

# Top 10 “Poison Pills” in H.R. 4437

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## TITLE II. COMBATting ALIEN SMUGGLING AND ILLEGAL ENTRY AND PRESENCE

### **Section 201: Definition of Aggravated Felony**

Section 201 would amend INA § 101(a)(43) to expand the definition of “aggravated felony” to include all smuggling offenses, illegal entry and reentry crimes with a sentence of one year or more, and solicitation and assistance in specified offenses.<sup>1</sup> In addition, section 201(a)(4) would put enhancements<sup>2</sup> and divisible statutes<sup>3</sup> back in play and would reverse the burden of proof for the latter.<sup>4</sup> This means that *any* offense in any part of the aggravated felony definition (not just

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<sup>1</sup> This provision affects cases holding that soliciting and aiding and abetting are not aggravated felonies, such as *Martinez-Perez v. Gonzalez*, 417 F.3d 1022 (9th Cir. 2005) (noting that aiding and abetting theft does not constitute an aggravated felony); *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005) (noting that aiding and abetting theft does not constitute an aggravated felony); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (conviction for solicitation to possess marijuana not an aggravated felony because solicitation is not punishable under the Controlled Substances Act).

<sup>2</sup> This provision overrules *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2001) (conviction for petty theft not an aggravated felony where two-year sentence imposed was due to application of recidivist sentence enhancement; without such an enhancement, maximum possible sentence for petty theft under California law is six months).

<sup>3</sup> This provision eliminates the courts’ long-standing categorical approach to determining whether state-level convictions constitute aggravated felonies. The categorical approach allows the government to establish deportability based only on the conviction record. At the same time, it protects against a second trial in the immigration proceeding about the underlying facts of the crime. Under the categorical approach, if the statute of conviction encompasses conduct which does not meet the aggravated felony definition, the conviction will not be deemed an aggravated felony. See, e.g., *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939) (“the deporting officials may not consider the particular conduct for which the alien has been convicted...”); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758-59 (2d Cir. 1933) (where the government alleges that an alien had been convicted of a crime involving moral turpitude, “neither the immigration officials nor the court reviewing their decision may go outside the record of conviction to determine whether in the particular instance the alien’s conduct was immoral. And by the record of conviction we mean the charge (indictment), plea, verdict, and sentence.”). The Supreme Court endorsed this approach in *Taylor v. United States*, 495 U.S. 575, 602 (1990), in which the Court stated that trial courts, in making sentencing decisions based on prior convictions, should “look only to the fact of conviction and the statutory definition of the prior offense.”

<sup>4</sup> It is clearly established that the government must show by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true. *Woodby v. INS*, 385 U.S. 276 (1966). Courts have consistently held this to mean that the government must prove through judicially noticeable evidence that the underlying facts of a conviction met the statutory definition of an aggravated felony. See, e.g., *Huerta-Guevara v. Ashcroft*, 321 F.3d 883 (9<sup>th</sup> Cir. 2003) (government failed to meet its burden of showing that alien’s conviction was a “theft offense” within the meaning of 8 U.S.C. § 1101(a)(43)(G)); *United States v. Harrison*, 2004 U.S. Dist. LEXIS 3621, at \*30 (government failed to establish conviction of an aggravated felony where the statute of conviction criminalized conduct that qualified as a drug trafficking offense and conduct that qualified as an offense under the Controlled Substances Act, but also encompassed offenses that did neither). This provision also allows the use of police reports, court records, and presentence reports, which the Supreme Court has prohibited. *Shephard v. United States*, 125 S.Ct. 1254 (2005) (prohibiting use of police reports to determine whether guilty plea defined by a non-generic statute necessarily admitted elements of the generic offense; such inquiry is limited to “the terms of the charging

smuggling offenses) could be categorized as an aggravated felony even if the statute under which the person was convicted is divisible and also includes non-aggravated felony conduct.

### **Section 202: Alien Smuggling and Related Offenses**

Section 202 would expand the alien smuggling provisions of INA § 274 to include “offenses” where the “offender” acts with knowledge of, or in reckless disregard of, the fact that the alien lacks lawful permission to enter or remain in the U.S. This incredibly overbroad definition of smuggling would criminalize the work of social service organizations, refugee agencies, churches, attorneys, and other groups that counsel immigrants, treating them the same as smuggling organizations. In addition, family members and employers could be fined and imprisoned for “harboring,” “shielding,” or “transporting” undocumented family members or employees, filling our prisons with people who have done nothing more than try to reunite their families, or help a worker, friend or client. Section 202 also mandates the seizure and forfeiture of any property, real or personal, that has been used to commit or facilitate the commission of a violation of this section.

