

American Immigration Lawyers Association

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437) **Section-by-Section Analysis**

Section 1. Short Title and Table of Contents

The Act may be cited as the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.

Section 2. Definitions

This section defines the following terms: “appropriate congressional committee” and “State.”

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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.¹ In addition, section 201(a)(4) would put enhancements² and divisible statutes³ back in play and would reverse the burden of proof for the latter.⁴ This means that *any* offense in any part of the aggravated felony definition (not just

¹ 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).

² 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).

³ 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.”

⁴ 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 (9th 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

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.⁵ 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.

Section 204: Reentry of Removed Aliens

Section 204 would roll back the various due process safeguards secured through judicial rulings respecting reentry issues and would amend INA § 276 to create mandatory minimum sentences for aliens convicted of reentry after removal.

Section 205: Mandatory Sentencing Ranges for Persons Aiding or Assisting Certain Reentering Aliens

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 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.”).

⁵ 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.

Section 205 would amend INA § 277 to impose upon persons who aid or assist certain aliens to enter the U.S. the same sentences that the aliens themselves would receive.

Section 206: Prohibiting Carrying or Using a Firearm During and in Relation to an Alien Smuggling Crime

Section 206 would add smuggling crimes to the list of crimes for which the use or carrying of a firearm during the commission thereof would result in criminal sentencing enhancements.

Section 207: Clarifying Changes

Section 207 would amend INA § 212(a)(6)(C)(ii) to expand, retroactively, the current provision rendering inadmissible aliens who have made false claims to U.S. citizenship to include aliens who have made false claims to U.S. nationality.⁶ Section 207 also would provide that the DHS shall have access to any information kept by any federal agency as to any person seeking a benefit or privilege under the immigration law.

Section 208: Voluntary Departure Reform

Section 208 would amend INA § 240B to make various changes to the Voluntary Departure laws. Specifically, this section would: reduce from 120 to 60 days the maximum period of voluntary departure that can be granted before the conclusion of proceedings; require aliens receiving a grant of voluntary departure before the conclusion of proceedings to post a bond or demonstrate that such requirement would create serious hardship; and require aliens, in exchange for voluntary departure, to waive all rights to any further motion, appeal, application, petition, or petition for review relating to removal or relief or protection from removal. If the alien chooses to take a subsequent appeal, such appeal would invalidate the voluntary departure grant, as would an alien's failure to timely depart. Failure to timely depart would also subject the alien to a \$3,000 fine, render him ineligible for various immigration benefits for 10 years after his departure, and preclude a reopening of the removal proceedings except to apply for withholding of removal or protection under the Convention Against Torture. Section 208 would also preclude courts from reinstating, enjoining, delaying, staying, or tolling the period of voluntary departure.⁷

⁶ This section appears to be designed to overturn case law holding that the analogous criminal statute, 18 U.S.C. § 911 (“[w]hoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both”) does not apply to those who claim U.S. nationality, rather than citizenship. *U.S. v. Karaouni*, 379 F.3d 1139, 1140 (9th Cir. 2004) (holding that a noncitizen defendant who had checked the box on Form I-9 attesting to being a “citizen or national of the United States” had not violated § 911 because he might have been claiming to be a national).

⁷ Section 208 would override established case law from several circuits and the BIA, including: *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (holding that “in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or voluntary departure is requested, the voluntary departure period is tolled during the period the BIA is considering the motion”); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005) (applying *Azarte*'s reasoning to the pre-IIRIRA scheme, and holding that “the pre-IIRIRA voluntary departure provision requires that aliens be afforded a reasonable opportunity to receive a ruling on the merits of a timely-filed motion to reopen”); *Barrios v. Attorney General of U.S.*, 399 F.3d 272, 278 (3d Cir. 2005); *In re A-M-*, 23 I. & N. Dec. 737, 743 (BIA 2005) (emphasizing that “recent statutory and regulatory changes have not altered the basic principle... that the timely filing of an appeal with the Board stays the execution of the decision of the Immigration Judge during the pendency of the appeal and tolls the running of the time authorized by the Immigration Judge for voluntary departure”); *Matter of Chouliaris*, 161 I. & N. Dec. 168 (BIA 1977).

