4

ORIGINAL

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
KELLEY JOHNSON
Deputy Attorney General
State Bar No. 216387
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3155
Fax: (619) 645-2581
E-mail: Kelley.Johnson@doj.ca.gov
Attorneys for Plaintiff and Respondent

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **HONORIO MORENO HERRERA,** Defendant and Appellant.	S171895 Appellate District Division Three Case No. G039028 Orange County Superior Court Case No. 05CF3817

RESPONDENT'S MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent respectfully moves this Court, pursuant to Evidence Code sections 451, 452 and 459 and California Rules of Court, rules 8.252(a), and 8.520(g), to take judicial

notice of the following matters: (1) the 1911 treaty between El Salvador and the United States [hereinafter Treaty] and, (2) section 1182(a)(9)(A)(ii)(I) and (a)(9)(B)(i)(II) of Title 8 of the United States Code. The relevant documents are appended to this motion (Exh. A, B), and are the proper subject of judicial notice, as explained below.

The Treaty

The Treaty is the proper subject of judicial notice under Evidence Code sections 451, subdivision (a); 452, subdivision (c); and 459, subdivision (a).

Pursuant to section 451, subdivision (a), judicial notice shall be taken of the "decisional, constitutional, and public statutory law of this state and of the United States." Section 452, subdivision (c), provides that judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. Pursuant to section 459, subdivision (a), the reviewing court shall take judicial notice of each matter that the trial court was required to notice under Section 451 or 453.

Pursuant to the above authority, it is appropriate to take judicial notice of the Treaty. (See also *Brownell v. San Francisco* (1954) 126 Cal.App.2d 102, 108 [noting that courts take judicial notice of treaties and their interpretation by the judicial and the executive branches of government].) In addition, the Treaty is relevant to this appeal because it shows that El Salvador would not extradite Portillo to the United States to testify as a witness at appellant's trial. At the May 30, 2007, pretrial hearing, the prosecution and the court referred to the *lack of* a treaty that would allow for Portillo's extradition (1 RT 20, 27), but the trial court did not take judicial notice of the Treaty at that time. (See Cal. Rules of Court, rule 8.252(a).)

Title 8 of the United States Code

The relevant portion of Title 8 of the United States Code, section 1182, is being submitted pursuant to subdivision (a) of section 451, which provides that judicial notice shall be taken of the "decisional, constitutional, and public statutory law of this state and of the United States . . . ." Courts of this state must take judicial notice of the statutory

law of the United States. (*People v. Ouellette* (1969) 271 Cal.App.2d 33, 36, citing Evid. Code, §§ 451, subd. (a), 459.)

Section 1182(a)(9)(A)(ii)(I) of Title 8 of the United States Code provides that an alien who "has been ordered removed under section 240 [8 U.S.C. § 1229a] or any other provision of law, . . . and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible." This subdivision is relevant to this appeal because it shows that since Portillo was deported in September 2006 (1 RT 17), he was ineligible to be admitted to the United States (and would remain ineligible until 2016). (See *Chong v. District Director INS* (3rd Cir. 2001) 264 F.3d 378, 385.)

In addition, because Portillo had testified that he had been in the United States for at least 10 years (1 CT 88-89), it appears that Portillo would be also subject to a ten-year bar on reentry to this country pursuant to section 1182(a)(9)(B)(i)(II), resulting from his time of illegal residence in the United States. Pursuant to that subdivision, any alien who "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States," is ineligible to be admitted to the United States. (See *Cervantes-Ascencio v. INS* (2nd Cir. 2003) 326 F.3d 83, 86 [8 U.S.C. § 1182(a)(9)(B)(i)(II) imposes a ten-year bar on re-admission on all "long term" aliens, "irrespective of how or when" the alien departs].)

CONCLUSION

For the reasons stated above, respondent respectfully requests this Court to take judicial notice of the documents attached in Exhibits A and B.

Dated: September 17, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General

KELLEY JOHNSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

MM:gnn
SD2009701890
80387156.doc

EXHIBIT "A"

April 18, 1903. *Treaty between the United States and Salvador for the mutual extradition of fugitives from justice. Signed at San Salvador, April 18, 1911; ratification advised by the Senate, May 22, 1911; ratified by the President, June 8, 1911; ratified by Salvador, May 11, 1911; ratifications exchanged at San Salvador, July 10, 1911; proclaimed, July 13, 1911*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Extradition with Salvador. Preamble. Whereas a Treaty between the United States of America and the Republic of Salvador providing for the mutual extradition of fugitives from justice was concluded and signed by their respective Plenipotentiaries at San Salvador on the eighteenth day of April, one thousand nine hundred and eleven, the original of which Treaty, being in the English and Spanish languages, is word for word as follows:

TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND EL SALVADOR.

Contracting Powers. The United States of America and the Republic of El Salvador having judged it expedient, with a view to the better administration of justice and the prevention of crime within their respective territories and jurisdictions, that persons charged with or convicted of the crimes and offenses hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a treaty for that purpose, and have appointed as their plenipotentiaries—

Plenipotentiaries. The President of the United States of America, William Heimké, Envoy Extraordinary and Minister Plenipotentiary of said United States, at San Salvador, and the President of the Republic of El Salvador, Don Manuel Castro Ramírez, Under Secretary of State in the Department of Foreign Relations, who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:

LOS ESTADOS UNIDOS DE AMERICA y la República de EL SALVADOR, juzgando conveniente para la mejor administración de justicia y la prevención de delitos dentro de sus respectivos territorios y jurisdicciones, que toda persona acusada ó convicta de los delitos que más adelante se enumeran y que se halle prófuga de la justicia, deba ser recíprocamente entregada bajo ciertas circunstancias, han resuelto concluir un tratado á este propósito, y han nombrado por sus respectivos plenipotenciarios, á saber:

El Presidente de los Estados Unidos de América, al señor WILLIAM HEIMKE, Enviado Extraordinario y Ministro Plenipotenciario de dichos Estados Unidos en El Salvador, y

El Presidente de la República de El Salvador, al doctor don MANUEL CASTRO RAMIREZ, Sub-Secretario de Estado en el Departamento de Relaciones Exteriores,

quienes después de haberse comunicado sus respectivos plenos poderes, encontrados en buena y debida forma, han convenido en los siguientes artículos:

ARTICLE I.

It is agreed that the Government of the United States and the Government of El Salvador shall, upon mutual requisition duly made as herein provided, deliver up to justice any person who may be charged with, or may have been convicted of any of the crimes specified in Article II of this Treaty committed within the jurisdiction of one of the Contracting Parties, who shall seek an asylum or shall be found within the territories of the other, provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed.

ARTICULO I

Reciprocal delivery of persons charged with crimes.

Los Gobiernos de Estados Unidos de América y de El Salvador en virtud de requerimiento mútuo hecho debidamente según lo que en este Tratado se dispone, entregarán á la justicia, á toda persona acusada ó condenada por cualquiera de los delitos especificados en el artículo II, cometido dentro de la jurisdicción de una de las Partes Contratantes, que buscare asilo ó fuere encontrada en los territorios de la otra, con tan de que la entrega tenga lugar en vista de pruebas de criminalidad que según las leyes del lugar en donde se asilare el prófugo ó persona acusada justificaren su detención y enjuiciamiento, si el delito hubiese sido cometido allí.

ARTICLE II.

Persons shall be delivered up according to the provisions of this Treaty, who shall have been charged with or convicted of any of the following crimes:

1. Murder, comprehending the crimes designated by the terms of parricide, assassination, manslaughter when voluntary; poisoning or infanticide.

2. The attempt to commit murder.

3. Rape, abortion, carnal knowledge of children under the age of twelve years.

4. Mayhem and other wilful mutilation causing disability or death.

5. Bigamy.

6. Arson.

7. Wilful and unlawful destruction or obstruction of railroads, which endangers human life.

8. Crimes committed at sea:

(a) Piracy, as commonly known and defined by the law of Nations, or by Statute;

(b) Wrongfully sinking or destroying a vessel at sea or attempting to do so;

ARTICULO II

Extraditable crimes.

Serán entregadas conforme las disposiciones de este Tratado las personas que hayan sido acusadas ó condenadas por cualquiera de los delitos siguientes:

Murder, etc.

1.—Asesinato, comprendiendo los delitos clasificados con los nombres de parricidio, homicidio voluntario, envenenamiento ó infanticidio.

Attempt to murder.

2.—Tentativa de cualquiera de esos delitos.

Rape, etc.

3.—Violación, aborto, comercio carnal con menores de doce años.

Mayhem, etc.

4.—Mutilación de parte del cuerpo, ó cualquiera lesión voluntaria que cause inhabilidad para el trabajo, ó muerte.

Bigamy.

5.—Bigamía.

Arson.

6.—Incendio.

Injuries to railroads.

7.—Voluntaria ó ilegal destrucción ú obstrucción de ferrocarriles, que ponga en peligro la vida humana.

Crimes committed at sea. Piracy.

8.—Delitos cometidos en el mar: a)—Piratería, según se define comunmente por Derecho Internacional ó por estatutos (leyes).—

Destroying vessels.

b)—Hundimiento ó destrucción culpable de un buque en el mar, ó tentativa para ejecutarlo.

Mutiny.

(c) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the Captain or Commander of such vessel, or by fraud or violence taking possession of such vessel;

c)—Motín ó conspiración por dos ó más miembros de la tripulación ú otras personas á bordo de un buque en alta mar con objeto de rebelarse contra la autoridad del Capitán ó Comandante de tal buque, ó apoderarse del mismo por fraude ó violencia.

Assault on shipboard.

(d) Assault on board ships upon the high seas with intent to do bodily harm.

d)—Abordaje de un buque en alta mar con intención de causar daños corporales.

Burglary.

9. Burglary, defined to be the act of breaking into and entering the house of another in the night time with intent to commit a felony therein.

9.—El acto de allanar la casa de otro en horas de la noche con el propósito de cometer delito.

Feloniously entering offices, etc.

10. The act of breaking into and entering the offices of the Government and public authorities, or the offices of banks, banking houses, saving banks, trust companies, insurance companies, or other buildings not dwellings, with intent to commit a felony therein.

10.—Allanamiento de las oficinas del Gobierno ó de las autoridades públicas, ó de las oficinas de Bancos, Casas Bancarias, Cajas de Ahorro, Compañías de trust, Compañías de Seguros, ú otros edificios que no sean habitaciones, con objeto de cometer delito.

Robbery.

11. Robbery, defined to be the act of feloniously and forcibly taking from the person of another, goods or money by violence or by putting him in fear.

11.—Robo, entendiéndose por tal la sustracción de bienes ó dinero de otro con violencia ó intimidación.

Forgery.

12. Forgery or the utterance of forged papers.

12.—Falsificación ó expendición de documentos falsificados.

Forgery of public documents.

13. The forgery or falsification of the official acts of the Government or public authority, including Courts of Justice, or the uttering or fraudulent use of any of the same.

