection (e)(4)(B).

- No National ID Card. Paragraph (c)(6) would provide that nothing in this subsection authorizes the issuance or use of a national identification card.

- Mandatory Electronic Employment Verification System. Subsection (d) would create a mandatory Electronic Employment Verification System (EEVS) that would be phased-in over a 5-year period beginning with employers determined to be part of the critical infrastructure or directly related to national security. The initial phase-in would begin 180 days after enactment. Subsequent phases would be rolled-out from large to small employers.



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All employers would be required to participate within five years after the date of enactment. In general, the EEVS would only apply to new hires; however, employers determined to be part of the critical infrastructure would be required to apply the system to new hires and current employees. The Secretary would also have the authority and unreviewable discretion to require any employer to use the EEVS for current and new employees if DHS has reasonable cause to believe the employer has violated immigration law. Employers who receive a final nonconfirmation regarding an employee's work authorization would be required to provide DHS with any information regarding the individual that would help DHS enforce immigration laws. Employers would also be charged a fee to be determined by DHS to participate in the system.

1. Social Security Administration and Department of Homeland Security. Paragraph (d)(1) would require the Secretary, in cooperation with the Commissioner of Social Security, to implement an Electronic Employment Verification System (EEVS).

2. Electronic Operation of System. Paragraph (d)(2) would incorporate existing Basic Pilot program language requiring the Secretary to operate the verification system through electronic media through which participating employers can make inquiries as to whether individuals are work authorized. This paragraph would also require the Secretary to maintain records of inquiries and responses to inquiries and to do so in a manner that safeguards the information. The verification system would be required to provide a confirmation or tentative nonconfirmation of eligibility within 3 days of the submission. If the employer receives a tentative nonconfirmation from the verification system, and the employee contests that finding, the system would be required to produce a final confirmation or nonconfirmation within 10 days.

3. Requirements for Employer Participation. Paragraph (d)(3) would outline the requirements for employer participation into the System. On the date of enactment, the Secretary would be authorized through notice in the Federal Register to require participation in the EEVS by employers that the Secretary determines to be part of the critical infrastructure, or directly related to the national, or homeland security needs of the United States. Participation of these employers would apply with respect to both newly hired and currently hired employees. Two years after the date of enactment of this Act, employers with more than 5,000 employees would be required participate in the EEVS. Three years after the date of enactment, employers with less than 5,000 employees and with more than 1,000 employees would be required to participate in the EEVS. Four years after the date of enactment, employers with more than 250 employees and less than 1,000 employees would be required to participate in the EEVS. Five years after the date of enactment, all employers would be required to participate in EEVS.

4. Discretionary Participation of Employers. Paragraph d(4) would provide that the Secretary has the authority to permit participation in EEVS of employers not required to participate. In addition, the Secretary would be permitted to expand the participation of employers who are required to participate if there is reasonable cause to believe that the employer has violated the immigration laws. If such reasonable cause exists, the



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Secretary would be able to require the employer to use the system for existing workers in addition to new hires.

5. Secretary Authority to Delay or Waive Participation. Paragraph d(5) would provide that the Secretary is authorized to waive or delay the participation in EEVS but must provide notice to Congress of such waiver prior to the date such waiver is granted.

6. Consequences for Failure to Comply. Paragraph (d)(6) would provide that any failure to comply with the EEVS's requirements shall be treated as a violation of subsection (a)(1)(B)'s prohibition against hiring individuals without complying with this section, including the requirements of subsections (c) and (d). Subsection (d)(6) further provides that such failure to comply shall be treated as presumed violations of subsection (a)(1)(A)'s prohibition against the hiring of unauthorized aliens.

7. Procedures for Employer Participation. Paragraph (d)(7) would establish procedures for employers participating in the EEVS, including provision of identity and work authorization information, presentation of documentation, reliance on documentation, requirements for seeking confirmation or resolving nonconfirmations of work authorizations, and consequences of final nonconfirmations. This subsection largely incorporates language identical to that contained in the current Basic Pilot statute. A change from current law is a requirement that employers share information with DHS about employees who receive a final nonconfirmation.

8. Protection From Civil and Criminal Liability. Paragraph (d)(8) would protect from civil and criminal liability any person or entity who relies in good faith on information provided through the EEVS confirmation system. This incorporates existing language applicable to the Basic Pilot program authority.

9. Prohibition on Other Uses. Paragraph (d)(9) would prohibit use of the EEVS by any Federal agency for any purposes other than enforcement and administration of the immigration laws, the SSA, or the criminal laws.

10. Secretary Discretion to Modify. Paragraph (d)(10) would authorize the Secretary of Homeland Security to modify the requirements of the EEVS.

11. Secretary Authority to Set Fees. Paragraph (d)(11) would allow the Secretary to establish, require, and modify fees for employers participating in the EEVS. Such fees may be set at a level that will recover the full cost of providing the EEVS to all participants . This provision further provides that fees are to be deposited and remain available as provided in INA sections 286(m) and (n), and that the EEVS is considered an immigration adjudication service under 286(n). This provision also allows the Secretary to modify the frequency or schedule for payment.



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12. Report to Congress on Accuracy of System. Paragraph (d)(12) requires that the Secretary submit a report to Congress within one year after enactment on the capacity, integrity, and accuracy of the EEVS.

- Compliance.

1. Paragraph (e)(1) would require the Secretary to establish procedures for the filing of complaints and investigation of possible violations.

2. Paragraph (e)(2) would ensure that immigration officers have reasonable access to evidence of employers they are investigating. It also authorizes DHS to compel the production of evidence by subpoena and to fine or void any mitigation of penalties available to employers who fail to comply with subpoenas.

