''(2) pursuant to such approval, timely filed before the date of the enactment of this Act [Nov. 2, 2002] an application for adjustment of status under section 245 of such Act (8 U.S.C. 1255) or an application for an immigrant visa under section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)); and

''(3) is not inadmissible or deportable on any ground.

''(c) TREATMENT OF CERTAIN APPLICATIONS.—

''(1) REVOCATION OF APPROVAL OF PETITIONS.—If the Attorney General revoked the approval of a petition described in subsection (b)(1), such revocation shall be disregarded for purposes of this section if it was based on a determination that the alien failed to satisfy section 203(b)(5)(A)(ii) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)(A)(ii)).

''(2) APPLICATIONS NO LONGER PENDING.—

''(A) IN GENERAL.—If an application described in subsection (b)(2) is not pending on the date of the enactment of this Act [Nov. 2, 2002], the Attorney General shall disregard the circumstances leading to such lack of pendency and treat it as reopened, if such lack of pendency is due to a determination that the alien—

''(i) failed to satisfy section 203(b)(5)(A)(ii) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)(A)(ii)); or

''(ii) departed the United States without advance parole.

''(B) APPLICANTS ABROAD.—In the case of an eligible alien who filed an application for adjustment of status described in subsection (b)(2), but who is no longer physically present in the United States, the Attorney General shall establish a process under which the alien may be paroled into the United States if necessary in order to obtain adjustment of status under this section.

''(d) RECORDATION OF DATE; REDUCTION OF NUMBERS.—Upon the approval of an application under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence on a conditional basis as of the date of such approval and the Secretary of State shall reduce by one the number of visas authorized to be issued under sections 201(d) and 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1151(d) and 1153(b)(5)) for the fiscal year then current.

''(e) REMOVAL OF CONDITIONAL BASIS.—

''(1) PETITION.—In order for a conditional basis established under this section for an alien (and the alien's spouse and children) to be removed, the alien must satisfy the requirements of section 216A(c)(1) of the Immigration and Nationality Act (8 U.S.C. 1186b(c)(1)), including the submission of a petition in accordance with subparagraph (A) of such section. Such petition may include the facts and information described in subparagraphs (A) and (B) of section 216A(d)(1) of the Immigration and Nationality Act (8 U.S.C. 1186b(d)(1)) with respect to any commercial enterprise (regardless of whether such enterprise is a limited partnership and regardless of whether the alien entered the enterprise after its formation) in the United States in which the alien has made a capital investment at any time.

''(2) DETERMINATION.—In carrying out section 216A(c)(3) of the Immigration and Nationality Act (8 U.S.C. 1186b(c)(3)) with respect to an alien described in paragraph (1), the Attorney General, in lieu of the determination described in such section 216A(c)(3), shall make a determination, within 90 days of the date of such filing, whether—

''(A) the petition described in paragraph (1) contains any material misrepresentation in the facts and information alleged in the petition with respect to the commercial enterprises included in the petition;

''(B) subject to subparagraphs (B) and (C) of section 11031(c)(1), all such enterprises, considered together, created full-time jobs for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the alien and the alien's spouse, sons, or daughters), and those jobs exist or existed on either of the dates described in paragraph (3); and

''(C) considering the alien's investments in such enterprises on either of the dates described in paragraph (3), or on both such dates, the alien is or was in substantial compliance with the capital investment requirement described in section 216A(d)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1186b(d)(1)(B)).

''(3) DATES.—The dates described in this paragraph are the following:

''(A) The date on which the application described in subsection (b)(2) was filed.

''(B) The date on which the determination under paragraph (2) is made.

''(f) CLARIFICATION WITH RESPECT TO CHILDREN.—In the case of an alien who was a child on the date on which the application described in subsection (b)(2) was filed, the alien shall be considered to be a child for purposes of this section regardless of any change in age or marital status after such date.

''SEC. 11033. REGULATIONS.

''The Immigration and Naturalization Service shall promulgate regulations to implement this chapter [chapter 1 (§§ 11031–11034) of subtitle B of title I of div. C of Pub. L. 107–273, enacting this note] not later than 120 days after the date of enactment of this Act [Nov. 2, 2002]. Until such regulations are promulgated, the Attorney General shall not deny a petition filed or pending under section 216A(c)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1186b(c)(1)(A)) that relates to an eligible alien described in section 11031, or on an application filed or pending under section 245 of such Act (8 U.S.C. 1255) that relates to an eligible alien described in section 11032. Until such regulations are promulgated, the Attorney General shall not initiate or proceed with removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a) that relate to an eligible alien described in section 11031 or 11032.

''SEC. 11034. DEFINITIONS.

''Except as otherwise provided, the terms used in this chapter shall have the meaning given such terms in section 101(b) of the Immigration and Nationality Act (8 U.S.C. 1101(b)).''

§ 1187. Visa waiver program for certain visitors

(a) Establishment of program

The Attorney General and the Secretary of State are authorized to establish a program (hereinafter in this section referred to as the ''program'') under which the requirement of paragraph (7)(B)(i)(II) of section 1182(a) of this title may be waived by the Attorney General, in consultation with the Secretary of State and in accordance with this section, in the case of an alien who meets the following requirements:

(1) Seeking entry as tourist for 90 days or less

The alien is applying for admission during the program as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) for a period not exceeding 90 days.

(2) National of program country

The alien is a national of, and presents a passport issued by, a country which—

(A) extends (or agrees to extend), either on its own or in conjunction with one or more other countries that are described in subparagraph (B) and that have established with it a common area for immigration admis-

sions, reciprocal privileges to citizens and nationals of the United States, and

(B) is designated as a pilot program country under subsection (c) of this section.

(3) Machine readable passport

(A) In general

Except as provided in subparagraph (B), on or after October 1, 2003, the alien at the time of application for admission is in possession of a valid unexpired machine-readable passport that satisfies the internationally accepted standard for machine readability.