13.—Falsificación y suplantación de actos oficiales del Gobierno ó de la autoridad pública incluso los Tribunales de Justicia, ó la expendición ó el uso fraudulento de los mismos.

Counterfeiting.

14. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, created by National, State, Provincial, Territorial, Local or Municipal Governments, banknotes or other instruments of public credit, counterfeit seals, stamps, dies and marks of State or public administrations, and the utterance, circulation or fraudulent use of the above mentioned objects.

14.—Fabricación de moneda falsa, acuñada ó papel, de titulos ó cupones de deuda pública, creada por autoridades nacionales, de Estado, provinciales, territoriales, locales ó municipales, Billetes de Banco ú otros valores de crédito público, de sellos, timbres, troqueles, marcas falsas de administraciones del Estado ó públicas y la expendición, circulación ó uso fraudulento de cualquiera de los objetos antes mencionados.

Embezzling public funds.

15. Embezzlement or criminal malversation committed within the jurisdiction of one or the other party by public officers or depositaries, where the amount embezzled exceeds two hundred dollars (or Salvadorean equivalent).

15.—Desfalco ó malversación criminal cometida dentro de la jurisdicción de una de ambas partes por empleados ó depositarios públicos, siempre que la suma desfalcada exceda de doscientos dollars (ó su equivalente en moneda salvadoreña).—

16. Embezzlement by any person or persons hired, salaried or employed, to the detriment of their employers or principals, when the crime or offence is punishable by imprisonment or other corporal punishment by the laws of both countries, and where the amount embezzled exceeds two hundred dollars (or the Salvadorean equivalent).

16.—Desfalco realizado por cualquiera persona ó personas asalariadas ó empleadas, en detrimento de sus patrones ó principales, cuando el delito tenga pena de prisión u otro castigo corporal conforme á las leyes de ambos países y cuando la suma desfalcada exceda de doscientos dollars (ó su equivalente en moneda salvadoreña).— Embezzling by employees.

17. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons, in order to exact money from them or their families, or for any other unlawful end.

17.—Secuestro de menores ó adultos, definido como la sustracción ó detención de persona ó personas para exigirles dinero á ellas ó á sus familias, ó para algún otro fin ilegítimo. Kidnaping.

18. Larceny, defined to be the theft of effects, personal property, horses, cattle, or live stock, or money, of the value of twenty-five dollars (or Salvadorean equivalent) or more, or receiving stolen property, of that value, knowing it to be stolen.

18.—Hurto, definido como la sustracción de efectos, bienes muebles, caballos, ganados ú otros semovientes, ó dinero por valor de veinticinco dollars en adelante (ó su equivalente en moneda salvadoreña), ó recibir esos bienes hurtados, de ese valor, sabiendo que son hurtados. Larceny.

19. Obtaining money, valuable securities or other property by false pretences or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds two hundred dollars (or Salvadorean equivalent).

19.—Obtener por títulos falsos, dinero, valores realizables ú otros bienes, ó recibirlos sabiendo que han sido obtenidos ilegítimamente, siempre que la suma de dinero ó el valor de los bienes así adquiridos ó recibidos exceda de doscientos dollars (ó su equivalente en moneda salvadoreña).— Obtaining money by false pretenses, etc.

20. Perjury or subornation of perjury.

20.—Falso testimonio ó soborno de testigos. Perjury.

21. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director or officer of any Company or Corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds two hundred dollars (or Salvadorean equivalent).

21.—Fraude ó abuso de confianza cometido por depositarios, banqueros, agentes, factores, síndicos, ejecutores, administradores, guardianes, directores ó empleados de cualquiera compañía ó corporación ó por cualquiera persona que desempeñe un puesto de confianza, siempre que la suma de dinero ó el valor de los bienes estafados exceda de doscientos dollars (ó su equivalente en moneda salvadoreña). Breach of trust.

22. Crimes and offences against the laws of both countries for the suppression of slavery and slave trading.

22.—Delitos y ofensas contra las leyes de ambos países sobre la supresión de la esclavitud y el comercio de esclavos. Slave trading.

23. The extradition is also to take place for participation in any of the aforesaid crimes as an accessory before or after the fact,

23.—Procederá así mismo la extradición de los complices, antes ó después del hecho, en cualquiera de los delitos enumeradas, con tal Accessories.

provided such participation be punishable by imprisonment by the laws of both Contracting Parties.

de que la participación tenga pena de prisión según las leyes de ambas Partes Contratantes.

ARTICLE III.

ARTICULO III

No surrender for political offenses.

The provisions of this Treaty shall not import claim of extradition for any crime or offence of a political character, nor for acts connected with such crimes or offences; and no person surrendered by or to either of the Contracting Parties in virtue of this Treaty shall be tried or punished for a political crime or offence.

Attempts, etc., against Head of State not a political crime.

When the offence charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offence was committed or attempted against the life of the Sovereign or Head of a foreign State, or against the life of any member of his family, shall not be deemed sufficient to sustain that such a crime or offence was of a political character, or was an act connected with crimes or offences of a political character.

Las disposiciones de este Tratado no darán derecho de extradición por delito alguno de carácter político ni por actos conexionados con ellos; y ninguna persona entregada por ó á una ú otra de las Partes Contratantes en virtud de este Tratado será juzgada ó castigada por delito político. Cuando el delito imputado comprende un acto de homicidio, asesinato ó de envenenamiento, ya sea consumado ó intentado, el hecho de haber sido cometido ó intentado el delito contra la vida del Soberrano, ó jefe de un Estado extranjero, ó contra la vida de cualquier miembro de su familia no será considerado motivo suficiente para sostener que tal delito ha sido de carácter político ó un acto conexionado con delitos de carácter político.

Decision of Government final.

If any question shall arise as to whether a case comes within the provisions of this Article, the decisions of the authorities of the Government on which the demand for surrender is made, or which may have granted the extradition shall be final.

Si surgiere cuestión sobre si un caso entra en las disposiciones de este artículo, serán definitivas las decisiones de las autoridades del Gobierno ante quien se ha hecho la demanda de extradición, ó que la haya concedido.

ARTICLE IV.

ARTICULO IV

Trial limited to offense for which extradited.

No person shall be tried or punished for any crime or offence other than that for which he was surrendered without the consent of the Government which surrendered him, which may, if it think proper, require the production of one of the documents mentioned in Article XI of this Treaty.

Post, p. 1522.

Ninguna persona será juzgada ó castigada por otro delito ú ofensa que no sea aquel ó aquella por que ha sido entregada, sin el consentimiento del Gobierno que hizo la extradición, el cual puede, si lo cree conveniente, exigir la presentación de uno de los documentos mencionados en el artículo XI de este Tratado.

ARTICLE V.

ARTICULO V

Limitation of time.

A fugitive criminal shall not be surrendered under the provisions hereof, when, from lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime

El criminal evadido no será entregado con arreglo á las disposiciones del presente Tratado cuando por el trascurso del tiempo ó por otra causa legal, con arreglo á las leyes del punto dentro de

was committed, the criminal is exempt from prosecution or punishment for the offence for which the surrender is asked.

cuya jurisdicción se cometió el crímen, el delincuente se halle exento de ser castigado ó procesado por el delito que motiva la demanda de extradición.

ARTICLE VI.

If a fugitive criminal whose surrender may be claimed pursuant to the stipulations hereof, be actually under prosecution, out on bail or in custody, for a crime or offence committed in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be determined, and, until he shall have been set at liberty in due course of law.

ARTICULO VI

Si el criminal evadido cuya entrega puede reclamarse con arreglo á las estipulaciones del presente Tratado se halla actualmente enjuiciado, libre confianza ó preso por cualquier delito cometido en el país en que buscó asilo ó haya sido condenado por el mismo, la extradición podrá demorarse hasta tanto que terminen las actuaciones y el criminal sea puesto en libertad con arreglo á derecho.

Persons under prosecution in country where found.

ARTICLE VII.

If a fugitive criminal claimed by one of the parties hereto, shall be also claimed by one or more powers pursuant to treaty provisions, on account of crimes committed within their jurisdiction, such criminal shall be delivered to that State whose demand is first received.

ARTICULO VII

Si un reo prófugo reclamado por una de las Partes Contratantes, fuere reclamado también por una ó más Potencias conforme á las disposiciones de tratados, por razón de delitos cometidos dentro de su jurisdicción, tal reo será entregado al Estado de quien se reciba primero la demanda.

Persons claimed by other countries.

ARTICLE VIII.

Under the stipulations of this Treaty, neither of the Contracting Parties shall be bound to deliver up its own citizens.

ARTICULO VIII

Bajo las estipulaciones de este Tratado, ninguna de las Partes Contratantes estará obligada á entregar sus propios ciudadanos.

Neither country bound to deliver its own citizens.

ARTICLE IX.

The expense of the arrest, detention, examination and transportation of the accused shall be paid by the Government which has preferred the demand for extradition.

ARTICULO IX

Los gastos de arresto, detención, exámen y trasporte del acusado serán pagados por el Gobierno que ha intentado la demanda de extradición.

Expenses.

ARTICLE X.

Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime or offence, or which may be material as evidence in making proof of the crime, shall, so far as practicable, according to the laws of either of the Contracting Parties,

ARTICULO X

Todo lo que se encuentre en poder del criminal fugado al tiempo de su captura, ya sea producto del delito ó que pueda servir de prueba del mismo, será, en cuanto sea posible, con arreglo á las leyes de cualquiera de las Partes Contratantes, entregado con el reo, al tiempo de su ex-

Disposal of articles seized with person.

be delivered up with his person at the time of the surrender. Nevertheless the rights of a third party with regard to the articles aforesaid shall be duly respected.

tradición. Sin embargo, se respetarán debidamente los derechos de tercero con respecto á los objetos mencionados.

ARTICLE XI.

ARTICULO XI

Territory affected.

The stipulations of this Treaty shall be applicable to all territory wherever situated, belonging to either of the Contracting Parties or in the occupancy and under the control of either of them, during such occupancy or control.

Las estipulaciones de este Tratado serán aplicables á todo territorio donde quiera que esté situado, perteneciente á cualquiera de las Partes Contratantes ó en posesión ó bajo el control de una ú otra de ellas, durante tal posesión ó control.

Requisitions.

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the Contracting Parties. In the event of the absence of such Agents from the country or its seat of Government, requisition may be made by superior Consular officers.

Las demandas para la entrega de reos prófugos de la justicia se harán por los respectivos agentes diplomáticos de las Partes Contratantes. En el evento de estar ausentes del país ó de su asiento tales agentes, puede la demanda hacerse por Funcionarios Consulares Superiores.

Preliminary arrests.

It shall be competent for such Diplomatic or superior Consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, whereupon the judges and magistrates of the two Governments shall respectively have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate, that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of the fugitive.

