

Graham-Kyl-Martinez Amendment
June 26, 2007

Modifications to Title I

Visa Exit Tracking System

- Requires the Secretary of DHS to create a tracking system capable of recording the departure of aliens admitted under the temporary worker program (Y Visa) and H-2 program, as modified by Title IV. The creation of this tracking system will be a 'trigger' for implementation of the legalization program and the temporary worker programs.

Mandates removal proceedings against visa overstays

- The Secretary of Homeland Security is required to initiate removal proceedings against temporary workers (under H-2 visas and Y visas) and holders of parent visitor visas who overstay or violate the terms of the visa.

Report to Border State Governors on Border Security

- Secretary of HS is required to submit a report to governors of U.S. states on the Mexican border 90 days prior to certification that the triggers in Title I are met. Governors may submit a report to Congress within 60 days of receiving DHS report commenting on accuracy of DHS report.

Increased Enforcement Personnel

- Increases the number of investigators for alien smuggling and removal.

Collection of Biometric Data From Aliens Entering and Departing the United States

- Aliens entering and departing the United States must provide biometric data and other information relating to the alien's immigration status to DHS.
- Temporary workers in the Y visa and H-2 programs and parents on visitor's visas will be required to record their departure at a designated port of entry or at a designated United States consulate abroad. An alien who does not record his departure shall be entered into a database as an overstay not later than 48 hours after the expiration of the alien's visa.

Impact on State and Local Law Enforcement of the Exit Tracking Requirements

- Y visa holders and parent visitors who fail to register their departure would be added to a database that police can access. The provision states that the provision of information to state and local law enforcement would be governed by Sec. 240 which is created in Sec. 223 of the base bill. The use of NCIC to provide this information is not prohibited. If police identify such aliens, they could detain the alien under the new INA Section 240D that is created in section 223 of the base bill. This exit registration requirement could create a situation where an alien

complied but the database failed to register the exit, or through some other error, the alien is marked for arrest through no fault of his own.

Modifications to Title II

Aggravated felony:

- Gives retroactive application to the expansion of aggravated felony included in the base bill with respect to sexual abuse of a minor.

Drunk Driving:

- Adds to base bill regarding increased penalties for drunk driving. Base bill states that an alien convicted of one felony for which a sentence of a year or more was given is inadmissible and deportable. The Graham/Kyl/Martinez amendment states that two convictions for DUI under federal or state law (whether felony or not) makes the alien inadmissible and deportable.

Gang Violence:

- Modifies the bill to make any felony crime of violence (18 USC 16) subject to the bill's section on gang violence and removal. The base bill makes a felony crime of violence punishable by a five year sentence subject to the bill's section on gang violence and removal.
- Expands the grounds of inadmissibility to those who a consular officer, the AG, or Secy of HS knows or has reason to believe *is a member of or has participated in the activities of a criminal gang*. The base bill expanded grounds to include those who these officials know or have reason to believe *participated in a criminal gang*. This is a subtle change in language with the capacity to give even greater discretion to officials to exclude or deport those who are merely associated with members of gangs, or whose participation in gang activities was attenuated or incidental. The amendment includes a discretionary waiver but adds the words "as appropriate" to the waiver in the base bill.
- Gang deportability standard is different from standard for inadmissibility above. Alien is deportable if there is by a preponderance of evidence to believe the alien is a member of criminal gang or has participated in gang activities. Contains same waiver as above for inadmissibility.
- Makes aliens who are members of a criminal gang ineligible for TPS. Base bill included participation in the activities of a criminal gang as a ground of ineligibility.
- Applies to everyone who seeks to legalize (applies to all those who seek to establish admissibility as of date of enactment.)

Mandatory Detention of Overstays

- An alien shall be arrested and detained by the Secretary of Homeland Security pending a decision on whether the alien is to be removed from the United States for willfully exceeding by 60 days or more the period of the alien's authorized admission or parole into the United States.
- Includes an exceptional circumstances waiver.