(B) Limited waiver authority

For the period beginning October 1, 2003, and ending September 30, 2007, the Secretary of State may waive the requirement of subparagraph (A) with respect to nationals of a program country (as designated under subsection (c) of this section), if the Secretary of State finds that the program country—

(i) is making progress toward ensuring that passports meeting the requirement of subparagraph (A) are generally available to its nationals; and

(ii) has taken appropriate measures to protect against misuse of passports the country has issued that do not meet the requirement of subparagraph (A).

(4) Executes immigration forms

The alien before the time of such admission completes such immigration form as the Attorney General shall establish.

(5) Entry into the United States

If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier, including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations[1] which has entered into an agreement with the Attorney General pursuant to subsection (e) of this section. The Attorney General is authorized to require a carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a domestic corporation conducting operations under part 91 of that title, to give suitable and proper bond, in such reasonable amount and containing such conditions as the Attorney General may deem sufficient to ensure compliance with the indemnification requirements of this section, as a term of such an agreement.

(6) Not a safety threat

The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(7) No previous violation

If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

[1] So in original. Probably should be followed by a comma.

(8) Round-trip ticket

The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Attorney General under regulations or the alien is arriving at the port of entry on an aircraft operated under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations).

(9) Automated system check

The identity of the alien has been checked using an automated electronic database containing information about the inadmissibility of aliens to uncover any grounds on which the alien may be inadmissible to the United States, and no such ground has been found.

(10) Electronic transmission of identification information

Operators of aircraft under part 135 of title 14, Code of Federal Regulations, or operators of noncommercial aircraft that are owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, carrying any alien passenger who will apply for admission under this section shall furnish such information as the Attorney General by regulation shall prescribe as necessary for the identification of any alien passenger being transported and for the enforcement of the immigration laws. Such information shall be electronically transmitted not less than one hour prior to arrival at the port of entry for purposes of checking for inadmissibility using the automated electronic database.

(11) Eligibility determination under the electronic travel authorization system

Beginning on the date on which the electronic travel authorization system developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States. Upon review of such biographical information, the Secretary of Homeland Security shall determine whether the alien is eligible to travel to the United States under the program.

(b) Waiver of rights

An alien may not be provided a waiver under the program unless the alien has waived any right—

(1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

(c) Designation of program countries

(1) In general

The Attorney General, in consultation with the Secretary of State, may designate any country as a program country if it meets the requirements of paragraph (2).

(2) Qualifications

Except as provided in subsection (f) of this section, a country may not be designated as a program country unless the following requirements are met:

(A) Low nonimmigrant visa refusal rate

Either—

(i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during—

(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and

(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or

(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.

(B) Machine readable passport program

(i) In general

Subject to clause (ii), the government of the country certifies that it issues to its citizens machine-readable passports that satisfy the internationally accepted standard for machine readability.

(ii) Deadline for compliance for certain countries

In the case of a country designated as a program country under this subsection prior to May 1, 2000, as a condition on the continuation of that designation, the country—

(I) shall certify, not later than October 1, 2000, that it has a program to issue machine-readable passports to its citizens not later than October 1, 2003; and

(II) shall satisfy the requirement of clause (i) not later than October 1, 2003.

(C) Law enforcement and security interests

The Attorney General, in consultation with the Secretary of State—

(i) evaluates the effect that the country's designation would have on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(ii) determines that such interests would not be compromised by the designation of the country; and

(iii) submits a written report to the Committee on the Judiciary and the Committee on International Relations of the House of Representatives and the Committee on the Judiciary and the Committee on Foreign Relations of the Senate regarding the country's qualification for designation that includes an explanation of such determination.

(D) Reporting lost and stolen passports

The government of the country enters into an agreement with the United States to report, or make available through Interpol or other means as designated by the Secretary of Homeland Security, to the United States Government information about the theft or loss of passports within a strict time limit and in a manner specified in the agreement.

(E) Repatriation of aliens

The government of the country accepts for repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued not later than three weeks after the issuance of the final order of removal. Nothing in this subparagraph creates any duty for the United States or any right for any alien with respect to removal or release. Nothing in this subparagraph gives rise to any cause of action or claim under this paragraph or any other law against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(F) Passenger information exchange

The government of the country enters into an agreement with the United States to share information regarding whether citizens and nationals of that country traveling to the United States represent a threat to the security or welfare of the United States or its citizens.

(3) Continuing and subsequent qualifications

For each fiscal year after the initial period—

(A) Continuing qualification

In the case of a country which was a program country in the previous fiscal year, a country may not be designated as a program country unless the sum of—

(i) the total of the number of nationals of that country who were denied admission at the time of arrival or withdrew their application for admission during such previous fiscal year as a nonimmigrant visitor, and

(ii) the total number of nationals of that country who were admitted as nonimmigrant visitors during such previous fiscal year and who violated the terms of such admission,

was less than 2 percent of the total number of nationals of that country who applied for admission as nonimmigrant visitors during such previous fiscal year.

(B) New countries

In the case of another country, the country may not be designated as a program

country unless the following requirements are met:

(i) Low nonimmigrant visa refusal rate in previous 2-year period

The average number of refusals of nonimmigrant visitor visas for nationals of that country during the two previous full fiscal years was less than 2 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years.

(ii) Low nonimmigrant visa refusal rate in each of the 2 previous years

The average number of refusals of nonimmigrant visitor visas for nationals of that country during either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year.

(4) Initial period

For purposes of paragraphs (2) and (3), the term ''initial period'' means the period beginning at the end of the 30-day period described in subsection (b)(1) of this section and ending on the last day of the first fiscal year which begins after such 30-day period.

(5) Written reports on continuing qualification; designation terminations

(A) Periodic evaluations

(i) In general

The Secretary of Homeland Security, in consultation with the Secretary of State, periodically (but not less than once every 2 years)—

(I) shall evaluate the effect of each program country's continued designation on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(II) shall determine, based upon the evaluation in subclause (I), whether any such designation ought to be continued or terminated under subsection (d) of this section;

(III) shall submit a written report to the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Homeland Security, of the House of Representatives and the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs of the Senate regarding the continuation or termination of the country's designation that includes an explanation of such determination and the effects described in subclause (I); and

(IV) shall submit to Congress a report regarding the implementation of the electronic travel authorization system under subsection (h)(3) and the participation of new countries in the program through a waiver under paragraph (8).