Los Representantes Diplomáticos ó Funcionarios Consulares Superiores serán competentes para pedir y obtener una orden de arresto preventivo contra la persona cuya extradición se pide, y desde luego los jueces y magistrados de los dos Gobiernos, respectivamente, tendrán facultad á virtud de queja hecha bajo juramento, de expedir orden para la aprehensión de la persona acusada, á efecto de que sea traída ante el juez ó magistrado, para que sean oídas y consideradas las pruebas de criminalidad; y si en vista de ellas, fuese conceptuada suficiente la prueba para decretar su detención, será deber del juez ó magistrado que actúa hacerlo constar así á la autoridad competente para que libre orden de entrega del prófugo.

Delivery of fugitive.

The extradition of fugitives under the provisions of this Treaty shall be carried out in the United States and in the Republic of El Salvador, respectively, in conformity with the laws regulating extradition for the time being in force in the State in which the request for the surrender is made.

La extradición de prófugos según las disposiciones de este Tratado será efectuada en los Estados Unidos y en la República de El Salvador, respectivamente, en conformidad á las leyes que regulan la extradición, actualmente vigentes en el Estado en que ha sido hecha la solicitud de extradición.

ARTICLE XII.

Where the arrest and detention of a fugitive in the United States are desired on telegraphic or other information in advance of the presentation of formal proof, complaint on oath, as provided by the statutes of the United States, shall be made by an agent of the Government of El Salvador before a judge or magistrate authorized to issue warrants of arrest in extradition cases.

When, under the provisions of this Article, the arrest and detention of a fugitive are desired in the Republic of El Salvador, the proper course shall be to apply to the Foreign Office, which will immediately cause the necessary steps to be taken in order to secure the provisional arrest or detention of the fugitive.

The provisional detention of a fugitive shall cease and the prisoner be released if a formal requisition for his surrender accompanied by the necessary evidence of his guilt has not been produced under the stipulations of this Treaty, within two months from the date of his provisional arrest or detention.

ARTICULO XII

Applications for provisional arrest. In United States.

Si se pidiese por telégrafo el arresto y detención de un prófugo que se encuentre en los Estados Unidos, ó alguna otra información antes de exhibir prueba formal, se presentará demanda con juramento, como lo disponen los estatutos de los Estados Unidos, por un agente del Gobierno del Salvador ante un juez ó magistrado autorizado para dar órdenes de arresto en casos de extradición.

In Salvador.

Y cuando se pidiere arrestar y detener á un prófugo en la República del Salvador, de conformidad con las disposiciones de este artículo, se ocurrirá á la Secretaría de Relaciones Exteriores, la cual hará las gestiones necesarias á efecto de asegurar la detención provisional del inculpado.

Release if evidence etc., is not produced.

Cesará la detención provisional del prófugo y será puesto en libertad, si no se hubiere presentado formal solicitud de extradición acompañada de las pruebas necesarias de su delito de acuerdo con las estipulaciones de este Tratado, dentro de dos meses contados desde la fecha de su arresto ó detención provisional.

ARTICLE XIII.

Legal assistance.

In every case of a request made by either of the two Contracting Parties for the arrest, detention or extradition of fugitive criminals, the legal officers or fiscal ministry of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their or its power; and no claim whatever for compensation for any of the services so rendered shall be made against the Government demanding the extradition, provided however, that any officer or officers of the surrendering Government so giving assistance, who shall, in the usual course of their duty, receive no salary or compensation

ARTICULO XIII

Legal assistance.

Siempre que se presente una reclamación por cualquiera de las dos Partes Contratantes para el arresto, detención ó extradición de criminales evadidos, los funcionarios de justicia ó el Ministerio fiscal del país en que se sigan los procedimientos de extradición, auxiliarán á los del Gobierno que la pida ante los respectivos Juezes y Magistrados, por todos los medios legales que estén á su alcance, sin

Compensation.

que puedan reclamar, del Gobierno que pida la extradición, remuneración alguna por los servicios prestados; sin embargo, los funcionarios del Gobierno que concede la extradición, que hayan prestado su concurso para la misma y que en el ejercicio ordinario de sus funciones no reciban otro salario ni remuneración que determinados

other than specific fees for services performed, shall be entitled to receive from the Government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

honorarios por los servicios prestados, tendrá derecho á percibir del Gobierno que pida la extradición los honorarios acostumbrados por los actos ó servicios realizados por ellos, en igual forma y proporción que si dichos actos ó servicios hubiesen sido realizados en procedimientos criminales ordinarios, con arreglo á las leyes del país á que dichos funcionarios pertenezcan.

ARTICLE XIV.

Transit of persons extradited from other country.

The conveyance through the territories of either of the High Contracting Parties of any person, not being a citizen of the country to be passed through, extradited by a third Power to either of them for any of the crimes specified in this Treaty, will be permitted if, in the case of the United States, the authority of the Secretary of State and, in that of El Salvador, that of the Minister for Foreign Relations, is first obtained.

ARTICULO XIV

La conducción á través de los territorios de una ú otra de las Altas Partes Contratantes, de una persona, que no sea ciudadano del país que ha de atravesarse, entregada por una tercera Potencia á una ú otra de ellas por cualquiera de los delitos especificados en este Tratado, será permitida respecto de los Estados Unidos, previa autorización del Secretario de Estado, respecto del Salvador, con la del Ministro de Relaciones Exteriores.

ARTICLE XV.

Effect.

This Treaty shall take effect from the day of the exchange of the ratifications thereof; but either Contracting Party may at any time terminate the same on giving to the other six months' notice of its intention to do so.

Exchange of ratifications.

The ratifications of the present Treaty shall be exchanged at San Salvador or at Washington as soon as possible.

Signatures.

In witness whereof, the respective Plenipotentiaries have signed the above Articles, and have hereunto affixed their seals.

Done in duplicate, at the City of San Salvador, this eighteenth day of April, one thousand nine hundred and eleven.

(SEAL) WILLIAM HEIMKÉ.
(SEAL) M. CASTRO R.

ARTICULO XV

Tendrá efecto este Tratado desde el día del canje de sus ratificaciones; pero una ú otra Parte Contratante puede en cualquier tiempo denunciarlo dando aviso á la otra, con seis meses de anticipación de su intención de hacerlo cesar.

Las ratificaciones del presente Tratado serán canjeadas en San Salvador ó en Washington, tan pronto como sea posible.

En testimonio de lo cual, los respectivos Plenipotenciarios han firmado las estipulaciones que preceden y han puesto abajo sus sellos, en dos ejemplares, en inglés y español.

Hecho en duplicado, en la ciudad de San Salvador, el día dieciocho de abril de mil novecientos once.

(SELLO) WILLIAM HEIMKÉ.
(SELLO) M. CASTRO R.

Ratifications exchanged.

And whereas the said Treaty has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of San Salvador, on the tenth day of July, one thousand nine hundred and eleven;

Proclamation.

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this thirteenth day of July in the year of our Lord one thousand nine hundred and eleven,
[SEAL] and of the Independence of the United States of America the one hundred and thirty-sixth.

WM H TAFT

By the President:
HUNTINGTON WILSON
Acting Secretary of State.

EXHIBIT "B"

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION
ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

Go to the United States Code Service Archive Directory

8 USCS § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.

(A) In general. Any alien--

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)--

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized. For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) Exception from immunization requirement for adopted children 10 years of age or younger. Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in section 101(b)(1)(F) [*8 USCS § 1101(b)(1)(F)*], and

(iii) is seeking an immigrant visa as an immediate relative under section 201(b) [*8 USCS § 1151(b)*],

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (*21 U.S.C. 802*)),

is inadmissible.

(ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions. Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers. Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (*21 U.S.C. 802*)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice. Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h) [*8 USCS § 1101(h)*]).

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized. For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have committed particularly severe violations of religious freedom. Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (*22 U.S.C. 6402*), is inadmissible.

(H) Significant traffickers in persons.

(i) In general. Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act [*22 USCS § 7102*], is inadmissible.

(ii) Beneficiaries of trafficking. Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters. Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering. Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds.

(A) In general. Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in--

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities.

(i) In general. Any alien who--

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of--

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code [*18 USCS § 2339D(c)(1)*]) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.

(ii) Exception. Subclause (IX) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in *section 1116(b)(4) of title 18, United States Code*) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined. As used in this Act, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization--

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined. As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined. As used in this section, the term "terrorist organization" means an organization--

(I) designated under section 219 [*8 USCS § 1189*];

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy.

(i) In general. An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials. An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens. An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations. If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party.

(i) In general. Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership. Clause (i) shall not a alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership. Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that--

(I) the membership or affiliation terminated at least--

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members. The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing.

(i) Participation in Nazi persecutions. Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide. Any alien who ordered, incited, assisted, or otherwise participated in conduct outside the United States that would, if committed in the United States or by a United States national, be genocide, as defined in *section 1091(a) of title 18, United States Code*, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings. Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of--

(I) any act of torture, as defined in *section 2340 of title 18, United States Code*; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (*28 U.S.C. 1350* note),

is inadmissible.

(F) Association with terrorist organizations. Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, 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 is inadmissible.

(G) Recruitment or use of child soldiers. Any alien who has engaged in the recruitment or use of child soldiers in violation of *section 2442 of title 18, United States Code*, is inadmissible.

(4) Public charge.

(A) In general. Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account.

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 213A [*8 USCS § 1183a*] for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants. Any alien who seeks admission or adjustment of status under a visa number issued under section 201(b)(2) or 203(a) [*8 USCS § 1151(b)(2)* or *1153(a)*] is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) [*8 USCS § 1154(a)(1)(A)(ii)*, (iii), or (iv)];

(II) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) [*8 USCS § 1154(a)(1)(B)*]; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 213A(f) [*8 USCS § 1183a(f)*] or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 213A [*8 USCS § 1183a*] with respect to such alien.

(D) Certain employment-based immigrants. Any alien who seeks admission or adjustment of status under a visa number issued under section 203(b) [*8 USCS § 1153(b)*] by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 213A [*8 USCS § 1183a*] with respect to such alien.

(5) Labor certification and qualifications for certain immigrants.

(A) Labor certification.

(i) In general. Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule. For purposes of clause (i)(I), an alien described in this clause is an alien who--

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) Professional athletes.

(I) In general. A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) Definition. For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by--

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) Long delayed adjustment applicants. A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) [*8 USCS § 1154(j)*] shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) Unqualified physicians. An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) Uncertified foreign health-care workers. Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that--

(i) the alien's education, training, license, and experience--

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) Application of grounds. The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 203(b) [*8 USCS § 1153(b)(2)* or (3)].

(6) Illegal entrants and immigration violators.

(A) Aliens present without admission or parole.

(i) In general. An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children. Clause (i) shall not apply to an alien who demonstrates that--

(I) the alien is a VAWA self-petitioner;

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) Failure to attend removal proceeding. Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) Misrepresentation.

(i) In general. Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) Falsely claiming citizenship.