Section 209: Deterring Aliens Ordered Removed from Remaining in the United States Unlawfully and from Unlawfully Returning to the United States after Departing Voluntarily

Section 209 would render individuals ordered removed who fail to depart the U.S. ineligible for any discretionary relief from removal pursuant to a motion to reopen during the time they remain in the U.S. and for a period of 10 years after their departure, with the exception of motions to reopen to seek withholding of removal or protection against torture.

TITLE III. BORDER SECURITY COOPERATION AND ENFORCEMENT

Section 301: Joint Strategic Plan for United States Border Surveillance and Support

Section 302: Border Security on Protected Land

Section 303: Border Security Threat Assessment and Information Sharing Test and Evaluation Exercise

Section 304: Border Security Advisory Committee

Section 305: Permitted Use of Homeland Security Grant Funds for Border Security Activities

Section 306: Center of Excellence for Border Security

Section 307: Sense of Congress Regarding Cooperation with Indian Nations

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. The provision makes an exception for Cubans.

Section 402: Expansion and Effective Management of Detention Facilities

Section 402 would require DHS to utilize fully all available detention facilities and all possible options to cost effectively increase detention capacity, including temporary facilities, contracting with state and local jails, and secure alternatives to detention.

Section 403: Enhancing Transportation Capacity for Unlawful Aliens

This section would authorize the DHS Secretary to enter into contracts with private entities to provide secure domestic transportation of aliens apprehended at or between ports of entry from the custody of the Border Patrol to a detention facility and other locations as necessary.

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 405: Report on Financial Burden of Repatriation

Section 405 would require the DHS Secretary to submit an annual report to the Secretary of State and Congress detailing the costs to DHS of repatriating aliens, and providing recommendations for more a cost effective repatriation program.

Section 406: Training Program

This section would require the DHS Secretary to review and evaluate the training provided to Border Patrol Agents and port of entry inspectors to ensure consistency in their referrals to an asylum officer for credible fear determinations.

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 exempts 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.⁸

TITLE V. EFFECTIVE ORGANIZATION OF BORDER SECURITY AGENCIES

⁸ 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).

Section 501: Enhanced Border Security Coordination and Management

Section 502: Office of Air and Marine Operations

Section 503: Shadow Wolves Transfer

TITLE VI. TERRORISTS AND CRIMINAL ALIENS

Section 601: Removal of Terrorist Aliens

Section 601 would render ineligible for withholding of removal aliens who are deportable under the broad definition of “terrorism,” including “any alien who the Secretary of State, after consultation with the Attorney General [or vice versa], determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.” Section 601 would also expand the bars to asylum to include all of 212(a)(3)(B)(i) and (212)(a)(3)(F), thus making the asylum bar coextensive with the withholding bar. These changes would apply retroactively to all aliens in removal, deportation, or exclusion proceedings and to all applications pending on or filed after the date of enactment of this legislation.

Section 602: Detention of Dangerous Aliens

Section 602 would amend INA § 241 to create a new “dangerous aliens” detention ground permitting indefinite detention for aliens who cannot be removed. Review of the new detention provisions would be limited to the U.S. District Court for the District of D.C.⁹

Section 603: Increase in Criminal Penalties

Section 603 would amend INA § 243 to increase penalties and set mandatory minimum sentences for aliens who fail to depart when ordered removed, who obstruct their removal, or who fail to comply with the terms of release pending removal.

Section 604: Precluding Admissibility of Aggravated Felons and Other Criminals

Section 604 would amend INA § 212(a) to render inadmissible aliens: who have been convicted of offenses related to the misuse of Social Security numbers and cards, or fraud in connection with identification documents; who at any time have been convicted of an aggravated felony; who have procured citizenship unlawfully; who have been convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment; or who have violated a protective order. It also would bar such aliens from seeking a waiver of inadmissibility.