3. Paragraph (e)(3) would authorize the Secretary to issue pre-penalty notices to employers when there is reasonable cause to believe the employer has violated this section. It would provide employers a reasonable opportunity to defend their actions and to petition the Secretary for the remission or mitigation of any fine or penalty or to terminate the proceedings. Mitigating circumstances would include good faith compliance and participation in the EEVS. The paragraph also sets forth the procedures for the Secretary to follow when making a determination of whether there has been a violation and authorizes the Secretary to mitigate penalties or terminate proceedings in appropriate cases.

4. Paragraph (e)(4) would set forth the civil monetary penalties for unlawfully hiring, recruiting, or referring unauthorized aliens or for continuing to employ an individual who is unauthorized to work, as well as penalties for recordkeeping or verification practice violations.

5. Paragraph (e)(5) would provide that an employer may appeal an adverse determination within 45 days of the issuance of the final determination.

6. Paragraph (e)(6) would authorize the Government to file suit in Federal court if an employer fails to comply with a final determination.

- Criminal Penalties. Subsection (f) would establish criminal penalties and injunction procedures for employers who engage in a pattern or practice of knowing violations of subsection (a)(1)(A), which prohibit hiring unauthorized aliens, or paragraph (a)(2), which prohibits continuing to employ unauthorized aliens after employer is aware or has reason to be aware that the alien is not authorized to work. Such employers can be fined up to $10,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned up to six months, or both. This subsection further authorizes the Attorney General to bring a civil action requesting such monetary penalties or injunctive relief.



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- Prohibition of Indemnity Bonds. Subsection (g) would prohibit any employer from requiring prospective employees to post a bond or other security indemnifying the employer against liability arising from the employer's violation of this section. Violation of this prohibition is subject to civil penalties, and amounts obtained in the form of such bonds can be ordered to be deposited in the Employer Compliance Fund authorized by INA § 286(w).

- Bar of Noncompliant Employers. Subsection (h) would bar noncompliant employers from eligibility for Federal contracts.

- Miscellaneous Provisions. Subsection (i) contains several miscellaneous provisions.

- Use of Funds from Penalties. Subsection (j) would direct the deposit of funds paid for civil penalties into the employer compliance fund authorized by INA § 286(w).

- Definitions. Subsection (k) contains several definitions used in section 274A.

Sec. 302. Employer Compliance Fund. Section 302 would establish a general fund of the Treasury and would name it the "Employer Compliance Fund." Any offsetting receipts of civil monetary penalties collected under section 274A of the INA (Unlawful Employment of Aliens) would be deposited into the fund, and any amounts refunded would be used to enforce employer compliance with section 274A. Amounts deposited into the fund would remain available until expended and would be refunded, at least on a quarterly basis, to the Secretary of Homeland Security.

Sec. 303. Additional Worksite Enforcement and Fraud Detection Agents. Section 303 would require the Secretary to annually add at least 2,000 investigators dedicated to enforcing unlawful employment of aliens; and section 303(b) would add at least 1,000 Immigration Enforcement Agents dedicated to immigration fraud detection. Both sections 303(a) and 303 (b) would be subject to the availability of appropriations and carried out during the 5-year period beginning on the date of enactment of this Act. Section 303(c) would authorize the necessary appropriations to carry out this section during each of the fiscal years 2007 through 2011.

Sec. 304. Clarification of Ineligibility for Misrepresentation. Section 304 would change "citizen" to "national," so that it would state that any alien who falsely represents himself or herself to be a national of the United States is inadmissible.

## TITLE IV – NONIMMIGRANT AND IMMIGRANT VISA REFORM

Sec. 401. Nonimmigrant Temporary Worker. Section 401 would amend Section 101(a)(15)(H) of the INA to create a new worker category (to be known as H-2C) for persons coming temporarily to the U.S. to perform labor or services -- other than such labor or services described in INA § 101(a)(15)(H)(i)(b), (H)(i)(c), (H)(ii)(a), (H)(ii)(b), (H)(iii), (L), (O), (P), or (R) – if unemployed persons in the U.S. who are capable of performing such labor or services cannot be



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found. Spouses and children would be eligible to accompany or follow to join the principal alien.

Sec. 402. Admission of Nonimmigrant Temporary Guest Workers. Section 402 would create a new section in the INA, Section 218A, relating to admission of temporary workers in H-2C status. This provision would authorize the issuance of a temporary visa to an individual who: (1) is capable of performing the labor or services required for the occupational classification; (2) has received an offer of employment; (3) pays a $500 fee in addition to the cost of processing and adjudicating the application; and (4) undergoes a medical exam at their own expense. In addition to other information required to establish H-2C eligibility, the individual would be required to provide personal information regarding his or her health (physical and mental), criminal history, gang membership, immigration history, and involvement with terrorist groups or individuals. The Secretary of Homeland Security would be accorded sole, unreviewable discretion to determine H-2C eligibility.

- Section 402(c) would authorize DHS to waive certain grounds of inadmissibility (specifically, 212(a)(5), (6)(A), (7), (9)(B), and (9)(C)) related to conduct that occurred prior to the date of enactment. It also would create an affirmative waiver for pre-enactment conduct for the remaining grounds of inadmissibility – except certain enumerated criminal and security grounds – for humanitarian, family unity, or other public interest reasons.