(I) In general. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A [*8 USCS § 1324a*]) or any other Federal or State law is inadmissible.

(II) Exception. In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (i).

(D) Stowaways. Any alien who is a stowaway is inadmissible.

(E) Smugglers.

(i) In general. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification. Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990 [*8 USCS § 1255a* note]), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) [*8 USCS § 1153(a)(2)*] (including under section 112 of the Immigration Act of 1990 [*8 USCS § 1153* note]) or benefits under section 301(a) of the Immigration Act of 1990 [*8 USCS § 1255a* note] if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) Subject of civil penalty.

(i) In general. An alien who is the subject of a final order for violation of section 274C [*8 USCS § 1324c*] is inadmissible.

(ii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) Student visa abusers. An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) [*8 USCS § 1101(a)(15)(F)(i)*] and who violates a term or condition of such status under section 214(l) is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

(7) Documentation requirements.

(A) Immigrants.

(i) In general. Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission--

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a) [*8 USCS § 1181(a)*], or

(II) whose visa has been issued without compliance with the provisions of section 203 [*8 USCS § 1183*],

is inadmissible.

(ii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (k).

(B) Nonimmigrants.

(i) In general. Any nonimmigrant who--

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) Guam and Northern Mariana Islands visa waiver. For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (l).

(iv) Visa waiver program. For authority to waive the requirement of clause (i) under a program, see section 217 [*8 USCS § 1187*].

(8) Ineligible for citizenship.

(A) In general. Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) Draft evaders. Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) Aliens previously removed.

(A) Certain aliens previously removed.

(i) Arriving aliens. Any alien who has been ordered removed under section 235(b)(1) [*8 USCS § 1225(b)(1)*] or at the end of proceedings under section 240 [*8 USCS § 1229a*] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens. Any alien not described in clause (i) who--

(I) has been ordered removed under section 240 [*8 USCS § 1229a*] or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception. Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present.

(i) In general. Any alien (other than an alien lawfully admitted for permanent residence) who--

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) [section 240B]) prior to the commencement of proceedings under section 235(b)(1) [*8 USCS § 1225(b)(1)*] or section 240 [*8 USCS § 1229a*], and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence. For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.

(I) Minors. No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section 208 [*8 USCS § 1158*] shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity. No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 [*8 USCS § 1255a* note] shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered women and children. Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) Victims of a severe form of trafficking in persons. Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 103 of the Trafficking Victims Protection Act of 2000 (*22 U.S.C. 7102*)) was at least one central reason for the alien's unlawful presence in the United States.

(iv) Tolling for good cause. In the case of an alien who--

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver. The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens unlawfully present after previous immigration violations.

(i) In general. Any alien who--

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1) [*8 USCS § 1225(b)(1)*], section 240 [*8 USCS § 1229a*], or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception. Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver. The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

(10) Miscellaneous.

(A) Practicing polygamists. Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) Guardian required to accompany helpless alien. Any alien--

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 232(c) [*8 USCS § 1222(c)*], and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i),

is inadmissible.

(C) International child abduction.

(i) In general. Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

(ii) Aliens supporting abductors and relatives of abductors. Any alien who--

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) Exceptions. Clauses (i) and (ii) shall not apply--

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) Unlawful voters.

(i) In general. Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) Exception. In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former citizens who renounced citizenship to avoid taxation. Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

(b) Notices of denials.

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a), the officer shall provide the alien with a timely written notice that--

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or [ineligible for] adjustment of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a).

(c) [Repealed]

(d) Temporary admission of nonimmigrants.

(1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(S) [*8 USCS § 1101(a)(15)(S)*]. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(S) [*8 USCS § 1101(a)(15)(S)*], if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 101(a)(15)(S) [*8 USCS § 1101(a)(15)(S)*] for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 101(a)(15)(S) [*8 USCS § 1101(a)(15)(S)*].

(2) [Repealed]

(3) (A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

(B) (i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may

determine in such Secretary's sole unreviewable discretion that subsection (a)(3)(B) shall not apply with respect to an alien within the scope of that subsection or that subsection (a)(3)(B)(vi)(III) shall not apply to a group within the scope of that subsection, except that no such waiver may be extended to an alien who is within the scope of subsection (a)(3)(B)(i)(II), no such waiver may be extended to an alien who is a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization that is described in subclause (I) or (II) of subsection (a)(3)(B)(vi), and no such waiver may be extended to a group that has engaged [in] terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians. Such a determination shall neither prejudice the ability of the United States Government to commence criminal or civil proceedings involving a beneficiary of such a determination or any other person, nor create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such *title [28 USCS §§ 1361* and *1651*], no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this *title [8 USCS § 1252*], and review shall be limited to the extent provided in section 1252(a)(2)(D) [*8 USCS § 1252(a)(2)(D)*]. The Secretary of State may not exercise the discretion provided in this clause with respect to an alien at any time during which the alien is the subject of pending removal proceedings under section 1229a of this *title [8 USCS § 1229a*].

(ii) Not later than 90 days after the end of each fiscal year, the Secretary of State and the Secretary of Homeland Security shall each provide to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on International Relations of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Homeland Security of the House of Representatives a report on the aliens to whom such Secretary has applied clause (i). Within one week of applying clause (i) to a group, the Secretary of State or the Secretary of Homeland Security shall provide a report to such Committees.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 238(c) [233(c)] [*8 USCS § 1223(c)*].

(5) (A) The Attorney General may except as provided in subparagraph (B) or in section 214(f) [*8 USCS § 1184(f)*], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207 [*8 USCS § 1157*].

(6) [Repealed]

(7) The provisions of subsection (a) (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso. Any alien described in this paragraph, who is denied admission to the United States, shall be immediately removed in the manner provided by section 241(c) of this Act [*8 USCS § 1251(c)*].

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

(9), (10) [Repealed]

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) [*8 USCS § 1181(b)*] and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section

203(a) [*8 USCS § 1153(a)*] (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F)--

(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 211(b) [*8 USCS § 1181(b)*], and

(B) in the case of an alien seeking admission or adjustment of status under section 201(b)(2)(A) [*8 USCS § 1151(b)(2)(A)*] or under section 203(a) [*8 USCS § 1153(a)*],

if no previous civil money penalty was imposed against the alien under section 274C [*8 USCS § 1324c*] and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.

(13) (A) The Secretary of Homeland Security shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(T) [*8 USCS § 1101(a)(15)(T)*], except that the ground for inadmissibility described in subsection (a)(4) shall not apply with respect to such a nonimmigrant.

(B) In addition to any other waiver that may be available under this section, in the case of a nonimmigrant described in section 101(a)(15)(T) [*8 USCS § 1101(a)(15)(T)*], if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's [Secretary's] discretion, may waive the application of--

(i) subsection (a)(1); and

(ii) any other provision of subsection (a) (excluding paragraphs (3), (4), (10)(C), and (10[])(E)) if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I) [*8 USCS § 1101(a)(15)(T)(i)(I)*].

(14) The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(U) [*8 USCS § 1101(a)(15)(U)*]. The Secretary of Homeland Security, in the Attorney General's [Secretary's] discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(U) [*8 USCS § 1101(a)(15)(U)*], if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

(e) Educational visitor status; foreign residence requirement; waiver. No person admitted under section 101(a)(15)(J) [*8 USCS § 1101(a)(15)(J)*] or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) [*8 USCS § 1101(a)(15)(J)*] was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) [*8 USCS § 1101(a)(15)(H)* or (L)] until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that the departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l) [*8 USCS § 1184(l)*]: And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

(f) Suspension of entry or imposition of restrictions by President. Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

(g) Bond and conditions for admission of alien inadmissible on health-related grounds. The Attorney General may waive the application of--

(1) subsection (a)(1)(A)(i) in the case of any alien who--

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; or

(C) is a VAWA self-petitioner,

in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe;

(2) subsection (a)(1)(A)(ii) in the case of any alien--

(A) who receives vaccination against the vaccine-preventable disease or diseases for which the alien has failed to present documentation of previous vaccination,

(B) for whom a civil surgeon, medical officer, or panel physician (as those terms are defined by *section 34.2 of title 42 of the Code of Federal R*egulations) certifies, according to such regulations as the Secretary of Health and Human Services may prescribe, that such vaccination would not be medically appropriate, or

(C) under such circumstances as the Attorney General provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions; or

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) Waiver of subsec. (a)(2)(A)(i)(I), (II), (B), (D), and (E). The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status, and

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States,

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if

either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(i) Admission of immigrant inadmissible for fraud or willful misrepresentation of material fact.

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

(j) Limitation on immigration of foreign medical graduates.

(1) The additional requirements referred to in section 101(a)(15)(J) [*8 USCS § 1101(a)(15)(J)*] for an alien who is coming to the United States under a program under which he will receive graduate medical education or training are as follows:

(A) A school of medicine or of one of the other health professions, which is accredited by a body or bodies approved for the purpose by the Secretary of Education, has agreed in writing to provide the graduate medical education or training under the program for which the alien is coming to the United States or to assume responsibility for arranging for the provision thereof by an appropriate public or nonprofit private institution or agency, except that, in the case of such an agreement by a school of medicine, any one or more of its affiliated hospitals which are to participate in the provision of the graduate medical education or training must join in the agreement.

(B) Before making such agreement, the accredited school has been satisfied that the alien (i) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States); or (ii)(I) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), (II) has competency in oral and written English, (III) will be able to adapt to the educational and cultural environment in which he will be receiving his education or training, and (IV) has adequate prior education and training to participate satisfactorily in the program for which he is coming to the United States. For the purposes of this subparagraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) The alien has made a commitment to return to the country of his nationality or last residence upon completion of the education or training for which he is coming to the United States, and the government of the country of his nationality or last residence has provided a written assurance, satisfactory to the Secretary of Health and Human Services, that there is a need in that country for persons with the skills the alien will acquire in such education or training.

(D) The duration of the alien's participation in the program of graduate medical education or training for which the alien is coming to the United States is limited to the time typically required to complete such program, as determined by the Director of the United States Information Agency at the time of the alien's admission into the United States, based on criteria which are established in coordination with the Secretary of Health and Human Services and which take into consideration the published requirements of the medical specialty board which administers such education or training program; except that--

(i) such duration is further limited to seven years unless the alien has demonstrated to the satisfaction of the Director that the country to which the alien will return at the end of such specialty education or training has an exceptional need for an individual trained in such specialty, and

(ii) the alien may, once and not later than two years after the date the alien is admitted to the United States as an exchange visitor or acquires exchange visitor status, change the alien's designated program of graduate medical education or training if the Director approves the change and if a commitment and written assurance with respect to the alien's new program have been provided in accordance with subparagraph (C).

(E) The alien furnishes the Attorney General each year with an affidavit (in such form as the Attorney General shall prescribe) that attests that the alien (i) is in good standing in the program of graduate medical education or training in

which the alien is participating, and (ii) will return to the country of his nationality or last residence upon completion of the education or training for which he came to the United States.