⁹ This provision seeks to invalidate Supreme Court precedents *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 125 S.Ct. 716 (2005), by allowing for indefinite and potentially permanent detention. *Zadvydas* and *Clark* hold that, where removal of a noncitizen is “a remote possibility at best,” *Zadvydas* at 690, indefinite civil detention under the INA is an unconstitutional infringement of basic liberty principles built into the Constitution. By limiting extensions of the 90-day statutory removal period to six months, *Zadvydas* holds that indefinite, potentially permanent civil detention is unconstitutional because “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent,” *Zadvydas* at 693. *Clark* interpreted the *Zadvydas* rule to apply to inadmissible noncitizens who cannot be removed, holding that any distinction between the classes of immigrants “cannot justify giving the same detention provision a different meaning,” *Clark* at 724.

Section 605: Precluding Refugee or Asylee Adjustment of Status for Aggravated Felonies

Section 605 would amend INA § 209(c) to bar asylees and refugees convicted of an aggravated felony from adjustment of status. The amendments made by section 605 would be retroactive.

Section 606: Removing Drunk Drivers

Section 606 would broaden the definition of aggravated felony at INA § 101(a)(43) to include a third drunk driving conviction, regardless of the states in which the convictions occurred, and regardless of whether the offenses are deemed to be misdemeanors or felonies under state law, thus rendering deportable individuals so convicted.¹⁰

Section 607: Designated County Law Enforcement Assistance Program

This section would authorize and reimburse local sheriffs in “designated counties” (defined as “a county any part of which is within 25 miles of the southern border of the United States”) to enforce state and federal laws in their counties, including the immigration laws if authorized under a written agreement pursuant to INA § 287(g), and to transfer aliens to federal custody. Section 607 also would reimburse those Sheriffs for costs associated with detaining, housing and transporting undocumented aliens whom they arrest.

Section 608: Rendering Inadmissible and Deportable Aliens Participating in Criminal Street Gangs; Detention; Ineligibility from Protection from Removal and Asylum

Section 608 would render inadmissible and deportable aliens participating in “criminal street gangs” (as defined under this section). Section 608 also would render such individuals ineligible for asylum, withholding of removal, and temporary protected status, and would subject them to mandatory detention. In addition, section 609 would adopt procedures similar to those used by the State Department to designate foreign terrorist organizations under INA § 219, to enable the Attorney General to designate criminal street gangs for purposes of the immigration laws.

Section 609: Naturalization Reform

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

¹⁰ This provision is an attempt to circumvent *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which recognized that driving under the influence convictions which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle are not “aggravated felonies.”

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.¹¹

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.¹²

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 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.¹³

Section 610: Expedited Removal for Aliens Inadmissible on Criminal or Security Grounds

Section 610 would authorize the Secretary of Homeland Security to use expedited removal proceedings to determine inadmissibility under INA § 212(a)(2) and issue an order of removal with respect to an alien who has not been admitted or paroled, has not been found to have a credible fear of persecution pursuant to the procedures set forth in § 235, and is not eligible for a waiver of inadmissibility or relief from removal. In addition, section 610 would cut from 14 to 7 days the prohibition on executing such a removal order designed to allow the alien an opportunity to seek judicial review.

Section 611: Technical Correction for Effective Date in Change in Inadmissibility for Terrorists Under REAL ID Act

¹¹ 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.

¹² 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”).

¹³ 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.

Section 611 purports to “clarify” that the amendments made in the terrorist grounds of removal in the REAL ID Act are to be applied to aliens in all removal, deportation, and exclusion cases, regardless of when those cases were initiated.