### **Section 203: Improper Entry by, or Presence of, Aliens**

Section 203 would amend INA § 275 to create a new federal crime of “unlawful presence.” Under current law, presence in the U.S. without valid status is a civil, not a criminal violation. Section 203 defines the term broadly to mean “present in violation of the immigration laws or the regulations prescribed thereunder,” essentially rendering every violation, however minor, technical or non-intentional, a federal crime.<sup>5</sup> This section also would expand penalties for aliens who illegally enter or who are present without authorization following convictions for certain crimes, and double the penalties for marriage and immigration-related entrepreneurship fraud.

### **Sections 220, 221, 222 & 225: Enforcement of Immigration Laws by State and Local Law Enforcement Agencies<sup>6</sup>**

These sections would: declare that state and local law enforcement authorities have the inherent authority to investigate, identify, apprehend, arrest, detain, or transfer to federal custody aliens in the United States for the purposes of assisting in the enforcement of immigration laws; require DHS to provide training on this issue at no cost to the local agency, with the caveat that such training would *not* be a prerequisite to state and local law enforcement personnel participation in immigration law enforcement; provide financial assistance to states and localities that assist in the enforcement of immigration laws; and bar states and localities that have policies prohibiting

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document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record...”); *see also United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758-59 (2d Cir. 1933) (only the record of conviction may be used to determine whether an alien has committed a crime of moral turpitude, “[a]nd by the record of conviction we mean the charge (indictment), plea, verdict, and sentence.”).

<sup>5</sup> Such violations would include lawful permanent residents who fail to report a change of address to the Department of Homeland Security within ten days (*see* INA 237(a)(3)(A)), as well as university students on an F-1 visa who drop below a full course load (*see* INA 237(a)(1)(C) and implementing regs for F-1 students) or H-1B workers who get laid off and do not find new sponsorship within a small window of opportunity (*see* INA 237(a)(1)(C) and implementing regs for H-1Bs). In conjunction with Section 201 of this bill, such “crimes” could trigger “aggravated felony” liability, subjecting the individual to mandatory detention and virtually no relief from deportation.

<sup>6</sup> These sections were added to H.R. 4437 on the House floor by an amendment (no. 658) offered by Representative Charlie Norwood (R-GA), sponsor of the CLEAR Act.

law enforcement officials from assisting or cooperating with federal immigration law enforcement from receiving State Criminal Alien Assistance Program (SCAAP) funding.

#### **TITLE IV. DETENTION AND REMOVAL**

##### **Section 401: Mandatory Detention for Aliens Apprehended at or Between Ports of Entry**

Section 401 would require the Department of Homeland Security (DHS), by October 1, 2006, to detain all aliens apprehended at ports of entry or along the international land and maritime borders of the U.S. until they are removed from the U.S. or a final decision granting their admission has been determined. The only exceptions to mandatory detention are reserved for aliens who depart immediately, such as Mexican nationals who are voluntarily returned across the border, and those paroled in on the basis of urgent humanitarian reasons or significant public benefit. Section 401 also sets up an interim scheme which would begin 60 days after enactment. Under the interim regime, a person attempting to enter the U.S. illegally and apprehended at a U.S. port of entry or along a land or maritime border could not be released pending proceedings unless the DHS Secretary determines that the alien does not pose a national security risk and the alien posts bond of at least \$5,000.

##### **Section 404: Denial of Admission to Nationals of Country Denying or Delaying Accepting Alien**

Section 404 would amend INA § 243(d) to authorize the DHS Secretary, after consultation with the Secretary of State, to deny admission to any citizen, subject, national, or resident of any country that has denied or unreasonably delayed accepting the return of an alien ordered removed from the U.S. This section of the INA currently allows the State Department (DOS) to discontinue granting visas to individuals from such countries upon notification by the Attorney General of the delay or denial. Because the proposed amendment would not require the DOS to cease issuing visas to individuals of the countries in question, such persons could find themselves at our borders with proper visas and have their entry subsequently denied by DHS officials. In addition, no exception is made for asylum applicants, creating the potential for individuals to be sent back to countries in which their lives could be in danger.