(2) An alien who is a graduate of a medical school and who is coming to the United States to perform services as a member of the medical profession may not be admitted as a nonimmigrant under section 101(a)(15)(H)(i)(b) [*8 USCS § 1101(a)(15)(H)(i)(b)*] unless--

(A) the alien is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency, or

(B) (i) the alien has passed the Federation licensing examination (administered by the Federation of State Medical Boards of the United States) or an equivalent examination as determined by the Secretary of Health and Human Services, and

(ii) (I) has competency in oral and written English or (II) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States).

(3) [Omitted]

(k) Attorney General's discretion to admit otherwise inadmissible aliens who possess immigrant visas. Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

(l) Guam and Northern Mariana Islands visa waiver program.

(1) In general. The requirement of subsection (a)(7)(B)(i) may be waived by the Secretary of Homeland Security, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay in Guam or the Commonwealth of the Northern Mariana Islands for a period not to exceed 45 days, if the Secretary of Homeland Security, after consultation with the Secretary of the Interior, the Secretary of State, the Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands, determines that--

(A) an adequate arrival and departure control system has been developed in Guam and the Commonwealth of the Northern Mariana Islands; and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) Alien waiver of rights. An alien may not be provided a waiver under this subsection unless the alien has waived any right--

(A) to review or appeal under this Act [*8 USCS §§ 1101* et seq.] an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam or the Commonwealth of the Northern Mariana Islands; or

(B) to contest, other than on the basis of an application for withholding of removal under section 241(b)(3) of this Act [*8 USCS § 1231(b)(3)*] or under the Convention Against Torture, or an application for asylum if permitted under section 208 [*8 USCS § 1158*], any action for removal of the alien.

(3) Regulations. All necessary regulations to implement this subsection shall be promulgated by the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, on or before the 180th day after the date of enactment of the Consolidated Natural Resources Act of 2008 [enacted May 8, 2008]. The promulgation of such regulations shall be considered a foreign affairs function for purposes of section 553(a) of title 5, United States Code [*5 USCS § 553(a)*]. At a minimum, such regulations should include, but not necessarily be limited to--

(A) a listing of all countries whose nationals may obtain the waiver also provided by this subsection, except that such regulations shall provide for a listing of any country from which the Commonwealth has received a significant economic benefit from the number of visitors for pleasure within the one-year period preceding the date of enactment of the Consolidated Natural Resources Act of 2008 [enacted May 8, 2008], unless the Secretary of Homeland Security determines that such country's inclusion on such list would represent a threat to the welfare, safety, or security of the United States or its territories; and

(B) any bonding requirements for nationals of some or all of those countries who may present an increased risk of overstays or other potential problems, if different from such requirements otherwise provided by law for nonimmigrant visitors.

(4) Factors. In determining whether to grant or continue providing the waiver under this subsection to nationals of any country, the Secretary of Homeland Security, in consultation with the Secretary of the Interior and the Secretary of State, shall consider all factors that the Secretary deems relevant, including electronic travel authorizations, procedures for reporting lost and stolen passports, repatriation of aliens, rates of refusal for nonimmigrant visitor visas, overstays, exit systems, and information exchange.

(5) Suspension. The Secretary of Homeland Security shall monitor the admission of nonimmigrant visitors to Guam and the Commonwealth of the Northern Mariana Islands under this subsection. If the Secretary determines that such admissions have resulted in an unacceptable number of visitors from a country remaining unlawfully in Guam or the Commonwealth of the Northern Mariana Islands, unlawfully obtaining entry to other parts of the United States, or seeking withholding of removal or asylum, or that visitors from a country pose a risk to law enforcement or security interests of Guam or the Commonwealth of the Northern Mariana Islands or of the United States (including the interest in the enforcement of the immigration laws of the United States), the Secretary shall suspend the admission of nationals of such country under this subsection. The Secretary of Homeland Security may in the Secretary's discretion suspend the Guam and Northern Mariana Islands visa waiver program at any time, on a country-by-country basis, for other good cause.

(6) Addition of countries. The Governor of Guam and the Governor of the Commonwealth of the Northern Mariana Islands may request the Secretary of the Interior and the Secretary of Homeland Security to add a particular country to the list of countries whose nationals may obtain the waiver provided by this subsection, and the Secretary of Homeland Security may grant such request after consultation with the Secretary of the Interior and the Secretary of State, and may promulgate regulations with respect to the inclusion of that country and any special requirements the Secretary of Homeland Security, in the Secretary's sole discretion, may impose prior to allowing nationals of that country to obtain the waiver provided by this subsection.

(m) Requirements for admission of nonimmigrant nurses [Caution: For expiration of amendments made to this subsection by Act Nov. 12, 1999, P.L. 106-95, see § 2(e) of such Act, which appears as a note to this section.].

(1) The qualifications referred to in section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*], with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien--

(A) has obtained a full and unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States;

(B) has passed an appropriate examination (recognized in regulations promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

(2) (A) The attestation referred to in section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*], with respect to a facility for which an alien will perform services, is an attestation as to the following:

(i) The facility meets all the requirements of paragraph (6).

(ii) The employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.

(iii) The alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(iv) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.

(v) There is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(vi) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*], notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to the registered nurses employed at the facility through posting in conspicuous locations.

(vii) The facility will not, at any time, employ a number of aliens issued visas or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*] that exceeds 33 percent of the total number of registered nurses employed by the facility.

(viii) The facility will not, with respect to any alien issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*]--

(I) authorize the alien to perform nursing services at any worksite other than a worksite controlled by the facility; or

(II) transfer the place of employment of the alien from one worksite to another.

Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999 [enacted Nov. 12, 1999]. A copy of the attestation shall be provided, within 30 days of the date of filing, to registered nurses employed at the facility on the date of filing.

(B) For purposes of subparagraph (A)(iv), each of the following shall be considered a significant step reasonably designed to recruit and retain registered nurses:

(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses.

The steps described in this subparagraph shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of subparagraph (A)(iv). Nothing in this subparagraph shall require a facility to take more than one step if the facility can demonstrate that taking a second step is not reasonable.

(C) Subject to subparagraph (E), an attestation under subparagraph (A)--

(i) shall expire on the date that is the later of--

(I) the end of the one-year period beginning on the date of its filing with the Secretary of Labor; or

(II) the end of the period of admission under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*] of the last alien with respect to whose admission it was applied (in accordance with clause (ii)); and

(ii) shall apply to petitions filed during the one-year period beginning on the date of its filing with the Secretary of Labor if the facility states in each such petition that it continues to comply with the conditions in the attestation.

(D) A facility may meet the requirements under this paragraph with respect to more than one registered nurse in a single petition.

(E) (i) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying facilities which have filed petitions for nonimmigrants under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*] and, for each such facility, a copy of the facility's attestation under subparagraph (A) (and accompanying documentation) and each such petition filed by the facility.

(ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. Subject to the time limits established under this clause, this subparagraph shall apply regardless of whether an attestation is expired or unexpired at the time a complaint is filed.

(iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

(iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per nurse per violation, with the total penalty not to exceed $10,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least one year for nurses to be employed by the facility.

(v) In addition to the sanctions provided for under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

(F) (i) The Secretary of Labor shall impose on a facility filing an attestation under subparagraph (A) a filing fee, in an amount prescribed by the Secretary based on the costs of carrying out the Secretary's duties under this subsection, but not exceeding $250.

(ii) Fees collected under this subparagraph shall be deposited in a fund established for this purpose in the Treasury of the United States.

(iii) The collected fees in the fund shall be available to the Secretary of Labor, to the extent and in such amounts as may be provided in appropriations Acts, to cover the costs described in clause (i), in addition to any other funds that are available to the Secretary to cover such costs.

(3) The period of admission of an alien under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*] shall be 3 years.

(4) The total number of nonimmigrant visas issued pursuant to petitions granted under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*] in each fiscal year shall not exceed 500. The number of such visas issued for employment in each State in each fiscal year shall not exceed the following:

(A) For States with populations of less than 9,000,000, based upon the 1990 decennial census of population, 25 visas.

(B) For States with populations of 9,000,000 or more, based upon the 1990 decennial census of population, 50 visas.

(C) If the total number of visas available under this paragraph for a fiscal year quarter exceeds the number of qualified nonimmigrants who may be issued such visas during those quarters, the visas made available under this paragraph shall be issued without regard to the numerical limitation under subparagraph (A) or (B) of this paragraph during the last fiscal year quarter.

(5) A facility that has filed a petition under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*] to employ a nonimmigrant to perform nursing services for the facility--

(A) shall provide the nonimmigrant a wage rate and working conditions commensurate with those of nurses similarly employed by the facility;

(B) shall require the nonimmigrant to work hours commensurate with those of nurses similarly employed by the facility; and

(C) shall not interfere with the right of the nonimmigrant to join or organize a union.

(6) For purposes of this subsection and section 101(a)(15)(H)(i)(c) [*8 USCS § 1101(a)(15)(H)(i)(c)*], the term "facility" means a subsection (d) hospital (as defined in section 1886(d)(1)(B) of the Social Security Act (*42 U.S.C. 1395ww(d)(1)(B)*)) that meets the following requirements:

(A) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 332 of the Public Health Service Act (*42 U.S.C. 254e*)).

(B) Based on its settled cost report filed under title XVIII of the Social Security Act [*42 USCS §§ 1395* et seq.] for its cost reporting period beginning during fiscal year 1994--

(i) the hospital has not less than 190 licensed acute care beds;

(ii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of such title is not less than 35 percent of the total number of such hospital's acute care inpatient days for such period; and

(iii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act [*42 USCS §§ 1396* et seq.], is not less than 28 percent of the total number of such hospital's acute care inpatient days for such period.

(7) For purposes of paragraph (2)(A)(v), the term "lay off", with respect to a worker--

(A) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(B) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

Nothing in this paragraph is intended to limit an employee's or an employer's rights under a collective bargaining agreement or other employment contract.

(n) Labor condition application.

(1) No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B non-immigrant wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the application--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

(D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(E) (i) In the case of an application described in clause (ii), the employer did not displace and will not displace a United States worker (as defined in paragraph (4)) employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.

(ii) An application described in this clause is an application filed on or after the date final regulations are first promulgated to carry out this subparagraph, [and before] by an H-1B-dependent employer (as defined in paragraph (3)) or by an employer that has been found, on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998], under paragraph (2)(C) or (5) to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application. An application is not described in this clause if the only H-1B nonimmigrants sought in the application are exempt H-1B nonimmigrants.

(F) In the case of an application described in subparagraph (E)(ii), the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where--

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer;

unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.

(G) (i) In the case of an application described in subparagraph (E)(ii), subject to clause (ii), the employer, prior to filing the application--

(I) has taken good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and

(II) has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.

(ii) The conditions described in clause (i) shall not apply to an application filed with respect to the employment of an H-1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 203(b)(1) [*8 USCS § 1153(b)(1)*].