- The initial authorization of H-2C status would run for three years, and could be extended for one additional three-year period. At the conclusion of the six-year period, the individual could not reenter the U.S. in H-2C status until he or she had been in his or her home country for at least one year. The individual must be employed during his or her stay in the United States, but could change employers as long as the subsequent employer complied with the sponsoring obligations set forth in the new Section 218B and the individual had not worked without authorization. If the individual is unemployed for more than 45 consecutive days, the period of authorized admission would terminate and he or she would be required to return to their country of nationality or last residence. An individual who returned home due to unemployment could reenter the United States to work using the same visa, provided the individual meets the same standards required for the original entry. Individuals holding H-2C visas could travel outside of the United States and be readmitted on the same visa assuming the period of authorized admission had not expired. The three-year period of authorized admission could not be extended due to any time the individual spends outside the country. Individuals in H-2C status who willfully violate any material term or condition of such status (including failure to comply with the change of address reporting requirements) would not be eligible to renew their status.

- H-2C individuals who failed to depart before the expiration of the authorized period of admission would be barred from receiving any immigration benefit or relief except asylum, withholding of removal, or CAT relief. Individuals who unlawfully enter after the date of enactment and are physically present in the U.S. would be ineligible for cancellation of removal (Section 240A), voluntary departure (Section 240B), or nonimmigrant status under Section 101(a)(15).



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- Spouses and children who are accompanying or following to join an H-2C principal would be eligible for H-4 nonimmigrant visa classification assuming they are admissible (under the regime set forth in this section), pay an additional $500 family supplemental application fee, and satisfy other basic requirements.

Sec. 403. Employer Obligations. Section 403 would create a new section in the INA, Section 218B, relating to the obligations of H-2C employers.

- It would require employers who intend to hire H-2C nonimmigrants to file a sponsoring petition and to comply with all applicable federal, state and local laws, including laws affecting migrant and seasonal agricultural workers.

- An employer petitioning to hire an H-2C worker would have to attest, among other things, that:

    1. the employment of such worker will not adversely affect the wages and working conditions of similarly employed workers in the U.S.

    2. the employment of such worker did not and will not cause displacement of a U.S. worker employed by the petitioner during a 180 day period beginning 90 days before the petition is filed;

    3. such worker will be paid the greater of the prevailing wage or the actual wage paid by the employer to similarly situated workers;

    4. such worker will be provided the working conditions and benefits normal to similarly situated workers in the area of intended employment;

    5. there is no strike, lockout or work stoppage in the course of a labor dispute in the occupation at the place of employment;

    6. if the position is not covered by state workers compensation law, the employer shall provide, at no cost to employee, insurance covering injury or disease arising out of and in the course of the workers employment which will provide benefits at least equal to those provided under to state worker compensation law for comparable employment;

    7. except where DOL has determined there is a shortage of U.S. workers in the occupation and area of intended employment, there are not sufficient able, willing and qualified employees who are available at the time and place needed;

    8. the employer has made good faith efforts to recruit U.S. workers including, recruitment at least 14 days but no more than 90 days prior to filing; and



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9. the job is a bona fide job for which the employer needs labor or services and the employer will be able to place the employee on the payroll.

- The petition must be filed with 60 days prior to actual need and an employer must notify the Secretaries of Labor and Homeland Security within three business days of a separation of employment. A copy of each petition and documentation supporting the attestation must be provided to every temporary worker employed under the petition and made available for public examination (and remain available for five years) as well as to DOL during the course of an audit.

- This section also would provide whistleblower protection to H-2C workers who disclose violations of these requirements. It would require foreign labor contractors (and employers that engage in foreign labor contracting activity) to disclose a variety of information to the nonimmigrant workers at the time of their recruitment including, among other things, the location of employment, a description of the duties, compensation, benefits provided and any associated costs, existence of any labor dispute or labor organizing effort, the extent of any insurance coverage, any education or training required or provided, and a statement describing the protections of this Act. This section also would prohibit foreign labor contractors from providing false or misleading information and from assessing any fees to the worker for such recruitment.

- This section would require foreign labor contractors who recruit workers under this program to register with the Secretary of Labor and require the Secretary of Labor to promulgate regulations to establish a process for the investigation and approval of an application for a certificate of registration of foreign labor contractors. Such certificates would be valid for two years, and the Secretary could refuse to issue or renew, or could suspend or revoke a certificate of registration. This section also would provide remedies for foreign labor contractor violations, and would require the Secretary of Labor to prescribe regulations for the receipt, investigation, and disposition of complaints by individuals harmed under this section. In addition, Section 403 sets forth an administrative process under which workers who are harmed by violations of the program could bring a complaint.

Sec. 404. Alien Employment Management System. Section 404 would create a new section in the INA, Section 218C, relating to establishment of a system to manage and track employment of H-2C workers. The system would provide employers with an opportunity to recruit and advertise job openings to U.S. workers before hiring an H-2C worker. It also would collect sufficient information to allow DHS to determine if an H-2C worker is employed, which employers have hired H-2C workers, the number of H-2C workers and employer is authorized to hire and is currently employing, the length of time an H-2C worker has been employed in the U.S., and the occupation and industry in which the individual has been employed. The system also would enable employers to request approval for multiple H-2C workers and to file applications electronically.



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Sec. 405. Rulemaking; Effective Date. Section 405 would require the Secretary of Labor to promulgate regulations needed to implement Sections 218A, 218B, and 218C, as created under this Act. Sections 402, 403, and 404 would take effect one year after date of enactment.