Section 612: Bar to Good Moral Character

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.¹⁴ 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.¹⁵

Section 613: Strengthening Definitions of “Aggravated Felony” and “Conviction”

Section 613 would amend INA §101(a)(43)(A) to state that sexual abuse of a minor is an aggravated felony for immigration purposes “whether or not the minority of the victim is established by evidence contained in the record of conviction or by evidence extrinsic to the record of conviction.” In addition, and more noteworthy, section 613 would provide that “any reversal, vacatur, expungement, or modification to a conviction (or of a sentence or conviction record) that was granted to ameliorate the consequences of the conviction, or was granted for rehabilitative purposes, or for failure to advise the alien of the immigration consequences of the guilty plea” will have no effect on the immigration consequences resulting from the original conviction. Moreover, the alien would have the burden of demonstrating that the reversal, vacatur, expungement, or modification was not so granted. This change would be made retroactive.¹⁶

¹⁴ This provision appears to be an attempt to overturn a recent en banc 9th Cir decision in *Hovsepien*, 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 *Hovsepien* 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*’”).

¹⁵ 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.

¹⁶ Section 613 ignores violations of the requirement that a plea be knowing and voluntary and permits immigration proceedings to proceed on the basis of constitutionally suspect pleas. In addition, it reverses standards established

Section 614: Deportability for Criminal Offenses

Section 614 would render removable aliens who have procured citizenship unlawfully (or attempted to do so) as well as aliens convicted of offenses relating to the misuse of social security numbers and cards or fraud in connection with identification documents. Once again, this section would be made retroactive.

TITLE VII. EMPLOYMENT ELIGIBILITY VERIFICATION

Section 701: Employment Eligibility Verification System

Section 701 and the entire title would make major revisions to the employment eligibility verification regime contained in Section 274A of the INA. This section seeks to amend §274A(b) by requiring the Secretary of Homeland Security to create a system for telephonic or electronic verification of an individual's employment authorization. It would require the system to provide verification or tentative non-verification of an individual's identity and employment eligibility within 3 days of the inquiry and, in the case of tentative non-verification, a secondary process for final verification or non-verification within 10 days. The Commissioner of Social Security and the Secretary of Homeland Security would be responsible for developing a process for comparing the names against the respective databases to ensure timely and accurate responses to employer inquiries. When a single social security account number has been submitted in a way that suggests potential fraudulent use of the number, the Secretary of Homeland Security would be obligated to investigate.

This provision states that the information contained in this database cannot be used by the government for any purpose other than as provided for in this section and it states that this section does not authorize issuance of a national identity card. This section would prohibit class actions challenging problems with the verification mechanism and would limit claims for relief to the mechanism established in the Federal Tort Claims Act. It also would immunize from liability anyone who takes action in good faith reliance on information provided through this system.

This section would repeal §274A(d) relating to evaluation of and changes to the current employment verification system.

Section 702: Employment Eligibility Verification Process

Section 702 sets out the steps that an employer would have to undertake to be eligible for a good faith affirmative defense to liability for hiring or employment of unauthorized workers. It would obligate employers to seek verification under the new system within 3 working days of new hires or pursuant to the schedule set forth elsewhere in this title for previous hires. It also would create some limited exceptions to these requirements for failures of the verification system.

by the BIA and the courts. *See, e.g. In re Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005) (not looking behind court's decision to reduce a sentence); *In re Pickering*, 23 I & N 621 (2003)(finding a conviction despite vacatur that was solely for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I & N 1378 (BIA 2000)(conviction that had been vacated on the merits pursuant to Article 440 of the New York Criminal Procedure Law did not constitute a conviction for immigration purposes within the meaning of the statute); *Lujan-Amendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that conviction expunged under the Federal First Offender Act does not serve as a conviction under INA 101(48)).

This section would revise the attestation process that employers and employees (both citizens and noncitizens) must follow in connection with verifying employment authorization. It would maintain the requirement that employers examine the individual's authorizing documentation (e.g., U.S. passport or other authorizing documents prescribed by the Secretary of Homeland Security). It also would amend the retention of verification forms requirements to conform to the new verification system procedures while keeping the same basic timeframes intact (three years after the date of hiring or one year after date of termination).

In the event of a tentative non-verification, the individual for whom verification is sought would have to seek secondary verification pursuant to the process established in Section 701 (above). If the individual chooses not to contest the tentative non-verification within the time period allowed, the non-verification would become final. An employer would not be permitted to terminate an individual (for reasons relating to non-confirmation of identity and employment authorization) until a tentative non-verification becomes final.