The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). The Secretary shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of intended employment, and date of need. The Secretary shall make such list available for public examination in Washington, D.C. The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i)(b) [*8 USCS §*

1101(a)(15)(H)(i)(b)] within 7 days of the date of the filing of the application. The application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer described in such subparagraph displaces a United States worker as described in such subparagraph. Nothing in subparagraph (G) shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.

(2) (A) Subject to paragraph (5)(A), the Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under such process, the Secretary shall provide, within 30 days after the date such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with *section 556 of title 5, United States Code*, within 60 days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary may consolidate the hearings under this subparagraph on such complaints.

(C) (i) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), (1)(E), or (1)(F), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(G)(i)(I), or a misrepresentation of material fact in an application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) [*8 USCS § 1154* or *1184(c)*] during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) [*8 USCS § 1154* or *1184(c)*] during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) [*8 USCS § 1154* or *1184(c)*] during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Attorney General shall devise a process under which an H-1B nonimmigrant who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi) (I) It is a violation of this clause for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the

nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 214(c)(1) [*8 USCS § 1184(c)(1)*], for which a fee is imposed under section 214(c)(9) [*8 USCS § 1184(c)(9)*], to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien.

(III) If the Secretary finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii) (I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a full-time employee on the petition filed under section 214(c)(1) [*8 USCS § 1184(c)(1)*] by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a part-time employee on the petition filed under section 214(c)(1) [*8 USCS § 1184(c)(1)*] by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on such petition consistent with the rate of pay identified on such petition.

(III) In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection, and a petition under section 214(c)(1) [*8 USCS § 1184(c)(1)*], with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).

(IV) This clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to an H-1B nonimmigrant an established salary practice of the employer, under which the employer pays to H-1B nonimmigrants and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this Act to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for parent of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) If an H-1B-dependent employer places a nonexempt H-1B nonimmigrant with another employer as provided under paragraph (1)(F) and the other employer has displaced or displaces a United States worker employed by such other employer during the period described in such paragraph, such displacement shall be considered for purposes of this paragraph a failure, by the placing employer, to meet a condition specified in an application submitted under

paragraph (1); except that the Attorney General may impose a sanction described in subclause (II) of subparagraph (C)(i), (C)(ii), or (C)(iii) only if the Secretary of Labor found that such placing employer--

(i) knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer; or

(ii) has been subject to a sanction under this subparagraph based upon a previous placement of an H-1B nonimmigrant with the same other employer.

(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date (on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998]) on which the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) (or has been found under paragraph (5) to have committed a willful failure to meet the condition of paragraph (1)(G)(i)(II)) or to have made a willful misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether or not the employer is an H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(G) (i) The Secretary of Labor may initiate an investigation of any employer that employs nonimmigrants described in section 101(a)(15)(H)(i)(b) [*8 USCS § 1101(a)(15)(H)(i)(b)*] if the Secretary of Labor has reasonable cause to believe that the employer is not in compliance with this subsection. In the case of an investigation under this clause, the Secretary of Labor (or the acting Secretary in the case of the absence of [or] disability of the Secretary of Labor) shall personally certify that reasonable cause exists and shall approve commencement of the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer in complying with this subsection.

(ii) If the Secretary of Labor receives specific credible information from a source who is likely to have knowledge of an employer's practices or employment conditions, or an employer's compliance with the employer's labor condition application under paragraph (1), and whose identity is known to the Secretary of Labor, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor may conduct an investigation into the alleged failure or failures. The Secretary of Labor may withhold the identity of the source from the employer, and the source's identity shall not be subject to disclosure under *section 552 of title 5, United States Code*.

(iii) The Secretary of Labor shall establish a procedure for any person desiring to provide to the Secretary of Labor information described in clause (ii) that may be used, in whole or in part, as the basis for the commencement of an investigation described in such clause, to provide the information in writing on a form developed and provided by the Secretary of Labor and completed by or on behalf of the person. The person may not be an officer or employee of the Department of Labor, unless the information satisfies the requirement of clause (iv)(II) (although an officer or employee of the Department of Labor may complete the form on behalf of the person).

(iv) Any investigation initiated or approved by the Secretary of Labor under clause (ii) shall be based on information that satisfies the requirements of such clause and that--

(I) originates from a source other than an officer or employee of the Department of Labor; or

(II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this Act of any other Act.

(v) The receipt by the Secretary of Labor of information submitted by an employer to the Attorney General or the Secretary of Labor for purposes of securing the employment of a nonimmigrant described in section 101(a)(15)(H)(i)(b) [*8 USCS § 1101(a)(15)(H)(i)(b)*] shall not be considered a receipt of information for purposes of clause (ii).

(vi) No investigation described in clause (ii) (or hearing described in clause (viii) based on such investigation) may be conducted with respect to information about a failure to meet a condition described in clause (ii), unless the Secretary of Labor receives the information not later than 12 months after the date of the alleged failure.

(vii) The Secretary of Labor shall provide notice to an employer with respect to whom there is reasonable cause to initiate an investigation described in clauses [clause] (i) or (ii), prior to the commencement of an investigation under such clauses, of the intent to conduct an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced. The Secretary of Labor is not required to comply with this clause if the Secretary of Labor determines that to do so would interfere with an effort by the Secretary of Labor to secure compliance by the employer with the requirements of this subsection. There shall be no judicial review of a determination by the Secretary of Labor under this clause.

(viii) An investigation under clauses (i) or (ii) may be conducted for a period of up to 60 days. If the Secretary of Labor determines after such an investigation that a reasonable basis exists to make a finding that the employer has

committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(C), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing in accordance with *section 556 of title 5, United States Code*, within 120 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 120 days after the date of the hearing.

(H) (i) Except as provided in clauses (ii) and (iii), a person or entity is considered to have complied with the requirements of this subsection, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith attempt to comply with the requirements.

(ii) Clause (i) shall not apply if--

(I) the Department of Labor (or another enforcement agency) has explained to the person or entity the basis for the failure;

(II) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure; and

(III) the person or entity has not corrected the failure voluntarily within such period.

(iii) A person or entity that, in the course of an investigation, is found to have violated the prevailing wage requirements set forth in paragraph (1)(A), shall not be assessed fines or other penalties for such violation if the person or entity can establish that the manner in which the prevailing wage was calculated was consistent with recognized industry standards and practices.

(iv) Clauses (i) and (iii) shall not apply to a person or entity that has engaged in or is engaging in a pattern or practice of willful violations of this subsection.

(I) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act (such as the authorities under section 274B [*8 USCS § 1324b*]), or any other Act.

(3) (A) For purposes of this subsection, the term "H-1B-dependent employer" means an employer that--

(i) (I) has 25 or fewer full-time equivalent employees who are employed in the United States; and (II) employs more than 7 H-1B nonimmigrants;

(ii) (I) has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States; and (II) employs more than 12 H-1B nonimmigrants; or

(iii) (I) has at least 51 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(B) For purposes of this subsection--

(i) the term "exempt H-1B nonimmigrant" means an H-1B nonimmigrant who--

(I) receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000; or

(II) has attained a master"s or higher degree (or its equivalent) in a specialty related to the intended employment; and

(ii) the term "nonexempt H-1B nonimmigrant" means an H-1B nonimmigrant who is not an exempt H-1B nonimmigrant.

(C) For purposes of subparagraph (A)--

(i) in computing the number of full-time equivalent employees and the number of H-1B nonimmigrants, exempt H-1B nonimmigrants shall not be taken into account during the longer of--

(I) the 6-month period beginning on the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998]; or

(II) the period beginning on the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998] and ending on the date final regulations are issued to carry out this paragraph; and

(ii) any group treated as a single employer under subsection (b), (c), (m), or (o) of *section 414 of the Internal Revenue Code of 1986* [*26 USCS § 414*] shall be treated as a single employer.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an application with respect to one or more H-1B nonimmigrants by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by

a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C) The term "H-1B nonimmigrant" means an alien admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(B) [*8 USCS § 1101(a)(15)(H)(i)(B)*].

(D) (i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in subparagraph (E) or (F) of paragraph (1)); but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer (or, in the case of a placement of a worker with another employer under paragraph (1)(F), with either employer described in such paragraph) at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(E) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207 [*8 USCS § 1157*], is granted asylum under section 208 [*8 USCS § 1158*], or is an immigrant otherwise authorized, by this Act or by the Attorney General, to be employed.

(5) (A) This paragraph shall apply instead of subparagraphs (A) through (E) of paragraph (2) in the case of a violation described in subparagraph (B), but shall not be construed to limit or affect the authority of the Secretary or the Attorney General with respect to any other violation.

(B) The Attorney General shall establish a process for the receipt, initial review, and disposition in accordance with this paragraph of complaints respecting an employer's failure to meet the condition of paragraph (1)(G)(i)(II) or a petitioner's misrepresentation of material facts with respect to such condition. Complaints may be filed by an aggrieved individual who has submitted a resume or otherwise applied in a reasonable manner for the job that is the subject of the condition. No proceeding shall be conducted under this paragraph on a complaint concerning such a failure or misrepresentation unless the Attorney General determines that the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

(C) If the Attorney General finds that a complaint has been filed in accordance with subparagraph (B) and there is reasonable cause to believe that such a failure or misrepresentation described in such complaint has occurred, the Attorney General shall initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of such Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings. The Attorney General shall pay the fee and expenses of the arbitrator.

(D) (i) The arbitrator shall make findings respecting whether a failure or misrepresentation described in subparagraph (B) occurred. If the arbitrator concludes that failure or misrepresentation was willful, the arbitrator shall make a finding to that effect. The arbitrator may not find such a failure or misrepresentation (or that such a failure or misrepresentation was willful) unless the complainant demonstrates such a failure or misrepresentation (or its willful character) by clear and convincing evidence. The arbitrator shall transmit the findings in the form of a written opinion to the parties to the arbitration and the Attorney General. Such findings shall be final and conclusive, and, except as provided in this subparagraph, no official or court of the United States shall have power or jurisdiction to review any such findings.

(ii) The Attorney General may review and reverse or modify the findings of an arbitrator only on the same bases as an award of an arbitrator may be vacated or modified under section 10 or 11 of title 9, United States Code.

(iii) With respect to the findings of an arbitrator, a court may review only the actions of the Attorney General under clause (ii) and may set aside such actions only on the grounds described in subparagraph (A), (B), or (C) of *section 706(a)(2) of title 5, United States Code*. Notwithstanding any other provision of law, such judicial review may only be brought in an appropriate United States court of appeals.

(E) If the Attorney General receives a finding of an arbitrator under this paragraph that an employer has failed to meet the condition of paragraph (1)(G)(i)(II) or has misrepresented a material fact with respect to such condition, unless the Attorney General reverses or modifies the finding under subparagraph (D)(ii)--

(i) the Attorney General may impose administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation or $5,000 per violation in the case of a willful failure or misrepresentation) as the Attorney General determines to be appropriate; and

(ii) the Attorney General is authorized to not approve petitions filed, with respect to that employer and for aliens to be employed by the employer, under section 204 or 214(c)--

(I) during a period of not more than 1 year; or

(II) in the case of a willful failure or willful misrepresentation, during a period of not more than 2 years.