(ii) Effective date

A termination of the designation of a country under this subparagraph shall take effect on the date determined by the Secretary of Homeland Security, in consultation with the Secretary of State.

(iii) Redesignation

In the case of a termination under this subparagraph, the Secretary of Homeland Security shall redesignate the country as a program country, without regard to subsection (f) of this section or paragraph (2) or (3), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that all causes of the termination have been eliminated.

(B) Emergency termination

(i) In general

In the case of a program country in which an emergency occurs that the Secretary of Homeland Security, in consultation with the Secretary of State, determines threatens the law enforcement or security interests of the United States (including the interest in enforcement of the immigration laws of the United States), the Secretary of Homeland Security shall immediately terminate the designation of the country as a program country.

(ii) Definition

For purposes of clause (i), the term ''emergency'' means—

(I) the overthrow of a democratically elected government;

(II) war (including undeclared war, civil war, or other military activity) on the territory of the program country;

(III) a severe breakdown in law and order affecting a significant portion of the program country's territory;

(IV) a severe economic collapse in the program country; or

(V) any other extraordinary event in the program country that threatens the law enforcement or security interests of the United States (including the interest in enforcement of the immigration laws of the United States) and where the country's participation in the program could contribute to that threat.

(iii) Redesignation

The Secretary of Homeland Security may redesignate the country as a program country, without regard to subsection (f) of this section or paragraph (2) or (3), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that—

(I) at least 6 months have elapsed since the effective date of the termination;

(II) the emergency that caused the termination has ended; and

(III) the average number of refusals of nonimmigrant visitor visas for nationals

of that country during the period of termination under this subparagraph was less than 3.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during such period.

(iv) Program suspension authority

The Director of National Intelligence shall immediately inform the Secretary of Homeland Security of any current and credible threat which poses an imminent danger to the United States or its citizens and originates from a country participating in the visa waiver program. Upon receiving such notification, the Secretary, in consultation with the Secretary of State—

(I) may suspend a country from the visa waiver program without prior notice;

(II) shall notify any country suspended under subclause (I) and, to the extent practicable without disclosing sensitive intelligence sources and methods, provide justification for the suspension; and

(III) shall restore the suspended country's participation in the visa waiver program upon a determination that the threat no longer poses an imminent danger to the United States or its citizens.

(C) Treatment of nationals after termination

For purposes of this paragraph—

(i) nationals of a country whose designation is terminated under subparagraph (A) or (B) shall remain eligible for a waiver under subsection (a) of this section until the effective date of such termination; and

(ii) a waiver under this section that is provided to such a national for a period described in subsection (a)(1) of this section shall not, by such termination, be deemed to have been rescinded or otherwise rendered invalid, if the waiver is granted prior to such termination.

(6) Computation of visa refusal rates

For purposes of determining the eligibility of a country to be designated as a program country, the calculation of visa refusal rates shall not include any visa refusals which incorporate any procedures based on, or are otherwise based on, race, sex, or disability, unless otherwise specifically authorized by law or regulation. No court shall have jurisdiction under this paragraph to review any visa refusal, the denial of admission to the United States of any alien by the Attorney General, the Secretary's computation of the visa refusal rate, or the designation or nondesignation of any country.

(7) Visa waiver information

(A) In general

In refusing the application of nationals of a program country for United States visas, or the applications of nationals of a country seeking entry into the visa waiver program, a consular officer shall not knowingly or intentionally classify the refusal of the visa under a category that is not included in the calculation of the visa refusal rate only so that the percentage of that country's visa refusals is less than the percentage limitation applicable to qualification for participation in the visa waiver program.

(B) Reporting requirement

On May 1 of each year, for each country under consideration for inclusion in the visa waiver program, the Secretary of State shall provide to the appropriate congressional committees—

(i) the total number of nationals of that country that applied for United States visas in that country during the previous calendar year;

(ii) the total number of such nationals who received United States visas during the previous calendar year;

(iii) the total number of such nationals who were refused United States visas during the previous calendar year;

(iv) the total number of such nationals who were refused United States visas during the previous calendar year under each provision of this chapter under which the visas were refused; and

(v) the number of such nationals that were refused under section 1184(b) of this title as a percentage of the visas that were issued to such nationals.

(C) Certification

Not later than May 1 of each year, the United States chief of mission, acting or permanent, to each country under consideration for inclusion in the visa waiver program shall certify to the appropriate congressional committees that the information described in subparagraph (B) is accurate and provide a copy of that certification to those committees.

(D) Consideration of countries in the visa waiver program

Upon notification to the Attorney General that a country is under consideration for inclusion in the visa waiver program, the Secretary of State shall provide all of the information described in subparagraph (B) to the Attorney General.

(E) Definition

In this paragraph, the term ''appropriate congressional committees'' means the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on International Relations of the House of Representatives.

(8) Nonimmigrant visa refusal rate flexibility

(A) Certification

(i) In general

On the date on which an air exit system is in place that can verify the departure of not less than 97 percent of foreign nationals who exit through airports of the United States and the electronic travel authorization system required under subsection (h)(3) is fully operational, the Secretary of Homeland Security shall certify to Congress that such air exit system and elec-

tronic travel authorization system are in place.

(ii) Notification to Congress

The Secretary shall notify Congress in writing of the date on which the air exit system under clause (i) fully satisfies the biometric requirements specified in subsection (i).

(iii) Temporary suspension of waiver authority

Notwithstanding any certification made under clause (i), if the Secretary has not notified Congress in accordance with clause (ii) by June 30, 2009, the Secretary's waiver authority under subparagraph (B) shall be suspended beginning on July 1, 2009, until such time as the Secretary makes such notification.

(iv) Rule of construction

Nothing in this paragraph shall be construed as in any way abrogating the reporting requirements under subsection (i)(3).