Section 703: Expansion of Employment Eligibility Verification System to Previously Hired Individuals and Recruiting and Referring

This section would establish requirements for employers to verify the identity and employment eligibility of previously hired employees. Employers would be authorized to use the system on a voluntary, nondiscriminatory 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 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.

Section 704: Basic Pilot Program

Section 704 would revise the date upon which the basic pilot program for employment verification systems becomes mandatory to two years after enactment of this legislation.

Section 705: Hiring Halls

This section would define "recruit or refer" for purposes of triggering obligations under this title to verify identity and employment eligibility. "Refer" would be defined as the act of "sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person." It would generally limit the definition to individuals seeking remuneration for such referral but it would encompass union hiring halls as well. "Recruit" would be defined as "the act of soliciting a person, directly or indirectly, and referring the person to another with the intent of obtaining employment for that person. The same limitations and exceptions to those limitations would apply.

Section 706: Penalties

This section would significantly increase the civil penalties for hiring, recruiting, and referral violations. For the first violation, it would establish a minimum penalty of \$5,000 for each unauthorized alien with respect to whom a violation occurred. For entities previously subject to cease and desist orders under this section, it would raise the minimum penalty to \$5,000 and the

maximum penalty to \$10,000 for each offense. For entities previously subject to more than one such order, the minimum penalty would be raised to \$25,000.

The civil penalty levels for paperwork violations would also be significantly increased. Paperwork offenses, including failure to use the new verification system, would be subject to a minimum \$1,000 penalty and maximum \$25,000 penalty. This section also would establish a scheme for mitigating the penalty structure by reducing the amounts in question based on the size of the employer.

This section would increase dramatically the criminal penalties for entities engaged in a pattern or practice of hiring and employing unauthorized workers. It would raise the maximum fine from \$3,000 to \$50,000 for each unauthorized worker and would establish a minimum period of imprisonment of one year (the *maximum* period under current law is six months).

Section 707: Report on Social Security Card-Based Employment Eligibility Verification

This section would require the Commissioner of Social Security, in consultation with the Secretaries of the Treasury and Homeland Security and the Attorney General, to submit a report to Congress evaluating a list of proposed requirements and changes, including: making social security cards with encrypted, machine-readable electronic identification strips and a digital photograph; creating a unified database to be maintained by DHS and including data from the SSA and DHS specifying work authorization of all individuals; and requiring all employers to verify employment eligibility using the new social security cards through a phone, electronic card-reading, or other mechanism.

Section 708: Effective Date

Section 708 would make the amendments contained in this title effective on the date of enactment, except that the requirements of persons and entities to comply with the employment eligibility verification process would take effect two years after the date of enactment.

TITLE VIII. IMMIGRATION LITIGATION ABUSE REDUCTION

Section 801: Board of Immigration Appeals Removal Order Authority

This section, which deals with when a BIA order becomes final, seeks to reverse 9th circuit precedent “requiring the BIA to remand cases in which it has reversed an IJ [immigration judge] decision granting an alien relief back to the IJ for entry of the decision.” See *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003). This section would amend INA § 101(a)(47), which has been interpreted as only permitting immigration judges to enter orders of deportation or removal, and would make the order final when the BIA decision is issued.

Section 802: Judicial Review of Visa Revocation

Section 802 would amend INA § 221(i) to eliminate completely judicial review over claims or challenges arising from the revocation of a visa after the holder of the visa has entered the U.S., thereby removing any judicial oversight over consular decisions. As background, the House, in last year’s Intelligence Reform Bill, made visa revocation a ground of removal, but the Senate added in conference a clause allowing aliens facing removal to seek judicial review of their visa

revocations. This section would reverse the Senate’s attempt to inject a measure of due process into the revocation process.¹⁷

Section 803: Reinstatement

Section 803 would negate various circuit court rulings that prohibit reinstatement of removal without a hearing, or permit certain applications for adjustment of status, by amending INA § 241(a)(5) to state that reinstatement applies “regardless of the date of the original order or the date of the reentry”¹⁸ and shall not require proceedings before an immigration judge under INA section 240 or otherwise.¹⁹ Such reinstatement also would preclude adjustment of status under 245(i). In addition, section 803 would amend INA § 242 to restrict any judicial review on the issue of reinstatement to the United States Court of Appeals for the District of Columbia Circuit and to limit the issues available for review.