Sec. 406. Recruitment of United States Workers. Section 406 would require the Secretary of Labor to establish an electronic job registry and a nationwide system of public labor exchange services to provide information on employment opportunities available to U.S. workers. This provision would require employers to post job opportunities for at least 30 days before making an attestation under Section 218B and hiring an H-2C worker. It also would require employers to maintain records for at least one year describing the reasons for not hiring any U.S. workers who have applied for the posted position.

Sec. 407. Temporary Guest Worker Visa Program task Force. Section 407 would establish a Temporary Worker Task Force to study the impact of H-2C workers on wages, working conditions, and employment of U.S. workers and to make recommendations to the Secretary of Labor regarding the need for an annual numeric limitation on the number of H-2C workers admitted to the U.S. The Task Force would be composed of 10 individuals with appointment responsibility evenly distributed between majority and minority party leaders from the House and Senate. The President would appoint the Chairperson of the Task Force. This provision would also set forth criteria for the selection of Task Force Members and their meeting and reporting obligations.

Sec. 408. Student Visas. Section 408 would amend Section 101(a)(15)(F) of the INA to statutorily authorize 24 months of optional practical training for F-1 students and to create a new F-4 visa for individuals pursuing an advanced degree in a math, engineering, technology, or physical sciences program.

This provision also would amend Section 214(m) of the INA to allow students in the newly established F-4 visa classification to be intending immigrants if they plan to seek employment in the U.S. related to the graduate program's field of study. The F-4 visa would be valid for an additional year after completion of the graduate program while the individual seeks full-time employment related to the field of study. All F students would be eligible for off-campus employment unrelated to the field of study if they maintain good academic standing and the employer attests to the educational institution and the Department of Labor that it has spent at least 21 days recruiting U.S. citizens to fill the position and will pay the greater of the actual or prevailing wage. Such off-campus employment is limited to 20 hours per week during the academic term and 40 hours per week during vacation periods and between terms.

This provision also would amend Section 245(a) of the INA to authorize individuals in F-4 status who, after completing the advanced degree program, obtain full-time employment related to the field of study, to immediately adjust their status to permanent resident upon payment of a $1,000 fee. The fee would be allocated to training and scholarships (80%) and fraud detection and prevention (20%).



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Sec. 409. Visas for Individuals with Advanced Degrees. Section 409 would amend Section 201(b)(1) of the INA to exempt from the numerical limitations on employment-based immigration foreign nationals with advanced degrees in science, technology, engineering, or math who have been working in a related field in the United States on a nonimmigrant visa during the three year period immediately preceding their application for an immigrant visa. This provision also would exempt immediate relatives of individuals who are admitted as employment-based immigrants from the numerical limitations of Section 203(b) of the INA. These amendments would apply to visa applications pending on, or filed after, the date of enactment.

This provision also subjects advanced degree holders in the sciences, technology, engineering, or mathematics from a U.S. university to the more flexible special handling labor certification procedures.

In addition, this provision increases the numbers of H-1B visas available (to 115,000 in the fiscal year following enactment) and adds a market-based escalator mechanism so that the number available annually will fluctuate in response to the demand for such visas in the preceding fiscal year. In addition, it exempts from the numerical limitation foreign nationals who have earned advanced degrees in science, technology, engineering, or math.

Sec. 410. Requirements for Participating Countries. Section 410 would require the Secretary of State in cooperation with the Secretary of Homeland Security and the Attorney General to enter into bilateral agreements with the home countries of H-2C nonimmigrants. As part of these agreements, the participating countries would, among other things, be required to: accept return of individuals ordered removed from the U.S. within 3 days of the order; cooperate with the U.S. to reduce gang violence, human smuggling, trafficking, and illegal immigration; provide the U.S. with criminal records for individuals seeking admission to the U.S.; and educate their citizens regarding U.S. temporary worker programs.

Sec. 411. Authorization of Appropriations. Section 411 would authorize appropriations necessary to carry out implementation of this title.

## TITLE V – BACKLOG REDUCTION[35]

Sec. 501. Elimination of Existing Backlogs. Section 501 would remove immediate relatives (spouses, children, and parents) of U.S. citizens from the annual worldwide ceiling of 480,000 family-based visas and redistribute them elsewhere in the family-based preference system. It also would more than double the ceiling on employment-based visas from 140,000 to 290,000. And it would exempt spouses and children of employment-based immigrants from the limits.

[35] This title is drawn from provision in the November 9, 2005 Specter Chairman's Mark. However, dropped from this draft are what were sections 505, "Amending the Affidavit of Support Requirements"; section 506, "Discretionary Authority"; and section 507, "Family Unity" of the November 9, 2005, Chairman's Mark.



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Section 501 would provide for the recapture of both family-based and employment-based visas that go unused because of processing delays.

Sec. 502. Country Limits. Section 502 would increase per-country ceilings for both employment-based and family-based immigrant visas.

Sec. 503. Allocation of Immigrant Visas. Section 503 would redistribute the 480,000 family-based immigrant visas among the existing four family-based preference categories and redistribute the 290,000 employment-based visas, making modifications to the categories.

Sec. 504. Relief for Minor Children. Section 504 would allow an applicant for an immigrant visa who is a child to also bring his or her child with them as a derivative immigrant.

## TITLE VI – CONDITIONAL NONIMMIGRANT WORKERS

### Subtitle A – Conditional Nonimmigrant Work Authorization and Status

Sec. 601. Conditional Nonimmigrant Work Authorization and Status. Section 601 would establish a new section 218D of the Immigration and Nationality Act that would authorize the Secretary of Homeland Security to grant "conditional nonimmigrant work authorization and status to remain in the United States" to aliens who were employed in the United States on January 4, 2004.