(B) Waiver

After certification by the Secretary under subparagraph (A), the Secretary, in consultation with the Secretary of State, may waive the application of paragraph (2)(A) for a country if—

(i) the country meets all security requirements of this section;

(ii) the Secretary of Homeland Security determines that the totality of the country's security risk mitigation measures provide assurance that the country's participation in the program would not compromise the law enforcement, security interests, or enforcement of the immigration laws of the United States;

(iii) there has been a sustained reduction in the rate of refusals for nonimmigrant visas for nationals of the country and conditions exist to continue such reduction;

(iv) the country cooperated with the Government of the United States on counterterrorism initiatives, information sharing, and preventing terrorist travel before the date of its designation as a program country, and the Secretary of Homeland Security and the Secretary of State determine that such cooperation will continue; and

(v)(I) the rate of refusals for nonimmigrant visitor visas for nationals of the country during the previous full fiscal year was not more than ten percent; or

(II) the visa overstay rate for the country for the previous full fiscal year does not exceed the maximum visa overstay rate, once such rate is established under subparagraph (C).

(C) Maximum visa overstay rate

(i) Requirement to establish

After certification by the Secretary under subparagraph (A), the Secretary and the Secretary of State jointly shall use information from the air exit system referred to in such subparagraph to establish a maximum visa overstay rate for countries participating in the program pursuant to a waiver under subparagraph (B). The Secretary of Homeland Security shall certify to Congress that such rate would not compromise the law enforcement, security interests, or enforcement of the immigration laws of the United States.

(ii) Visa overstay rate defined

In this paragraph the term ''visa overstay rate'' means, with respect to a country, the ratio of—

(I) the total number of nationals of that country who were admitted to the United States on the basis of a nonimmigrant visa whose periods of authorized stays ended during a fiscal year but who remained unlawfully in the United States beyond such periods; to

(II) the total number of nationals of that country who were admitted to the United States on the basis of a nonimmigrant visa during that fiscal year.

(iii) Report and publication

The Secretary of Homeland Security shall on the same date submit to Congress and publish in the Federal Register information relating to the maximum visa overstay rate established under clause (i). Not later than 60 days after such date, the Secretary shall issue a final maximum visa overstay rate above which a country may not participate in the program.

(9) Discretionary security-related considerations

In determining whether to waive the application of paragraph (2)(A) for a country, pursuant to paragraph (8), the Secretary of Homeland Security, in consultation with the Secretary of State, shall take into consideration other factors affecting the security of the United States, including—

(A) airport security standards in the country;

(B) whether the country assists in the operation of an effective air marshal program;

(C) the standards of passports and travel documents issued by the country; and

(D) other security-related factors, including the country's cooperation with the United States' initiatives toward combating terrorism and the country's cooperation with the United States intelligence community in sharing information regarding terrorist threats.

(10) Technical assistance

The Secretary of Homeland Security, in consultation with the Secretary of State, shall provide technical assistance to program countries to assist those countries in meeting the requirements under this section. The Secretary of Homeland Security shall ensure that the program office within the Department of Homeland Security is adequately staffed and has resources to be able to provide such technical assistance, in addition to its duties to effectively monitor compliance of the countries

participating in the program with all the requirements of the program.

(11) Independent review

(A) In general

Prior to the admission of a new country into the program under this section, and in conjunction with the periodic evaluations required under subsection (c)(5)(A), the Director of National Intelligence shall conduct an independent intelligence assessment of a nominated country and member of the program.

(B) Reporting requirement

The Director shall provide to the Secretary of Homeland Security, the Secretary of State, and the Attorney General the independent intelligence assessment required under subparagraph (A).

(C) Contents

The independent intelligence assessment conducted by the Director shall include—

(i) a review of all current, credible terrorist threats of the subject country;

(ii) an evaluation of the subject country's counterterrorism efforts;

(iii) an evaluation as to the extent of the country's sharing of information beneficial to suppressing terrorist movements, financing, or actions;

(iv) an assessment of the risks associated with including the subject country in the program; and

(v) recommendations to mitigate the risks identified in clause (iv).

(d) Authority

Notwithstanding any other provision of this section, the Secretary of Homeland Security, in consultation with the Secretary of State, may for any reason (including national security) refrain from waiving the visa requirement in respect to nationals of any country which may otherwise qualify for designation or may, at any time, rescind any waiver or designation previously granted under this section. The Secretary of Homeland Security may not waive any eligibility requirement under this section unless the Secretary notifies, with respect to the House of Representatives, the Committee on Homeland Security, the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Appropriations, and with respect to the Senate, the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Appropriations not later than 30 days before the effective date of such waiver.

(e) Carrier agreements

(1) In general

The agreement referred to in subsection (a)(4) of this section is an agreement between a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title and the Attorney General under which the carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title agrees, in consideration of the waiver of the visa requirement with respect to a nonimmigrant visitor under the program—

(A) to indemnify the United States against any costs for the transportation of the alien from the United States if the visitor is refused admission to the United States or remains in the United States unlawfully after the 90-day period described in subsection (a)(1)(A) of this section,

(B) to submit daily to immigration officers any immigration forms received with respect to nonimmigrant visitors provided a waiver under the program,

(C) to be subject to the imposition of fines resulting from the transporting into the United States of a national of a designated country without a passport pursuant to regulations promulgated by the Attorney General, and

(D) to collect, provide, and share passenger data as required under subsection (h)(1)(B) of this section.

(2) Termination of agreements

The Attorney General may terminate an agreement under paragraph (1) with five days' notice to the carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title for the failure by a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title to meet the terms of such agreement.

(3) Business aircraft requirements

(A) In general

For purposes of this section, a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations[2] that owns or operates a noncommercial aircraft is a corporation that is organized under the laws of any of the States of the United States or the District of Columbia and is accredited by or a member of a national organization that sets business aviation standards. The Attorney General shall prescribe by regulation the provision of such information as the Attorney General deems necessary to identify the domestic corporation, its officers, employees, shareholders, its place of business, and its business activities.