Section 804: Withholding of Removal

Section 804 would import the REAL ID Act’s “at least one central reason” requirement into the withholding statute by amending INA § 241(b)(3) to preclude a grant of withholding of removal unless the alien can establish that his or her life or freedom would be threatened in the country in question, and that race, religion, nationality, membership in a particular social group, or political opinion would be at least *one central reason* for such threat. The provision would be effective retroactive to the date of the REAL ID Act’s passage into law (May 11, 2005).

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

¹⁷ By precluding review in any court, including review of narrow legal issues, section 802 seeks to reverse decisions that have allowed such review, such as *Ana Intern., Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004) and *Knoetze v. U.S., Dept. of State*, 634 F.2d 207 (5th Cir. 1981).

¹⁸ In *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005), *cert. granted*, 126 S.Ct. 544 (2005), the Supreme Court is considering whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 can be applied retroactively to eliminate relief from removal for persons who re-entered the United States before 1996. If enacted, it would affect court decisions in *Castro-Cortez v. INS*, 239 F.3d 1037, 1050-53 (9th Cir. 2001) (Congress unambiguously intended for INA § 241(a)(5) to be applied only to previously deported aliens who re-entered the country after the effective date of the statute); *Bejjani v. INS*, 271 F.3d 670, 676-77 (6th Cir. 2001) (same); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003) (INS reinstatement under 241(a)(5) negating pre-IIRIRA pending adjustment after an illegal reentry, has an impermissibly retroactive effect); *Sarmiento-Cisneros v. United States AG*, 381 F.3d 1277, 1284 (11th Cir. 2004) (adjustment application filed before the effective date of IIRIRA not affected by § 241(a)(5)’s elimination of the availability of discretionary relief because would attach a “new disability to a completed transaction”); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002) (limiting retroactive application of portions of reinstatement rule).

¹⁹ It is the implementing regulation governing the process under § 241(a)(5), which eliminates the basic procedural safeguards, that has been found objectionable. Under 8 C.F.R. § 241.8(a) (1999), a person charged with illegal reentry under § 241(a)(5) has no right to a hearing before an immigration judge. Rather, an immigration officer alone makes the relevant inquiries and decides whether to issue a reinstatement order. 8 C.F.R. § 241.8(a)(1)-(3).

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.²⁰

Section 806: Waiver of Rights in Nonimmigrant Visa Issuance

Section 806 would prohibit the issuance of a nonimmigrant visa unless the applicant first waives his or her right to any review or appeal of an immigration officer's decision at the port of entry as to the alien's admissibility, and gives up his or her right to contest, other than on the basis of an application for asylum, any action for removal of the alien. This would require any person who wishes to enter the United States as a nonimmigrant to give up the right to a hearing before an immigration judge in the event that he or she is later charged with any immigration violation, and would jeopardize any opportunity a nonimmigrant might have to obtain cancellation of removal, adjustment of status, or any relief from removal other than asylum, in an impartial hearing before an immigration judge.²¹

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²⁰ 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.

²¹ The sponsor's summary of the bill contends that this provision is analogous to the waiver of due process rights required under the existing Visa Waiver Program. This analogy is disingenuous at best, as this provision would adversely affect all nonimmigrants, including H-1B and L-1 visa holders, students, exchange visitors, journalists, diplomats, treaty traders, fiancés, spouses of United States citizens entering on K visas, athletes, entertainers, certain aliens with extraordinary ability, cultural exchange visitors, religious workers, witnesses, and victims of trafficking. The entry of these individuals is *not* analogous to that of tourists who, in exchange for being admitted visa-free for a period of 90 days, agree to waive their right to a removal hearing.