Modifications to Title III

Expiration of Alien's Employment Eligibility

- Requires an employer to notify an alien in writing of the expiration of the alien's employment eligibility at least 14 days before that eligibility expires.

DHS Personnel to Monitor Compliance with EEVS

- Modifies the number of required personnel to be hired by DHS to monitor compliance with the EEVS from 4500 in the first five years to 2500 in the first two years.

Rebuttable Presumption Employer Acted with Reckless Disregard

- Modifies the base bill with regard to employer compliance with EEVS. Base bill states that an employer is presumed to have acted with knowledge or reckless disregard if the employer fails to comply with DHS standards. The 6/25 version of the amendment states that a *rebuttable presumption* is created that the employer acted with knowledge or reckless disregard when the employer is shown by *clear and convincing evidence* to have *materially failed* to comply.

Rulemaking on Use of Labor Through Contract

- Requires rulemaking with regard to EEVS and contract labor.

Preemption of State Law

- Adds to the list of preempted state and local law any state or local law that requires employers to verify whether or not an individual is authorized to work in the United States.

Definition of Employer Modified; Franchises; Critical Infrastructure

- Modifies the definition of an employer in Title III of the base bill to include anyone who hires, recruits, or refers "for a fee."
- Exempts franchises that operate independently.
- Adds a definition of critical infrastructure employers.

Repeat Violators Rulemaking Required

- Requires a rulemaking on the definition of an employer that is a "repeat violator" of the EEVS requirements.

Alternatives for Employers without Internet Access

- Requires DHS to study the feasibility of providing alternatives to employers that are required to comply with the EEVS system but do not have Internet access.

Modifications to Title IV

Exit visa tracking fee (amount determined by the Secretary)

- Y nonimmigrant visa or the alien's employer shall pay, upon entry, an exit tracking fee in an amount set by Secretary to recover the full operational costs of the Y nonimmigrant visa exit system. (*Title 4, Sec. 402(a)*)

Dramatically expands Y visa program inadmissibility to include all of 212(a) including status violations:

- DHS may only waive inadmissibility grounds under section 212(a) of the INA if the provision was previously waivable (current, very limited waivers apply) for a Y nonimmigrant. (*Title 4, Sec. 402(a)*)

Y visa program attestation requirements:

- The base bill provides an exception to termination of Y visa status for those who can show that a period of unemployment was due to physical or mental disability, or authorized leave of employment. The Graham amendment requires a Y visa holder to attest to these circumstances under penalty of perjury. (*Section 402 of SA1150 to S.1348*)

Enhanced Requirements to Register Departure:

- Y visa holders who lose their Y visa status must register their departure and depart immediately. DHS is required to take immediate action to locate and remove any aliens who fail to depart. (*Section 402 of SA1150 to S.1348*)

Y nonimmigrant revocation of status shall be recorded in the EEVS system (*Title 4, Sec. 402(a)*)

Permanent Ban for Visa Overstays:

- The base bill created a ten year bar on future immigration benefits for those who overstay a visa after enactment. The Graham amendment makes this a permanent bar to immigration benefits. (*Title 4, Sec. 402(a)*)

Changes to the H-1B Program:

- Caps at 50,000 the currently unlimited H-1B exemption for workers who are employed at higher education institutions, nonprofits or government research organizations. (*Section 419*)
- Doubles the H-1B exemption to 40,000 for individuals who have earned a master's degree or higher at a U.S. institution of higher education. (*Section 419*)
- Adds a new H-1B exemption of 20,000 individuals who have earned a master's degree or higher in a STEM field outside the U.S. (*Section 419*)
- Limits employers who have at least 1,000 employees and a total workforce that is 15% or more H-1Bs to a maximum of 1,000 H-1B petitions a year. This reform is designed to curb abuses by large, foreign-based software service contracting companies with U.S. subsidiaries that file thousands of H-1B petitions, capturing a huge percentage of the limited H-1B supply. (*Section 419*)