(B) Collections

In addition to any other fee authorized by law, the Attorney General is authorized to charge and collect, on a periodic basis, an amount from each domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, for nonimmigrant visa waiver admissions on noncommercial aircraft owned or operated by such domestic corporation equal to the total

[2] So in original. Probably should be followed by a comma.

amount of fees assessed for issuance of nonimmigrant visa waiver arrival/departure forms at land border ports of entry. All fees collected under this paragraph shall be deposited into the Immigration User Fee Account established under section 1356(h) of this title.

(f) Duration and termination of designation

(1) In general

(A) Determination and notification of disqualification rate

Upon determination by the Attorney General that a program country's disqualification rate is 2 percent or more, the Attorney General shall notify the Secretary of State.

(B) Probationary status

If the program country's disqualification rate is greater than 2 percent but less than 3.5 percent, the Attorney General shall place the program country in probationary status for a period not to exceed 2 full fiscal years following the year in which the determination under subparagraph (A) is made.

(C) Termination of designation

Subject to paragraph (3), if the program country's disqualification rate is 3.5 percent or more, the Attorney General shall terminate the country's designation as a program country effective at the beginning of the second fiscal year following the fiscal year in which the determination under subparagraph (A) is made.

(2) Termination of probationary status

(A) In general

If the Attorney General determines at the end of the probationary period described in paragraph (1)(B) that the program country placed in probationary status under such paragraph has failed to develop a machine-readable passport program as required by section[3] (c)(2)(C) of this section, or has a disqualification rate of 2 percent or more, the Attorney General shall terminate the designation of the country as a program country. If the Attorney General determines that the program country has developed a machine-readable passport program and has a disqualification rate of less than 2 percent, the Attorney General shall redesignate the country as a program country.

(B) Effective date

A termination of the designation of a country under subparagraph (A) shall take effect on the first day of the first fiscal year following the fiscal year in which the determination under such subparagraph is made. Until such date, nationals of the country shall remain eligible for a waiver under subsection (a) of this section.

(3) Nonapplicability of certain provisions

Paragraph (1)(C) shall not apply unless the total number of nationals of a program country described in paragraph (4)(A) exceeds 100.

(4) "Disqualification rate" defined

For purposes of this subsection, the term ''disqualification rate'' means the percentage which—

(A) the total number of nationals of the program country who were—

(i) denied admission at the time of arrival or withdrew their application for admission during the most recent fiscal year for which data are available; and

(ii) admitted as nonimmigrant visitors during such fiscal year and who violated the terms of such admission; bears to

(B) the total number of nationals of such country who applied for admission as nonimmigrant visitors during such fiscal year.

(5) Failure to report passport thefts

If the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not reporting the theft or loss of passports, as required by subsection (c)(2)(D) of this section, the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(g) Visa application sole method to dispute denial of waiver based on a ground of inadmissibility

In the case of an alien denied a waiver under the program by reason of a ground of inadmissibility described in section 1182(a) of this title that is discovered at the time of the alien's application for the waiver or through the use of an automated electronic database required under subsection (a)(9) of this section, the alien may apply for a visa at an appropriate consular office outside the United States. There shall be no other means of administrative or judicial review of such a denial, and no court or person otherwise shall have jurisdiction to consider any claim attacking the validity of such a denial.

(h) Use of information technology systems

(1) Automated entry-exit control system

(A) System

Not later than October 1, 2001, the Attorney General shall develop and implement a fully automated entry and exit control system that will collect a record of arrival and departure for every alien who arrives and departs by sea or air at a port of entry into the United States and is provided a waiver under the program.

(B) Requirements

The system under subparagraph (A) shall satisfy the following requirements:

(i) Data collection by carriers

Not later than October 1, 2001, the records of arrival and departure described in subparagraph (A) shall be based, to the maximum extent practicable, on passenger data collected and electronically transmitted to the automated entry and exit control system by each carrier that has an agreement under subsection (a)(4) of this section.

(ii) Data provision by carriers

Not later than October 1, 2002, no waiver may be provided under this section to an

[3] So in original. Probably should be ''subsection''.

alien arriving by sea or air at a port of entry into the United States on a carrier unless the carrier is electronically transmitting to the automated entry and exit control system passenger data determined by the Attorney General to be sufficient to permit the Attorney General to carry out this paragraph.

(iii) Calculation

The system shall contain sufficient data to permit the Attorney General to calculate, for each program country and each fiscal year, the portion of nationals of that country who are described in subparagraph (A) and for whom no record of departure exists, expressed as a percentage of the total number of such nationals who are so described.

(C) Reporting

(i) Percentage of nationals lacking departure record

As part of the annual report required to be submitted under section 1365a(e)(1) of this title, the Attorney General shall include a section containing the calculation described in subparagraph (B)(iii) for each program country for the previous fiscal year, together with an analysis of that information.

(ii) System effectiveness

Not later than December 31, 2004, the Attorney General shall submit a written report to the Committee on the Judiciary of the United States House of Representatives and of the Senate containing the following:

(I) The conclusions of the Attorney General regarding the effectiveness of the automated entry and exit control system to be developed and implemented under this paragraph.

(II) The recommendations of the Attorney General regarding the use of the calculation described in subparagraph (B)(iii) as a basis for evaluating whether to terminate or continue the designation of a country as a program country.

The report required by this clause may be combined with the annual report required to be submitted on that date under section 1365a(e)(1) of this title.

(2) Automated data sharing system

(A) System

The Attorney General and the Secretary of State shall develop and implement an automated data sharing system that will permit them to share data in electronic form from their respective records systems regarding the admissibility of aliens who are nationals of a program country.

(B) Requirements

The system under subparagraph (A) shall satisfy the following requirements:

(i) Supplying information to immigration officers conducting inspections at ports of entry

Not later than October 1, 2002, the system shall enable immigration officers conducting inspections at ports of entry under section 1225 of this title to obtain from the system, with respect to aliens seeking a waiver under the program—

(I) any photograph of the alien that may be contained in the records of the Department of State or the Service; and

(II) information on whether the alien has ever been determined to be ineligible to receive a visa or ineligible to be admitted to the United States.