##### **Section 407: Expedited Removal**

Section 407 would expand the expedited removal provisions of INA § 235(b)(1)(A)(iii) to aliens other than Mexicans or Canadians who have not been admitted or paroled into the U.S. and who are apprehended within 100 miles of an international land border and within 14 days of entry. This section would also broaden the “Cuban exception” (which currently excepts from expedited removal Cubans arriving by air at a port of entry) to any Cuban present in the U.S. regardless of place or manner of arrival. Section 407 includes no other exceptions to the expedited removal policy, thus raising the likelihood that more and more individuals would be wrongly subjected to this policy without recourse to relief.<sup>7</sup>

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<sup>7</sup> The Section’s broad grant of unreviewable authority to remove persons within U.S. territory runs contrary to the Constitution’s guarantee of due process, as repeatedly articulated by the Supreme Court: “[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). “[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

## TITLE VI. TERRORISTS AND CRIMINAL ALIENS

### **Sections 609 & 612: Naturalization Reform & Bars to Good Moral Character**

Section 609 would amend INA § 316 to bar the naturalization of anyone the Secretary of Homeland Security determines, in the Secretary's discretion, to have been at any time an alien described in the INA's terrorism-related inadmissibility and removability provisions. The Secretary's determination could be based upon "any relevant information or evidence, including classified, sensitive, or national security information," and "shall be binding upon, and unreviewable by, any court exercising jurisdiction under the immigration laws over any application for naturalization." In addition, section 609 would prevent aliens in removal proceedings from naturalizing while those proceedings are pending, and require that conditional permanent residents have the conditions on their residence removed before they can be naturalized. As to the latter point, there are currently many EB-5 conditional permanent residents whose applications to remove the conditions on their residency have been pending for years due to agency disorganization, who are nonetheless eligible to naturalize under current law. Section 609 of the bill would preclude that. Section 609 would also gut the right to apply to the district court in the face of naturalization adjudication delays. INA § 336(b) currently provides that if the naturalization interview has occurred, and 120 days have passed without a decision (for whatever reason), the applicant may apply to the U.S. district court for a hearing on the matter. The court can choose to adjudicate the application, or remand the matter to the DHS for further action.<sup>8</sup>

Section 609 would effectively eliminate this ability to get a decision in delayed citizenship cases. While it appears to just shift the wait time from 120 to 180 days, in reality the clock would never start, as section 609 also allows the DHS to define by regulation an "interview" or "examination" to be continuing until a final decision. This is a tactic DHS tried successfully in a court in Virginia recently, but other courts have rejected this as vitiating the 120-day rule completely. Moreover, under section 609 the only power the court would have would be to remand the case to DHS; the bill thus strips the court of the ability to grant the application after reviewing the record. As noted above, current law gives the court the option to remand the case to the agency for further action, where appropriate, e.g., if the court wanted more background check information completed.<sup>9</sup>

Finally, section 609 would provide that "No court shall have jurisdiction to determine, or to review a determination of the Secretary made at any time regarding, for purposes of an application for naturalization, whether an alien is a person of good moral character..." Recent

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<sup>8</sup> Historical note: Prior to 1990, the statute provided that the courts would decide naturalization applications after the applicant applied to INS for a recommendation on his or her citizenship application. In IMMACT 90, Congress decided to make it a more administrative process, and shifted to INS the power to decide the application as an initial matter, but preserved a role for the courts if INS did not do so within 120 days of the interview.

<sup>9</sup> See, e.g., *United States v. Hovsepian*, 359 F.2d 1144, 1160 (9th Cir. 2003) ("Congress intended to vest power to decide languishing naturalization applications in the district court *alone, unless* the court chooses to 'remand the matter' to the INS, with the *court's* instructions").

litigation demonstrates that the DHS often gets good moral character decisions wrong. Absent judicial review, the agency will be able to continue this erroneous process unfettered.<sup>10</sup>

Section 612 would amend the definition of “good moral character” at INA § 101(f) to preclude from a finding of good moral character anyone described in the terrorism- or security-related grounds of INA §§ 212 and 237. Section 612 also would allow an aggravated felony conviction to bar a person from a finding of good moral character even if the crime was not classified as an aggravated felony at the time of conviction. In addition, section 612 would allow the DHS and the Attorney General to base a discretionary finding that a person is not of good moral character on conduct by the applicant that took place outside the statutory period for which good moral character must be established, effectively increasing the good moral character eligibility requirement from five years to a lifetime.<sup>11</sup> Finally, section 612 would bar naturalization for all applicants convicted of “aggravated felonies” (a term of art that is more misleading than instructive, as it can include misdemeanors, and many crimes that most people would not consider “aggravated”) where the conviction was prior to November 29, 1990 (the effective date of the Immigration Act of 1990). Current law and regulations provide that there is no bar to naturalization where the conviction occurred before that date, assuming that the applicant can show the five-year good moral character requirement.<sup>12</sup>