(F) The Attorney General shall not delegate, to any other employee or official of the Department of Justice, any function of the Attorney General under this paragraph, until 60 days after the Attorney General has submitted a plan for such delegation to the Committees on the Judiciary of the United States House of Representatives and the Senate.

(o) [Terminated]

(p) Computation of prevailing wage level.

(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) in the case of an employee of--

(A) an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 [*8 USCS § 1101(a)*]), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment.

(2) With respect to a professional athlete (as defined in subsection (a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.

(3) The prevailing wage required to be paid pursuant to subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.

(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

(q) Academic honoraria. Any alien admitted under section 101(a)(15)(B) [*8 USCS § 1101(a)(15)(B)*] may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities (lasting not longer than 9 days at any single institution), as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment or expenses from more than 5 institutions or organizations in the previous 6-month period.

(r) Exception for certain alien nurses. Subsection (a)(5)(C) shall not apply to an alien who seeks to enter the United States for the purpose of performing labor as a nurse who presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certified statement from the Commission on Graduates of Foreign Nursing Schools (or an equivalent independent credentialing organization approved for the certification of nurses under subsection (a)(5)(C) by the Attorney General in consultation with the Secretary of Health and Human Services) that--

(1) the alien has a valid and unrestricted license as a nurse in a State where the alien intends to be employed and such State verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(2) the alien has passed the National Council Licensure Examination (NCLEX);

(3) the alien is a graduate of a nursing program--

(A) in which the language of instruction was English;

(B) located in a country--

(i) designated by such commission not later than 30 days after the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999 [enacted Nov. 12, 1999], based on such commission's assessment that the quality of nursing education in that country, and the English language proficiency of those who complete such programs in that country, justify the country's designation; or

(ii) designated on the basis of such an assessment by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection; and

(C) (i) which was in operation on or before the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999 [enacted Nov. 12, 1999]; or

(ii) has been approved by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection.

(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge. In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 501 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (*8 U.S.C. 1641(c)*).

(t) Nonimmigrant professionals; labor attestations.

(1) No alien may be admitted or provided status as a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] in an occupational classification unless the employer has filed with the Secretary of Labor an attestation stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the attestation; and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the attestation--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought; or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which nonimmigrants under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] are sought.

(D) A specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(2) (A) The employer shall make available for public examination, within one working day after the date on which an attestation under this subsection is filed, at the employer's principal place of business or worksite, a copy of each such attestation (and such accompanying documents as are necessary).

(B) (i) The Secretary of Labor shall compile, on a current basis, a list (by employer and by occupational classification) of the attestations filed under this subsection. Such list shall include, with respect to each attestation, the wage rate, number of aliens sought, period of intended employment, and date of need.

(ii) The Secretary of Labor shall make such list available for public examination in Washington, D.C.

(C) The Secretary of Labor shall review an attestation filed under this subsection only for completeness and obvious inaccuracies. Unless the Secretary of Labor finds that an attestation is incomplete or obviously inaccurate, the Secretary of Labor shall provide the certification described in section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] within 7 days of the date of the filing of the attestation.

(3) (A) The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting the failure of an employer to meet a condition specified in an attestation submitted under this subsection or misrepresentation by the employer of material facts in such an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after

the date of the failure or misrepresentation, respectively. The Secretary of Labor shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under the process described in subparagraph (A), the Secretary of Labor shall provide, within 30 days after the date a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary of Labor determines that such a reasonable basis exists, the Secretary of Labor shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with *section 556 of title 5, United States Code*, within 60 days after the date of the determination. If such a hearing is requested, the Secretary of Labor shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary of Labor may consolidate the hearings under this subparagraph on such complaints.

(C) (i) If the Secretary of Labor finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraph (1)(C) or (1)(D), or a misrepresentation of material fact in an attestation--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 204, 214(c), 101(a)(15)(H)(i)(b1), or 101(a)(15)(E)(iii) [*8 USCS § 1154, 1184(c), 1101(a)(15)(H)(i)(b1)*, or *1101(a)(15)(E)(iii)*] during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an attestation, or a violation of clause (iv)--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $5,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 204, 214(c), 101(a)(15)(H)(i)(b1), or 101(a)(15)(E)(iii) [*8 USCS § 1154, 1184(c), 1101(a)(15)(H)(i)(b1)*, or *1101(a)(15)(E)(iii)*] during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary of Labor finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an attestation, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition or application supported by the attestation--

(I) the Secretary of Labor shall notify the Secretary of State and the Secretary of Homeland Security of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $35,000 per violation) as the Secretary of Labor determines to be appropriate; and

(II) the Secretary of State or the Secretary of Homeland Security, as appropriate, shall not approve petitions or applications filed with respect to that employer under section 204, 214(c), 101(a)(15)(H)(i)(b1), or 101(a)(15)(E)(iii) [*8 USCS § 1154, 1184(c), 1101(a)(15)(H)(i)(b1)*, or *1101(a)(15)(E)(iii)*] during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an attestation under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Secretary of Homeland Security shall devise a process under which a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi) (I) It is a violation of this clause for an employer who has filed an attestation under this subsection to require a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] to pay a penalty for ceasing employment with the employer prior to a date agreed to by the

nonimmigrant and the employer. The Secretary of Labor shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary of Labor may impose a civil monetary penalty of $1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii) (I) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] designated as a full-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection and who places a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] designated as a part-time employee in the attestation, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on the attestation consistent with the rate of pay identified on the attestation.

(III) In the case of a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] who has not yet entered into employment with an employer who has had approved an attestation under this subsection with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States, or 60 days after the date the nonimmigrant becomes eligible to work for the employer in the case of a nonimmigrant who is present in the United States on the date of the approval of the attestation filed with the Secretary of Labor.

(IV) This clause does not apply to a failure to pay wages to a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] an established salary practice of the employer, under which the employer pays to nonimmigrants under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this Act to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an attestation under this subsection to fail to offer to a nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*], during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary of Labor finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified in the attestation and required under paragraph (1), the Secretary of Labor shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

(E) The Secretary of Labor may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date on which the employer is found by the Secretary of Labor to have committed a willful failure to meet a condition of paragraph (1) or to have made a willful misrepresentation of material fact in an attestation. The authority of the Secretary of Labor under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(F) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act (such as the authorities under section 274B [*8 USCS § 1324b*]), or any other Act.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the nonimmigrant under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an attestation with respect to one or more nonimmigrants under section 101(a)(15)(H)(i)(b1) [*8 USCS § 1101(a)(15)(H)(i)(b1)*] or section 101(a)(15)(E)(iii) [*8 USCS § 1101(a)(15)(E)(iii)*] by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C) (i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(D) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207 of this *title [8 USCS § 1157*], is granted asylum under section 208 [*8 USCS § 1158*], or is an immigrant otherwise authorized, by this Act or by the Secretary of Homeland Security, to be employed.

[(u)](t) Foreign residence requirement.

(1) Except as provided in paragraph (2), no person admitted under section 101(a)(15)(Q)(ii)(I) [*8 USCS § 1101(a)(15)(Q)(ii)(I)*], or acquiring such status after admission, shall be eligible to apply for nonimmigrant status, an immigrant visa, or permanent residence under this Act until it is established that such person has resided and been physically present in the person's country of nationality or last residence for an aggregate of at least 2 years following departure from the United States.

(2) The Secretary of Homeland Security may waive the requirement of such 2-year foreign residence abroad if the Secretary determines that--

(A) departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or an alien lawfully admitted for permanent residence); or

(B) the admission of the alien is in the public interest or the national interest of the United States.

HISTORY:

(June 27, 1952, ch 477, Title II, Ch 2, § 212, 66 Stat. 182; July 18, 1956, ch 629, Title III, § 301(a), 70 Stat. 575; July 7, 1958, P.L. 85-508, § 23, 72 Stat. 351; March 18, 1959, P.L. 86-3, § 20(b), 73 Stat. 13; July 14, 1960, P.L. 86-648, § 8, 74 Stat. 505; Sept. 21, 1961, P.L. 87-256, § 109(c), 75 Stat. 535; Sept. 26, 1961, P.L. 87-301, §§ 11-15, 75 Stat. 654; Oct. 3, 1965, P.L. 89-236, §§ 10, 15, 79 Stat. 917, 919; April 7, 1970, P.L. 91-225, § 2, 84 Stat. 116; Oct. 12, 1976, P.L. 94-484, Title VI, § 601(a), (c), (d), 90 Stat. 2300, 2301; Oct. 20, 1976, P.L. 94-571, §§ 5, 7(d), 90 Stat. 2705, 2706; Aug. 1, 1977, P.L. 95-83, Title III, 307(q)(1), (2), 91 Stat. 394; Oct. 30, 1978, P.L. 95-549, Title I, §§ 101, 102, 92 Stat. 2065; Sept. 27, 1979, P.L. 96-70, Title III, Ch 2, § 3201(b), 93 Stat. 497; March 17, 1980, P.L. 96-212, Title II, § 203(d), (f), 94 Stat. 107; Dec. 17, 1980, P.L. 96-538, Title IV, § 404, 94 Stat. 3192; Dec. 29, 1981, P.L. 97-116, §§ 4, 5(a), (b), 18(e), 95 Stat. 1611, 1612, 1620; Oct. 5, 1984, P.L. 98-454, Title VI, § 602 [(a)], 98 Stat. 1737; Aug. 27, 1986, P.L. 99-396, § 14(a), 100 Stat. 842; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle M, § 1751(a), 100 Stat. 3207-47; Nov. 10, 1986, P.L. 99-639, § 6(a), 100 Stat. 3543; Nov. 14, 1986, P.L. 99-653, § 7(a), 100 Stat. 3657; Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 220(a)(9), 98 Stat. 2027; Aug. 27, 1986, P.L. 99-396, § 14(a); Nov. 14, 1986, P.L. 99-653, § 7(d)(2); Dec. 22, 1987, P.L. 100-204, Title VIII, § 806(c), 101 Stat. 1399; Oct. 24, 1988, P.L. 100-525, §§ 3(1)(A), 7(c), 8(f)(2), 9(i), 102 Stat. 1614, 2614, 2616, 2617, 2620; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle J, §