The section provides that aliens must conclusively establish employment status by submitting records and/or documents determined by the Secretary of Homeland Security.

In order to qualify for the status, the alien would have to establish that the alien is admissible, and may be required to undergo an appropriate medical examination. The alien also would be required to pay all Federal income taxes owed for employment before January 4, 2004.

The Secretary of Homeland Security would be authorized to terminate an alien's status granted under this section if the Secretary determines that the alien was not in fact eligible, or the alien commits an act that makes the alien removable.

The Secretary could not grant conditional nonimmigrant status until the Secretary approves the alien's application that is submitted not later than 1 year after date of enactment. The application must include a signed affidavit from the alien's employer attesting that the alien is a current employee and a waiver in which the alien, in exchange for this discretionary benefit, agrees to waive any right to administrative or judicial review as to the alien's eligibility or to contest any removal action (other than on the basis of an application for asylum). The alien also must acknowledge, under oath, that the alien is unlawfully present and subject to removal or deportation.



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The alien's employer would be required to a $500 application fee, and the fees collected are to be made available to the Secretary of Homeland Security to identify, locate, or remove illegal aliens and for worksite enforcement.

This section would require the Secretary of Homeland Security to begin accepting applications not later than 3 months after the date of enactment of the Act. It would require the Secretary to process all applications not later than 18 months after the date of enactment of the Act.

The section would prohibit an alien being granted conditional nonimmigrant work authorization and status until all appropriate background checks have been completed.

The spouse or child of an alien granted conditional nonimmigrant work authorization and status would be subject to the same terms and conditions as the principal alien, but would not be authorized to work.

An alien who fails to apply for the program would be ineligible for any relief. However, the failure to apply could be waived if the Secretary determines that the alien could not obtain such status for reasons of age, mental impairment, or physical disability.

An approved alien granted conditional nonimmigrant work authorization and status would have to be continuously employed while in the U.S. Any alien who fails to be employed for more than 45 days would become ineligible. An alien is free to accept a new offer of employment with a subsequent employer who complies with section 218B[36] and if the alien did not previously work unauthorized while in conditional nonimmigrant status.

Any alien who filed an application to obtain conditional nonimmigrant status and who knowingly and willfully made false representations within the document would be subject to criminal penalties under title 18.

- Eligibility Criteria. The proposed new section 218D(b)(1) of the INA would provide that in order to be eligible, an alien would have to establish that he –

    1. Had been physically present in the United States before January 4, 2004; and

    2. Was employed in the United States before January 4, 2004, and has been employed in the United States since that date.

- Evidence of Employment. The proposed new section 218D(b)(2) of the INA would provide that an alien applying for this status could conclusively establish present employment by submitting to the secretary of Homeland Security records maintained by the Social Security Administration; Internal Revenue Service; any other Federal State, or local government agency; an employer; or a labor union, day labor center, or organization that assists workers

[36] Section 218B of the INA would be added to the Immigration and Nationality Act by section 403 of the Act. It would provide a labor attestation process for a new class of workers, called H-2C workers.



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in matters relating to employment. The Secretary would, however would be empowered to accept other types of reliable documents.

- Admissibility. The proposed new INA section 218(D)(b)(3)(A) would provide that in order to be granted status and work authorization, an alien would have to establish that he is admissible and that he had not ordered, incited, assisted, or otherwise participated in past persecution.

- Waived Grounds of Inadmissibility. A number of grounds of inadmissibility would be automatically waived and some could be waived at the discretion of the Secretary of Homeland Security.

  1. Grounds of Inadmissibility that would be Automatically Waived. The following paragraphs of section 212(a) of the Immigration and Nationality Act would automatically be waived: (5)(A) (labor certification); (6)(A) (presence without permission or parole); (7) (documentation requirements); (9)(B) (unlawful presence). Also automatically waived would be section 212(d)(3) of the Immigration and Nationality Act.

  2. Grounds of Inadmissibility that would Not be Waivable. The Secretary would not have the discretion to waive any of the following paragraphs of 212(a) of the Immigration and Nationality Act: (2) (criminal and related grounds); (3) (security and related grounds); (6)(B) (failure to attend removal proceeding); (6)(E) (encouraging, inducing, assisting, abetting, or aiding any other alien to enter or to try to enter the United States in violation of law); (9)(A) (certain aliens previously removed); (9)(C)(i)(II) (aliens unlawfully present after having been ordered removed under section 235(b)(1) of the INA, section 240 of the INA, or any other provision of law); (10)(A) practicing polygamists; and (10)(E) former United States citizens who renounced their citizenship to avoid taxation).

  3. Ground of Inadmissibility that the Secretary would have the Discretion to Waive. The Secretary of Homeland Security would have the discretion to waive all other grounds of inadmissibility found in section 212(a) of the INA.

- Ineligible Aliens. The proposed new INA section 218D(b)(4) would provide a number of grounds that make aliens ineligible for treatment under Title VI. An alien would be ineligible if—

  1. Final Order of Removal or Exclusion. the alien is subject to a final order of removal, deportation, or exclusion;

  2. Failure to Depart. the alien failed to depart the United States during the period of a voluntary departure order under section 240B or a prior provision of law.

  3. Failure to Comply. The alien willfully fails to comply with any request for information by the Secretary of Homeland Security.



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4. Notice to Appear Filed. a notice to appear was served on the alien or filed with the immigration court before the alien filed an application under this title, except that the Secretary of Homeland Security could waive ineligibility that would otherwise result from the service or filing of a notice to appear under this provision.