- Allows for the filing of adjustment of status applications by H-1Bs and H-1B dependents who are waiting in employment backlog. Since individuals who file an adjustment of status application may also be granted employment authorization, this would allow H-1B dependents to work while waiting for final approval. (*Section 419*)
- Prohibits placement of an H-1B worker at another employer's worksite where the placement of the alien at the worksite is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the service of the affiliated employer. (*Section 420*)
- Requires DHS provide a report on fraud risk assessment of the H1-B program within 60 days of enactment. (*Section 420*)

Modifications to Title V

Phase-in of Self-Petitioning for Merit-Based System

- Phases *out* employer sponsorship of immigrants during first 5 fiscal years post-enactment. During that period, a diminishing portion of the overall number of merit-based green cards will be reserved for employer-sponsored petitions; the remainder will be available for self-petitioning. The employer-sponsored green cards will be awarded within the new merit-based system to those beneficiaries who have the point totals.
- Permits employers, even at the end of the phase-out period, to petition on behalf of a specific beneficiary but no numbers are specifically set aside for that purpose.

Carve-out for "Priority Workers"

- Reserves 20,000 green cards out of the worldwide ceiling for each of the first 5 fiscal years to be awarded to the current EB-1 Priority Worker category. This category includes: Aliens with Extraordinary Ability; Outstanding Professors and Researchers; and Certain Multinational Executives and Managers.

Permanent employment visas deadline and extension:

- Requires applications and petitions to be filed by July 1 at which point the Secretary will determine the threshold number of points necessary for green card eligibility. If there are too few applications meeting the threshold, DHS can continue receiving applications. (*Sec. 502(b)(1)*)

Pending and approved employment-based permanent visas:

- Employment-based visa filed for classification that were filed prior to the date of the introduction of this bill and were pending or approved at that time shall be treated as if such provision remained effective. The beneficiary and any dependent accompanying or following to join such beneficiary, may apply to adjust status regardless of whether an immigrant visa is immediately available and will be approved when a visa number becomes available. Aliens with applications for a labor certification pending shall preserve the immigrant visa priority date from the time the petition was filed.

Bond for Y visa program:

- Sponsors for the Y temporary worker program must post a \$2500 bond which is forfeited if the non-citizen overstays his visa or violates the terms of the visa. *(Title 5, Sec. 506(a))*

Time Limits for Y and parent visas:

- Spouse or child sponsored by an alien in the Y temporary worker program will not be permitted to visit for more than 30 days and parents sponsored by a United States citizen child may not stay more than 100 days, within any calendar year. *(Title 5, Sec. 506(a))*

Changes to Title VI**Application Form**

- Same as in the base bill except that the application form for Z visa does not specifically ask for information on “renunciation of gang activity.” It would include information concerning the alien’s physical and mental health; complete criminal history, including all arrests and dispositions; gang membership; immigration history; employment history; and claims to United States citizenship.

Background checks

- The Secretary shall utilize fingerprints and other biometric data provided by the alien and any other appropriate information to conduct background checks. Calls for additional scrutiny of applicants from countries that are state sponsors of terrorism, or for whom DHS has reasonable grounds to believe are a danger to U.S. security.

Modification to Probationary Status under Z Visa Program

- The amendment strikes the granting of probationary benefits the next business day for those aliens who were not immediately deemed ineligible for the Z visa program. This modification seems to place the alien in a status that is not technically unauthorized and that would allow the alien to work, but is a lesser status than would be granted under the base bill’s probationary status benefits. No probationary benefits shall be issued until the alien has passed all appropriate background checks

Touchback Within Three Years

- Requires the Z visa applicant to return to their home country within three years of being granted probationary status. Failure to do so will terminate the Z visa application.
- Generally, applicants must touchback to their home country. DHS has limited discretionary authority to allow a Z visa applicant to touchback in a country other than that home country based on country conditions or low income status.

- The touchback in the 6/25 amendment is the sole touchback for Z visa applicants.

Electronic System for Pre-registration of applicants

- Will allow DHS to begin to do fingerprinting and background checks.

Z Program participants can serve in the military