7349(a), 102 Stat. 4473; Dec. 18, 1989, P.L. 101-238, § 3(b), 103 Stat. 2100; Feb. 16, 1990, P.L. 101-246, Title I, Part C, § 131(a), (c), 104 Stat. 31; Nov. 29, 1990, P.L. 101-649, Title I, Subtitle E, § 162(e)(1), (f)(2)(B), Title II, Subtitle A, § 202(b), Subtitle B, § 205(c)(3), Title V, Subtitle A, §§ 511(a), 514(a), Title VI, §§ 601(a), (b), (d), 603(a)(19), 104 Stat. 5011, 5012, 5014, 5020, 5052, 5053, 5067, 5075, 5084; Dec. 12, 1991, P.L. 102-232, Title III, §§ 302(e)(6), (9), 303(a)(5)(B), (6), (7)(B), 306(a)(10), (12), 307(a)-(g) , 105 Stat. 1746, 1747, 1751, 1753; June 10, 1993, P.L. 103-43, Title XX, § 2007(a), 107 Stat. 210; Aug. 26, 1994, P.L. 103-317, Title V, § 506(a), 108 Stat. 1765; Sept. 13, 1994, P.L. 103-322, Title XIII, § 130003(b)(1), 108 Stat. 2024; Oct. 25, 1994, P.L. 103-416, Title II, §§ 203(a), 219(e), (z)(1), (5), 220(a), 108 Stat. 4311, 4316, 4318, 4319; April 24, 1996, P.L. 104-132, Title IV, Subtitle B, §§ 411, 412, Subtitle C, § 440(d), 110 Stat. 1268, 1269, 1277; Sept. 30, 1996, P.L. 104-208, Div C, Title I, Subtitle B, § 124(b)(1), Title III, Subtitle A, §§ 301(b)(1), (c)(1), 304(b), 305(c), 306(d), 308(c)(2)(B), (d)(1), (e)(1)(B), (C), (2)(A), (6), (f)(1)(C)-(F), (3)(A), (g)(4)(B), (10)(A), (H), Subtitle B, § 322(a)(2)(B), Subtitle C, §§ 341(a), (b), 342(a), 343, 344(a), 345(a), 346(a), 347(a), 348(a), 349, 351(a), 352(a), 355, Title V, Subtitle B, § 531(a), Title VI, Subtitle A, § 602(a), Subtitle B, §§ 622(b), 624(a), Subtitle E, § 671(e)(3), 110 Stat. 3009-562, 3009-575, 3009-578, 3009-597, 3009-607, 3009-612, 3009-616, 3009-619, 3009-620, 3009-621, 3009-622, 3009-625, 3009-629, 3009-635, 3009-636, 3009-637, 3009-638, 3009-639, 3009-640, 3009-641, 3009-644, 3009-674, 3009-689, 3009-695, 3009-698, 3009-723; Nov. 12, 1997, P.L. 105-73, § 1, 111 Stat. 1459; Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, §§ 412(a)-(c), 413(a)-(e)(1), (f), 415(a), Subtitle C, § 431(a), Div G, Subdiv B, Title XXII, Ch 2, § 2226(a), 112 Stat. 2681-642, 2681-645, 2681-651, 2681-654, 2681-658, 2681-820; Oct. 27, 1998, P.L. 105-292, Title VI, § 604(a), 112 Stat. 2814; Nov. 12, 1999, P.L. 106-95, §§ 2(b), 4(a), 113 Stat. 1312, 1317; Dec. 3, 1999, P.L. 106-120, Title VIII, § 809, 113 Stat. 1632; Oct. 17, 2000, P.L. 106-313, Title I, §§ 106(c)(2), 107(a), 114 Stat. 1254, 1255; Oct. 28, 2000, P.L. 106-386, Div A, §§ 107(e)(3), 111(d), Div B, Title V, §§ 1505(a), (c)(1), (d)-(f), 1513(e), 114 Stat. 1478, 1485, 1525, 1526, 1536; Oct. 30, 2000, P.L. 106-395, Title II, § 201(b)(1), (2), 114 Stat. 1633; Oct. 30, 2000, P.L. 106-396, Title I, § 101(b)(1), 114 Stat. 1638; Oct. 26, 2001, P.L. 107-56, Title IV, Subtitle B, § 411(a), Title X, § 1006(a), 115 Stat. 345, 394; March 13, 2002, P.L. 107-150, § 2(a)(2), 116 Stat. 74; Nov. 2, 2002, P.L. 107-273, Div C, Title I, Subtitle A, § 11018(c), 116 Stat. 1825; Sept. 3, 2003, P.L. 108-77, Title IV, § 402(b), (c), 117 Stat. 940; Dec. 19, 2003, P.L. 108-193, §§ 4(b)(4), 8(a)(2), 117 Stat. 2879, 2886; Dec. 8, 2004, P.L. 108-447, Div J, Title IV, Subtitle B, §§ 422(a), 423, 424(a)(1), (b), 118 Stat. 3353, 3355; Dec. 10, 2004, P.L. 108-449, § 1(b)(2), 118 Stat. 3470; Dec. 17, 2004, P.L. 108-458, Title V, Subtitle E, §§ 5501(a), 5502(a), 5503, 118 Stat. 3740, 3741; May 11, 2005, P.L. 109-13, Div B, Title I, §§ 103(a)-(c), 104, Title V, § 501(d), 119 Stat. 306, 309, 322; Jan. 5, 2006, P.L. 109-162, Title VIII, Subtitle A, § 802, 119 Stat. 3054; Aug. 12, 2006, P.L. 109-271, § 6(b), 120 Stat. 762; Dec. 26, 2007, P.L. 110-161, Div J, Title VI, § 691(a), (c), 121 Stat. 2364, 2365; May 8, 2008, P.L. 110-229, Title VII, Subtitle A, § 702(b)(2), (3), (d), 122 Stat. 860, 862; July 30, 2008, P.L. 110-293, Title III, Subtitle A, § 305, 122 Stat. 2963.)

(As amended Oct. 3, 2008, P.L. 110-340, § 2(b), 122 Stat. 3736; Dec. 23, 2008, P.L. 110-457, Title II, Subtitle C, § 222(f)(1), Subtitle D, § 234, 122 Stat. 5071, 5074.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act June 27, 1952, ch 477, popularly known as the Immigration and Nationality Act, which appears generally as *8 USCS §§ 1101* et seq. For full classification of such Act, consult USCS Tables volumes.

"Section 214(l)", referred to in subsec. (a)(6)(G), relating to public school studies, was redesignated subsec. (m) of § 214 by § 107(e)(2)(A) of Act Oct. 28, 2000, P.L. 106-386.

The "proviso" referred to in subsec. (d)(7) probably refers to a proviso that was removed from such paragraph by § 20(b) of Act March 18, 1959, P.L. 86-3.

With respect to the Committee on Foreign Affairs of the House of Representatives, referred to in this section, § 1(a)(5) of Act June 3, 1995, P.L. 104-14, which appears as a note preceding *2 USCS § 21*, provides that any reference to such Committee in any provision of law enacted before January 4, 1995, shall be treated as referring to the Committee on International Relations of the House of Representatives.

Explanatory notes:

The bracketed section number "240B" has been inserted in subsec. (a)(9)(B)(i)(I) as the section reference probably intended by Congress, as such section relates to voluntarily departure. Such section appears as *8 USCS § 1229c.*

The bracketed words "ineligible for" have been inserted in subsec. (b)(1)(B) to indicate the probable intent of Congress to include such words.

The bracketed section number "233(c)" has been inserted in subsec. (d) on the authority of § 308(g)(1) of Act Sept. 30, 1996, P.L. 104-208, which appears as a note to this section.

The bracketed word "in" has been inserted in subsec. (d)(3)(B)(i) to indicate the probable intent of Congress to include such word.

The bracketed word "Secretary's" has been inserted in subsec. (d)(13)(B) and (d)(14) as the word probably intended by Congress.

The bracketed close parenthesis has been inserted in subsec. (d)(13)(B)(ii) as the punctuation probably intended by Congress.

The bracketed title "Director of the United States Information Agency" has been inserted in subsec. (e) of this section on the authority of Reorg. Plan No. 2 of 1977, § 7(a)(8), *42 Fed. Reg. 62461,* 91 Stat. 1637, which appears as *5 USCS § 903* note, and Act Aug. 24, 1982, P.L. 97-241, Title III, § 303(a), which appears as *22 USCS § 1461* note. See the Transfer of functions notes to this section.

The words "and before" have been enclosed in brackets in subsec. (n)(1)(E)(ii) to indicate the probable intent of Congress to delete them.

The bracketed word "or" has been insert in subsec. (n)(2)(G)(i) as the word probably intended by Congress.

The bracketed word "clause" has been inserted in subsec. (n)(2)(G)(vii) as the word probably intended by Congress.

The bracketed subsection designator "(u)" has been inserted in order to maintain alphabetical continuity.

Subsec. (j)(3) of this section, which has been omitted, terminated effective May 15, 2000, pursuant to § 3003 of Act Dec. 21, 1995, P.L. 104-66, which appears as *31 USCS § 1113* note (see also page 193 of House Document No. 103-7). Such subsection required the Director of the United States Information Agency to transmit an annual report to Congress on aliens submitting affidavits described in subsection (j)(1)(E) of this section.

The subsection designation "(a)" has been inserted in brackets in the history line of this section because such designation was omitted from § 602 of Act Oct. 5, 1984, P.L. 98-454 (subsec. (b) of which amended *8 USCS § 1184*).

Effective date of section:

This section became effective at 12:01 ante meridian United States Eastern Standard Time on the 180th day immediately following enactment, as provided by § 407 of Act June 27, 1952, ch 477, which appears as *8 USCS § 1101* note.

Amendments:

1956. Act July 18, 1956, (effective 7/19/56, as provided by § 401 of such Act), in subsec. (a)(23), inserted ", or a conspiracy to violate," in two places and "possession of or".

1958. Act July 7, 1958, in subsec. (d)(7), deleted "Alaska,".

1959. Act March 18, 1959, in subsec. (d)(7), deleted "Hawaii," and ": Provided, That persons who were admitted to Hawaii under the last sentence of section 8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of section 101(a)(27) of this Act, other than subparagraph (C) thereof, or unless they were admitted to Hawaii with an immigration visa".

1960. Act July 14, 1960, in subsec. (a)(23), inserted "or marihuana" following "narcotic drugs".

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Honorio Moreno Herrera** Case No.: **S171895**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 18, 2009, I served the attached **RESPONDENT'S MOTION FOR JUDICIAL NOTICE WITH ATTACHED EXHIBITS "A" AND "B"** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Waldemar D. Halka Attorney at Law P.O. Box 99965 San Diego, CA 92169 *Attorney for Appellant* *Honorio M. Herrera* (two copies)	Court of Appeal Fourth Appellate District, Division Three 925 North Spurgeon St. Santa Ana, CA 92701
Hon. Daniel J. Didier Orange County Superior Court Central Justice Center 700 Civic Center Drive West Santa Ana, CA 92701	Tony Rackauckas, District Attorney Orange County District Attorney's Office 401 Civic Center Drive West Santa Ana, CA 92701
Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101	

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 18, 2009, at San Diego, California.

G. Nolan
Declarant


Signature