- Requirement for Medical Exam. The proposed new INA section 218D(b)(5) would authorize the Secretary to require aliens filing for treatment under Title VI to undergo, at the alien's expense, an appropriate medical exam.

- Payment of Income Taxes. The proposed new INA Section 218D(b)(6) would require that persons granted conditional nonimmigrant work authorization and status to establish the payment of Federal income taxes owed for employment in the United States before January 4, 2004.

- Termination of Status. The proposed new INA Section 218D(b)(7) would authorize the Secretary of Homeland Security to terminate an aliens' status if the Secretary determines that the alien was not, in fact eligible for the status or if the alien commits an act that makes the alien removable from the United States.

- Application. The proposed new INA section 218D(c)(1) sets forth the process for applying for conditional nonimmigrant work authorization and status. It provides that—

1. Information on Application. Applicants must apply within one year after the date of enactment of the Act on a form designed by the Secretary containing information about the alien's physical and mental health; criminal history and gang membership; immigration history; involvement with groups or individuals who have engaged in terrorism, genocide, persecution, or who seek the overthrow the U.S. government; claims to U.S. citizenship; and tax history.

2. Waiver of Rights. The applicant would be required to waive any right to administrative or judicial review or appeal of his eligibility, as well as waive any right to contest any removal other than on the basis of an application for asylum, withholding of removal, or relief under the torture convention.

3. Knowledge of Information on Application. The Applicant would be required to sign a statement certifying under the penalty of perjury his understanding of the information on the form an authorizing the release of any information contained in the application and an attached evidence for law enforcement purposes.

4. Affidavit from Employer. The application would have to be accompanied by a signed affidavit from the alien's employer.

5. Acknowledgement. The applicant would be required to submit to the Secretary of Homeland Security an acknowledgement, made under oath, that the alien is unlawfully present and subject to removal, an acknowledgement that the alien understands the terms



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of being granted conditional nonimmigrant work authorization status; any Social Security account number or card in the possession of the alien or relied upon by the alien; any false or fraudulent documents in the alien's possession.

6. Application Fee. An employer seeking to continue to employ an alien would be required to submit an application fee of $500, which would be used by the secretary for activities to identify, locate, or remove illegal aliens and for worksite enforcement.

- Processing Application. The proposed new INA section 218D(c)(2) would set forth requirements for processing applications. It provides that the Secretary must begin accepting applications within 3 months after the date of enactment of the Act. It further would provide that the Secretary may interview aliens to determine eligibility, but it does not mandate such an interview. If further would require the Secretary to complete processing all applications within 18 months after the date of enactment of the Act.

- Security. The proposed new INA section 218D(c)(3) would require the secretary of Homeland Security to ensure that the application process for aliens seeking treatment under this Title is secure, incorporates antifraud protection, and utilizes biometric authentication at time of document issuance. If further requires that aliens must submit biometric data and undergo all appropriate background checks to the satisfaction of the Secretary.

- Failure to Apply. The proposed new INA section 218D(d) would provide that an alien would be ineligible for relief cancellation of removal (Section 240A) or voluntary departure (Section 240B) if the alien fails to timely apply for conditional work authorization and status under this section.

  The Secretary of Homeland Security could waive this provision if he determines that the alien could not obtain such status for reasons of age, mental impairment, or physical disability.

- Documentary Evidence of Status. The proposed new section INA section 218D(e) would require the Secretary of Homeland Security to meet certain technological and security requirements in designing documentation providing evidence to aliens of their new status. The section also would provide that the document that is produced may be used by aliens to serve as a travel, entry, and work authorization document.

- Terms of Status. The proposed new INA section 218D(f) would provide that aliens granted status under Title VI would be required to register, shall be permitted to travel outside of the United States, would be treated as a nonimmigrant, and would not be subject to detention or removal pending adjudication of their application for treatment under Title VI of the Act.

- Family Members. The proposed new INA section 218D(g) would provide that spouses and children of aliens granted conditional nonimmigrant work authorization and status under section 601 would be subject to the same terms and conditions as the principal alien, except that they would not be eligible to work. Spouses and children would have to pay a $100 fee.



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- Employment. The proposed new INA section 218D(h) would establish the terms under which aliens granted conditional nonimmigrant work authorization and status can work. It provides that a person granted such status would be able to work for any U.S. employer; would be required to work continuously while employed in the United States; may accept employment with any subsequent employer so long as the employer complies with the law, including the labor certification process provided in the proposed new INA section 218B. The section provides that an alien who fails to be employed for 45 days while in the United States would be required to leave the United States and reenter before he could be eligible again for the status. However, the Secretary would have sole discretion to waive the requirement that the alien depart the United States before seeking reemployment.

- Penalties for False Statements in Applications. The proposed new INA section 218D(i) would provide criminal penalties and grounds of inadmissibility for anyone who commits fraud in the filing of an application for conditional nonimmigrant work authorization and status.

- Waiver of Rights. The proposed new INA section 218D(j) would require aliens to waive any right to contest any action for deportation or removal that is instituted against them subsequent to a grant of conditional nonimmigrant work authorization and status, other than relief of asylum or protection under the Convention Against Torture, as a condition of being granted such status.

- Denial of Discretionary Relief. The proposed new INA section 218D(k) would provide that the determination of whether an alien is eligible for a grant of conditional nonimmigrant work authorization and status is solely within the discretion of the Secretary of Homeland Security. Furthermore, it would provide that no court would have jurisdiction to review any judgment regarding the granting of relief under section 601 or any other decision or action by the Secretary of Homeland Security for which he is given discretion under this title, other than granting asylum under section 208(a) of the INA.