## **TITLE VII. EMPLOYMENT ELIGIBILITY VERIFICATION**

Title VII would make major revisions to the employment eligibility verification regime contained in Section 274A of the INA. Among other things, this title would require the creation of a new system for telephonic or electronic verification of an individual’s employment authorization, and would make participation in the new program mandatory for all employers within two years of the bill’s enactment. Verification would be required for both new employees and previously hired employees. Specifically, employers would be authorized to use the system on a voluntary basis to verify previous hires two years after enactment of this legislation. Federal, state, and local governmental entities and private employers in specified fields (relating to critical infrastructure) would be *required* to verify all previous hires within three years of

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<sup>10</sup> By strictly limiting the circumstances in which a noncitizen can appeal a denial of naturalization, Section 609 defeats the policy objectives behind the Immigration Act of 1990, namely to increase “the consistency and fairness of naturalization decisions,” and “to give naturalization applicants the power to choose which forum would adjudicate their applications,” *Hovsepian* at 1163-64. Finally, section 609(f) alters the burden of proof in court cases challenging denials of naturalization, thereby undermining the role of the courts in determining citizenship.

<sup>11</sup> This provision appears to be an attempt to overturn a recent en banc 9th Cir decision in *Hovsepian*, 422 F.3d 883 (9th Cir 2005), which held that since citizenship required good moral character for only the past five years, if the applicant showed he met that requirement, the DHS could not deny based on an offense prior to the five-year period. As the *Hovsepian* court stated, “To hold otherwise would sanction a denial of citizenship where the applicant’s misconduct...was many years in the past, and where a former bad record has been followed by many years of exemplary conduct with every evidence of reformation and subsequent good moral character. Such a conclusion would require a holding that Congress had enacted a legislative doctrine of predestination and eternal damnation, whereas the statutes contemplate rehabilitation.” See also *Repouille v. U.S.*, 165 F.2d 152, 153 (2d Cir. 1947), and *Klig v. U.S.*, 296 F.2d 533, 535 (2d Cir. 1961) (holding that GMC determinations in naturalization applications “are made on a case by case basis in accordance with the ‘generally accepted moral conventions *current at the time*’”).

<sup>12</sup> This provision also alters Congress’s judgment in 1990 not to make new bars to citizenship retroactive and instead reaches back to pre-1990 conduct to bar citizenship fifteen years later, without any rationale that could meet due process standards.

enactment of this legislation. All other employers would be required to use the new system to verify the identity and employment eligibility of individuals not previously verified within six years of enactment. In addition, Title VII would significantly increase the civil penalties for hiring, recruiting, and referral violations, and would extend the definition of “recruit or refer” for purposes of triggering obligations under this title to hiring hall-type situations.

## **TITLE VIII. IMMIGRATION LITIGATION ABUSE REDUCTION**

### **Section 805: Certificate of Reviewability**

Section 805 would implement an unprecedented, single-judge certification process for judicial review of orders of removal, so that circuit court review is no longer available unless a single judge determines that the petitioner has “made a substantial showing that the petition for review is likely to be granted” and issues a “certificate of reviewability.” Specifically, section 805 would amend INA §242(b)(3) so that a petitioner’s brief is reviewed by a single court of appeals judge who must issue a “certificate of reviewability” before the case can proceed to a panel for review. The decision of the single judge denying the petition for review would be unreviewable. In addition, if the judge fails to issue such a certificate within 60 days (with certain limited extensions available), the petition for review would be deemed denied. If no certificate of reviewability is issued, any stay of removal would dissolve automatically, the government would not be required to file its brief, and the petitioner could be removed without further recourse.<sup>13</sup>

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To view AILA’s complete section-by-section summary of H.R. 4437, as amended and passed by the House of Representatives, go to: <http://www.aila.org/content/default.aspx?docid=18258>

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<sup>13</sup> Section 805 ignores what courts have identified as the primary problem leading to a substantial number of appeals. As Judge Posner recently found, “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.” *Bensilame v. Gonzales*, No. 04-1339 (7th Cir. Nov. 30, 2005) (compiling statistics for nine months in 2005 and finding that the Court reversed 40 percent of 136 petitions for review in immigration cases as compared with 18 percent in other cases where the government was the appellee). Section 805 does nothing to improve the very poor performance of the Board of Immigration Appeals, while undermining the ability of the courts to perform their constitutional function.