(ii) Supplying photographs of inadmissible aliens

The system shall permit the Attorney General electronically to obtain any photograph contained in the records of the Secretary of State pertaining to an alien who is a national of a program country and has been determined to be ineligible to receive a visa.

(iii) Maintaining records on applications for admission

The system shall maintain, for a minimum of 10 years, information about each application for admission made by an alien seeking a waiver under the program, including the following:

(I) The name or Service identification number of each immigration officer conducting the inspection of the alien at the port of entry.

(II) Any information described in clause (i) that is obtained from the system by any such officer.

(III) The results of the application.

(3) Electronic travel authorization system

(A) System

The Secretary of Homeland Security, in consultation with the Secretary of State, shall develop and implement a fully automated electronic travel authorization system (referred to in this paragraph as the ''System'') to collect such biographical and other information as the Secretary of Homeland Security determines necessary to determine, in advance of travel, the eligibility of, and whether there exists a law enforcement or security risk in permitting, the[4] alien to travel to the United States.

(B) Fees

(i) In general

No later than 6 months after March 4, 2010, the Secretary of Homeland Security shall establish a fee for the use of the System and begin assessment and collection of that fee. The initial fee shall be the sum of—

(I) $10 per travel authorization; and

(II) an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary.

(ii) Disposition of amounts collected

Amounts collected under clause (i)(I) shall be credited to the Travel Promotion

[4] So in original. Probably should be ''an''.

Fund established by subsection (d) of section 2131 of title 22. Amounts collected under clause (i)(II) shall be transferred to the general fund of the Treasury and made available to pay the costs incurred to administer the System.

(iii) Sunset of Travel Promotion Fund fee

The Secretary may not collect the fee authorized by clause (i)(I) for fiscal years beginning after September 30, 2020.

(C) Validity

(i) Period

The Secretary of Homeland Security, in consultation with the Secretary of State, shall prescribe regulations that provide for a period, not to exceed three years, during which a determination of eligibility to travel under the program will be valid. Notwithstanding any other provision under this section, the Secretary of Homeland Security may revoke any such determination at any time and for any reason.

(ii) Limitation

A determination by the Secretary of Homeland Security that an alien is eligible to travel to the United States under the program is not a determination that the alien is admissible to the United States.

(iii) Not a determination of visa eligibility

A determination by the Secretary of Homeland Security that an alien who applied for authorization to travel to the United States through the System is not eligible to travel under the program is not a determination of eligibility for a visa to travel to the United States and shall not preclude the alien from applying for a visa.

(iv) Judicial review

Notwithstanding any other provision of law, no court shall have jurisdiction to review an eligibility determination under the System.

(D) Report

Not later than 60 days before publishing notice regarding the implementation of the System in the Federal Register, the Secretary of Homeland Security shall submit a report regarding the implementation of the system to—

(i) the Committee on Homeland Security of the House of Representatives;

(ii) the Committee on the Judiciary of the House of Representatives;

(iii) the Committee on Foreign Affairs of the House of Representatives;

(iv) the Permanent Select Committee on Intelligence of the House of Representatives;

(v) the Committee on Appropriations of the House of Representatives;

(vi) the Committee on Homeland Security and Governmental Affairs of the Senate;

(vii) the Committee on the Judiciary of the Senate;

(viii) the Committee on Foreign Relations of the Senate;

(ix) the Select Committee on Intelligence of the Senate; and

(x) the Committee on Appropriations of the Senate.

(i) Exit system

(1) In general

Not later than one year after August 3, 2007, the Secretary of Homeland Security shall establish an exit system that records the departure on a flight leaving the United States of every alien participating in the visa waiver program established under this section.

(2) System requirements

The system established under paragraph (1) shall—

(A) match biometric information of the alien against relevant watch lists and immigration information; and

(B) compare such biometric information against manifest information collected by air carriers on passengers departing the United States to confirm such aliens have departed the United States.

(3) Report

Not later than 180 days after August 3, 2007, the Secretary shall submit to Congress a report that describes—

(A) the progress made in developing and deploying the exit system established under this subsection; and

(B) the procedures by which the Secretary shall improve the method of calculating the rates of nonimmigrants who overstay their authorized period of stay in the United States.

(June 27, 1952, ch. 477, title II, ch. 2, §217, as added Pub. L. 99–603, title III, §313(a), Nov. 6, 1986, 100 Stat. 3435; amended Pub. L. 100–525, §2(p)(1), (2), Oct. 24, 1988, 102 Stat. 2613; Pub. L. 101–649, title II, §201(a), Nov. 29, 1990, 104 Stat. 5012; Pub. L. 102–232, title III, §§303(a)(1), (2), 307(*l*)(3), Dec. 12, 1991, 105 Stat. 1746, 1756; Pub. L. 103–415, §1(m), Oct. 25, 1994, 108 Stat. 4301; Pub. L. 103–416, title II, §§210, 211, Oct. 25, 1994, 108 Stat. 4312, 4313; Pub. L. 104–208, div. C, title III, §308(d)(4)(F), (e)(9), title VI, §635(a)–(c)(1), (3), Sept. 30, 1996, 110 Stat. 3009–618, 3009–620, 3009–702, 3009–703; Pub. L. 105–119, title I, §125, Nov. 26, 1997, 111 Stat. 2471; Pub. L. 105–173, §§1, 3, Apr. 27, 1998, 112 Stat. 56; Pub. L. 106–396, title I, §101(a), title II, §§201–207, title IV, §403(a)–(d), Oct. 30, 2000, 114 Stat. 1637–1644, 1647, 1648; Pub. L. 107–56, title IV, §417(c), (d), Oct. 26, 2001, 115 Stat. 355; Pub. L. 107–173, title III, §307(a), May 14, 2002, 116 Stat. 556; Pub. L. 110–53, title VII, §711(c), (d)(1), Aug. 3, 2007, 121 Stat. 339, 341; Pub. L. 111–145, §9(h), formerly §9(e), Mar. 4, 2010, 124 Stat. 62, renumbered Pub. L. 113–235, div. B, title VI, §606(1), Dec. 16, 2014, 128 Stat. 2219; Pub. L. 111–198, §5(a), July 2, 2010, 124 Stat. 1357; Pub. L. 113–235, div. B, title VI, §605(b), Dec. 16, 2014, 128 Stat. 2219.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b)(1) and (c)(7)(B)(iv), was in the original, ''this Act'', meaning act June 27, 1952, ch. 477, 66 Stat. 163, known as the Immigration and Nationality Act, which is classified principally to this chapter. For complete classification of

this Act to the Code, see Short Title note set out under section 1101 of this title and Tables.