- Judicial Review. The proposed new INA section 218D(l) would enact broad preclusions of judicial review of actions by the Secretary of Homeland Security in implementing section 601.

## Subtitle B – Grant programs to Assist Nonimmigrant Workers

Sec. 611. Grants to Support Public Education and Community Training. Section 611 would provide for grants to qualified nonprofits to help educate the public about their potential eligibility for the conditional nonimmigrant status available under this section.

Sec. 612. Funding for the Office of Citizenship. Section 612 would authorize the Secretary of Homeland Security to establish the United States Citizenship and Immigration Foundation to support the functions of the Office of Citizenship within USCIS. It would authorize the



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Foundation to accept and make gifts, and authorize such sums as may be necessary to carry out the mission of the Office of Citizenship.

Sec. 613. Civics Integration Grant Program. Section 613 would requires the Secretary of Homeland Security to establish a competitive grant program to provide financial assistance to nonprofit organizations, including faith-based organizations, to support entities certified by the Office of Citizenship to provide civics and English as a second language courses and other activities approved by the Secretary to promote civics and English as a second language.

Sec. 614. Temporary Worker Investment Account Study. Section 614 would require the Secretary of Homeland Security, in consultation with the Commissioner of Social Security and the Secretary of the Treasury, to conduct a study of the feasibility of establishing temporary worker investment accounts for aliens granted conditional nonimmigrant work authorization and status under section 218D of the INA, as added by section 601 of the Act, and report to Congress not later than 1 year after the date of enactment of the Act.

## TITLE VII – IMMIGRATION LITIGATION REDUCTION

### Subtitle A – Appeals and Review

Sec. 701. Consolidation of Immigration Appeals. Section 701 would move all petitions for review over removal orders and all appeals of district court orders in habeas cases (including cases arising out of expedited removal proceedings) to the United States Court of Appeals for the Federal Circuit. It also would move appeals on claims of nationality in criminal cases involving failure to depart to the Federal Circuit. The new judicial review scheme would apply to new petitions of review and new appeals of district court habeas decisions.

Sec. 702. Additional Immigration Personnel. Section 702 would provide that for each of the years 2007 through 2011, the number of positions for attorneys in the Office of General Counsel shall be increased by one hundred over the previous year. It also would increase the number of positions in the Office of Immigration Litigation by 50, increase the number of immigration judges by 50, and authorize funding for these positions and for additional federal public defenders.

Sec. 703. Board of Immigration Appeals Removal Order Authority. Section 703 would redefine the term "final" for an order of removal 101(a)(47) to include orders for which the parties waive the time to appeal and to include orders issued by administrative officers outside of the removal hearing process in INA 240.

Sec. 704. Judicial Review of Visa Revocation. Section 704 would preclude all federal court jurisdiction over a decision to revoke a visa under INA 221(i). This section would expressly preclude jurisdiction through a writ of habeas corpus, a writ of mandamus or a writ under the All Writs Act.



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Sec. 705. Reinstatement of removal Orders. Section 705 would provide for reinstatement of removal orders without any proceeding before an immigration judge. Reinstatement would apply to anyone who the Secretary of DHS finds has entered illegally after having been removed or having departed voluntarily. It would bar any review of the underlying legality of the removal order, including a challenge to the legal validity of the order or constitutional objections to the order. It also would preclude reopening of the underlying removal order or the provision of any relief from removal regardless of when the application for relief was made. Judicial review would be available under 242(a) through a petition for review, but the review would not include review of the underlying removal order. This section would expressly preclude habeas corpus, mandamus and All Writs Act jurisdiction over the reinstatement. The section would apply to all orders reinstated after April 1, 1997.

Sec. 706. Withholding of Removal. Section 706 would preclude withholding unless the noncitizen can prove that "at least one central reason" for the threat to life or freedom is due to race, religion, nationality, membership in a particular social group or political opinion. This provision would import the standards for asylum from the REAL ID Act and apply them to withholding. It would be effective as of May 11, 2005, and would apply to applications for withholding of removal made after that date.

Sec. 707. Certificate of Reviewability. Section 707 would establish a system for default denials and dismissals of petitions for review due to the inaction of a single judge. It would provide that once the petitioner's brief is filed, it would be assigned to a single judge in the Federal Circuit Court of Appeals. Unless that judge issues a "certificate of reviewability" the petition would be denied and the government would not need to file a brief supporting the removal order. No certificate of reviewability could be issued unless the petition provided a "prima facie" case that the petition should be granted. The judge would have 60 days to issue the certificate, or 120 days if all the parties agree to the extension or the extension was for good cause and the good cause was stated. If no certificate of reviewability was issued within the time limit, the petition would be denied and any stay would be automatically dissolved. If a certificate of reviewability was issued, the government would have an unspecified amount of time to answer, after which the petitioner would be held to replying within 24 days unless good cause is shown for an extension. The decision of the single judge not to issue a certificate of reviewability would be the final decision of the Federal Circuit Court of Appeals and could not be reconsidered or reversed by that Court "through any mechanism or procedure."

Sec. 708. Discretionary Decisions on Motions to Reopen or Reconsider. Section 708 would provide that decisions whether to reopen or reconsider are committed to the Attorney General's discretion. This provision would trigger INA 242(a)(2)(B)'s limitation of judicial review over discretionary decisions. The provision makes an exception to this if the Secretary is seeking to remove the individual to an alternative country; the motion to reopen would, in that case, be filed within 30 days of receipt of notice of the new country; and the noncitizen would have to establish a prima facie case of entitlement to withholding or protection under the Convention Against Torture. The amendments would apply to motions to reopen or reconsider filed on or after the date of enactment.



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Sec. 709. Prohibition of Attorney Fee Awards for Review of Final Orders of Removal. Section 709 would prohibit attorney fee awards in any proceeding related to an order of removal unless the determination that the individual was removable was not substantially justified.[37]

## Subtitle B – Immigration Review Reform

Sec. 711. Director of the Executive Office for Immigration Review. Section 711 would require the Director of the Executive Office for Immigration Review (EOIR) to be appointed by the President with the advice and consent of the Senate. The Director at the time of enactment would serve as the Acting Director until the individual is so appointed or a successor has been appointed.

Sec. 712. Board of Immigration Appeals. Section 712 would establish statutory guidelines for the composition, procedures, and authorities of the Board of Immigration Appeals.[38] This provision would require the Director of the EOIR, in consultation with the Attorney General, to appoint 14 immigration appeals judges, plus a Chairperson to the Board. Each Member of the Board would be appointed for a six-year period but permitted to continue acting (for no more than 12 years total) until a successor is appointed. Current Members would be appointed to the Board using a system of staggered appointments based on seniority of the Members. To be eligible for appointment, an individual would need to be an attorney in good standing of a bar with at least seven years of professional, legal expertise in immigration law.

The Chairperson would be responsible for the administrative operations of the Board, the internal operating policies and procedures of the Board, adjudicating cases as a sitting Member of the Board, and appointing 3-member panels.

The Board would retain its current jurisdiction over appeals from immigration judges with a limitation: it would be precluded from hearing appeals of immigration judge decisions regarding removal orders entered in absentia. The Board would be required to accept an immigration judge's findings of fact (including credibility determinations) unless clearly erroneous. The Board would have de novo review over questions of law, discretion, and judgment.

Upon individualized review of a case, the Board would be able to affirm the decision of an immigration judge without opinion only if: (1) the decision of the immigration judge resolved all the issues in the case; (2) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; (3) the factual and legal questions raised on appeal are so insubstantial so as not to warrant a written opinion in the case; and (4) the Board approves both the result reached in the decision below and all of the reasoning of that decision.

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[37] This provision would preclude fees in cases of unjustified denials of eligibility for asylum and other forms of relief from removal, even if the government's defense of the removal order lacked any justification.

[38] Presently, the Board of Immigration Appeals and the Executive Office for Immigration Review is largely a regulatory creature with no explicit statutory parameters.



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The 3-member panel or the presiding member acting alone could summarily dismiss any appeal or portion thereof in any case in which: (1) the appealing party fails to specify the reasons for the appeal; (2) the only reason specified involves a finding of fact or conclusion of law that was conceded by that party at a prior proceeding; (3) the appeal is from an order that granted such party the requested relief; (4) the appeal is determined to be filed for an improper purpose, such as to cause unnecessary delay; or (5) the appeal lacks an arguable basis in fact or law and is not supported by a good faith argument for extension, modification or reversal of existing law.

The 3-member panel or the presiding member acting alone could grant an unopposed motion or a motion to withdraw an appeal pending before the Board or adjudicate a motion to remand any appeal: (1) from the decision of a Department officer if the appropriate Department official requests that the matter be remanded; (2) if the remand is required because of a defective or missing transcript; or (3) if remand is required for any procedural or ministerial issue.

Board decisions would have to include notice to the alien of his or her right to file a petition for review in the U.S. Court of Appeals for the Federal Circuit within 30 days of the date of the decision.

Sec. 713. Immigration Judges. Section 713 would require the Director of the EOIR, in consultation with the Attorney General, to appoint the Chief Immigration Judge. Immigration judges would be appointed by the Director of the EOIR, in consultation with the Chief Immigration Judge and the Board Chair. Each immigration judge would be appointed for a seven-year period but permitted to continue acting (for no more than 14 years total) until a successor is appointed. Current judges would be appointed to the Bench using a system of staggered appointments based on seniority. To be eligible for appointment, an individual would need to be an attorney in good standing of a bar with at least five years of professional, legal expertise in immigration law.

Immigration judges would have the authority to hear matters related to any removal proceeding pursuant to INA § 240 described in 8 CFR § 1240.1(a) (or any corresponding similar regulation). Decisions of the immigration judges would be subject to Board review in any case in which the Board has jurisdiction.

Sec. 714. Removal and Review of Judges. Section 714 provides that immigration judges and Board Members could be removed from office only for good cause, by the EOIR Director in consultation with the Board Chair (in the case of Board Members) or by the Director in consultation with the Chief immigration Judge (in the case of immigration judges). Section 714 also provides that Board Members and immigration judges may not be removed or otherwise subject to disciplinary action for their exercise of independent judgment and discretion.

Sec. 715. Legal Orientation Program. Section 715 would require the EOIR Director to continue to operate a legal orientation program to provide basic information about immigration court proceedings for immigration detainees and to expand the program nationwide.



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Sec. 716. Regulations. Section 716 would require the Attorney General to issue regulations implementing this subtitle within 180 days of the date of enactment.

## TITLE VIII – MISCELLANEOUS

Sec. 801. Technical and Conforming Amendments. Section 801 would require that within 90 days of the date of enactment of the Act, the Attorney General, in consultation with the Secretary of Homeland Security, must submit to Congress a draft of any technical and conforming amendments to the Immigration and Nationality Act that he deems necessary to reflect the changes in the substantive provisions of law made by the Homeland security Act of 2002, of this Act, or any other provision of law.



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