AMENDMENTS

2014—Subsec. (h)(3)(B)(iii). Pub. L. 113–235, § 605(b), substituted ''September 30, 2020'' for ''September 30, 2015''.

2010—Subsec. (h)(3)(B). Pub. L. 111–145, § 9(h), formerly § 9(e), as renumbered by Pub. L. 113–235, § 606(1), amended subpar. (B) generally. Prior to amendment, text read as follows: ''The Secretary of Homeland Security may charge a fee for the use of the System, which shall be—

''(i) set at a level that will ensure recovery of the full costs of providing and administering the System; and

''(ii) available to pay the costs incurred to administer the System.''

Subsec. (h)(3)(B)(ii). Pub. L. 111–198, § 5(a)(1), made technical amendment to reference in original act which appears in text as reference to ''subsection (d) of section 2131 of title 22''.

Subsec. (h)(3)(B)(iii). Pub. L. 111–198, § 5(a)(2), substituted ''September 30, 2015.'' for ''September 30, 2014.''

2007—Subsec. (a). Pub. L. 110–53, § 711(d)(1)(A)(i), designated concluding provisions as par. (10) and inserted heading.

Subsec. (a)(11). Pub. L. 110–53, § 711(d)(1)(A)(ii), added par. (11).

Subsec. (c)(2)(D). Pub. L. 110–53, § 711(d)(1)(B)(i)(I), amended heading and text of subpar. (D) generally. Prior to amendment, text read as follows: ''The government of the country certifies that it reports to the United States Government on a timely basis the theft of blank passports issued by that country.''

Subsec. (c)(2)(E), (F). Pub. L. 110–53, § 711(d)(1)(B)(i)(II), added subpars. (E) and (F).

Subsec. (c)(5)(A)(i). Pub. L. 110–53, § 711(d)(1)(B)(ii)(I), substituted ''Secretary of Homeland Security'' for ''Attorney General'' in introductory provisions.

Subsec. (c)(5)(A)(i)(III). Pub. L. 110–53, § 711(d)(1)(B)(ii)(II)(bb)(AA), substituted '', the Committee on Foreign Affairs, and the Committee on Homeland Security,'' for ''and the Committee on International Relations'' and '', the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs'' for ''and the Committee on Foreign Relations''.

Subsec. (c)(5)(A)(i)(IV). Pub. L. 110–53, § 711(d)(1)(B)(ii)(II)(aa), (bb)(BB), (cc), added subcl. (IV).

Subsec. (c)(5)(A)(ii), (iii), (B)(i), (iii). Pub. L. 110–53, § 711(d)(1)(B)(ii)(I), substituted ''Secretary of Homeland Security'' for ''Attorney General'' wherever appearing.

Subsec. (c)(5)(B)(iv). Pub. L. 110–53, § 711(d)(1)(B)(ii)(III), added cl. (iv).

Subsec. (c)(8), (9). Pub. L. 110–53, § 711(c), added pars. (8) and (9).

Subsec. (c)(10), (11). Pub. L. 110–53, § 711(d)(1)(B)(iii), added pars. (10) and (11).

Subsec. (d). Pub. L. 110–53, § 711(d)(1)(C), substituted ''Secretary of Homeland Security'' for ''Attorney General'' in first sentence and inserted at end ''The Secretary of Homeland Security may not waive any eligibility requirement under this section unless the Secretary notifies, with respect to the House of Representatives, the Committee on Homeland Security, the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Appropriations, and with respect to the Senate, the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Appropriations not later than 30 days before the effective date of such waiver.''

Subsec. (f)(5). Pub. L. 110–53, § 711(d)(1)(D), substituted ''Secretary of Homeland Security'' for ''Attorney General'' in two places and ''theft or loss of passports'' for ''theft of blank passports''.

Subsec. (h)(3). Pub. L. 110–53, § 711(d)(1)(E), added par. (3).

Subsec. (i). Pub. L. 110–53, § 711(d)(1)(F), added subsec. (i).

2002—Subsec. (c)(2)(D). Pub. L. 107–173, § 307(a)(1), added subpar. (D).

Subsec. (c)(5)(A)(i). Pub. L. 107–173, § 307(a)(2), substituted ''2 years'' for ''5 years'' in introductory provisions.

Subsec. (f)(5). Pub. L. 107–173, § 307(a)(3), added par. (5).

2001—Subsec. (a)(3). Pub. L. 107–56, § 417(d), which directed the substitution of ''(A) IN GENERAL.—Except as provided in subparagraph (B), on or after'' for ''On or after'' and the addition of subpar. (B), was executed making the substitution for ''On and after'' and adding subpar. (B) to reflect the probable intent of Congress.

Pub. L. 107–56, § 417(c), substituted ''2003,'' for ''2007,''.

2000—Pub. L. 106–396, § 101(a)(1), in section catchline struck out ''pilot'' before ''program''.

Subsec. (a). Pub. L. 106–396, §§ 101(a)(2)(A), (B), 403(c), struck out ''pilot'' before ''program'' in heading and two places in introductory provisions and inserted concluding provisions.

Subsec. (a)(1). Pub. L. 106–396, § 101(a)(2)(C), substituted ''program'' for ''pilot program period (as defined in subsection (e) of this section)''.

Subsec. (a)(2). Pub. L. 106–396, § 101(a)(2)(D), in heading struck out ''pilot'' before ''program''.

Subsec. (a)(2)(A). Pub. L. 106–396, § 201, inserted '', either on its own or in conjunction with one or more other countries that are described in subparagraph (B) and that have established with it a common area for immigration admissions,'' after ''to extend)''.

Subsec. (a)(3), (4). Pub. L. 106–396, § 202(a), added par. (3) and redesignated former par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (a)(5). Pub. L. 106–396, § 403(a), substituted '', including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations which has entered into an agreement with the Attorney General pursuant to subsection (e) of this section. The Attorney General is authorized to require a carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a domestic corporation conducting operations under part 91 of that title, to give suitable and proper bond, in such reasonable amount and containing such conditions as the Attorney General may deem sufficient to ensure compliance with the indemnification requirements of this section, as a term of such an agreement'' for ''which has entered into an agreement with the Service to guarantee transport of the alien out of the United States if the alien is found inadmissible or deportable by an immigration officer''.

Pub. L. 106–396, § 202(a)(1), redesignated par. (4) as (5). Former par. (5) redesignated (6).

Subsec. (a)(6), (7). Pub. L. 106–396, § 202(a)(1), designated pars. (5) and (6) as (6) and (7), respectively. Former par. (7) redesignated (8).

Subsec. (a)(8). Pub. L. 106–396, § 403(b), inserted ''or the alien is arriving at the port of entry on an aircraft operated under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations'' after ''regulations''.

Pub. L. 106–396, § 202(a)(1), designated par. (7) as (8).

Subsec. (a)(9). Pub. L. 106–396, § 203(a), added par. (9).

Subsec. (b). Pub. L. 106–396, § 101(a)(3), struck out ''pilot'' before ''program'' in introductory provisions.

Subsec. (c). Pub. L. 106–396, § 101(a)(4)(A), in heading struck out ''pilot'' before ''program''.

Subsec. (c)(1). Pub. L. 106–396, § 101(a)(4)(B), struck out ''pilot'' before ''program''.

Subsec. (c)(2). Pub. L. 106–396, § 101(a)(4)(C), in introductory provisions, substituted ''subsection (f)'' for ''subsection (g)'' and struck out ''pilot'' before ''program''.

Subsec. (c)(2)(B). Pub. L. 106–396, § 202(b), amended heading and text of subpar. (B) generally. Prior to amendment, text read as follows: ''The government of

the country certifies that it has or is in the process of developing a program to issue machine-readable passports to its citizens.''

Subsec. (c)(2)(C). Pub. L. 106–396, §204(a), amended heading and text of subpar. (C) generally. Prior to amendment, text read as follows: ''The Attorney General determines that the United States law enforcement interests would not be compromised by the designation of the country.''

Subsec. (c)(3). Pub. L. 106–396, §101(a)(4)(D)(i), struck out ''(within the pilot program period)'' after ''fiscal year'' in introductory provisions.

Subsec. (c)(3)(A). Pub. L. 106–396, §101(a)(4)(D)(ii), struck out ''pilot'' before ''program'' in two places in introductory provisions.

Subsec. (c)(3)(B). Pub. L. 106–396, §101(a)(4)(D)(iii), struck out ''pilot'' before ''program'' in introductory provisions.

Subsec. (c)(5). Pub. L. 106–396, §204(b), added par. (5).

Subsec. (c)(6). Pub. L. 106–396, §206, added par. (6).

Subsec. (c)(7). Pub. L. 106–396, §207, added par. (7).

Subsec. (e)(1). Pub. L. 106–396, §§101(a)(5)(A), 403(d)(1)(A), in introductory provisions, substituted ''carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title'' for ''carrier'' in two places and struck out ''pilot'' before ''program''.

Subsec. (e)(1)(B). Pub. L. 106–396, §101(a)(5)(B), struck out ''pilot'' before ''program''.

Subsec. (e)(1)(D). Pub. L. 106–396, §205(b), added subpar. (D).

Subsec. (e)(2). Pub. L. 106–396, §403(d)(1), substituted ''carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title'' for ''carrier'' and ''failure by a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title'' for ''carrier's failure''.

Subsec. (e)(3). Pub. L. 106–396, §403(d)(2), added par. (3).

Subsec. (f). Pub. L. 106–396, §101(a)(6), redesignated subsec. (g) as (f) and struck out heading and text of former subsec. (f). Text read as follows: ''For purposes of this section, the term 'pilot program period' means the period beginning on October 1, 1988, and ending on April 30, 2000.''

Subsec. (f)(1)(A), (C). Pub. L. 106–396, §101(a)(7)(A), (B), struck out ''pilot'' before ''program''.

Subsec. (f)(2) to (4). Pub. L. 106–396, §101(a)(7)(C)–(E), substituted ''as a program country'' for ''as a pilot program country'' in two places in par. (2)(A) and struck out ''pilot'' before ''program'' in pars. (3) and (4)(A).

Subsec. (g). Pub. L. 106–396, §203(b), added subsec. (g). Former subsec. (g) redesignated (f).

Subsec. (h). Pub. L. 106–396, §205(a), added subsec. (h).

1998—Subsec. (c)(2). Pub. L. 105–173, §3, reenacted heading without change and amended text generally. Prior to amendment, text consisted of introductory provisions and subpars. (A) to (D) relating to low nonimmigrant visa refusal rate for previous 2-year period, low nonimmigrant visa refusal rate for each of 2 previous years, machine readable passport program, and law enforcement interests.

Subsec. (f). Pub. L. 105–173, §1, substituted ''2000'' for ''1998''.

1997—Subsec. (f). Pub. L. 105–119 reenacted subsec. heading without change and amended text generally, substituting ''April 30, 1998'' for ''September 30, 1997''.

1996—Subsec. (a). Pub. L. 104–208, §635(a)(1), in introductory provisions, substituted ''Attorney General, in consultation with the Secretary of State'' for ''Attorney General and the Secretary of State, acting jointly''.

Subsec. (a)(2)(B). Pub. L. 104–208, §635(c)(3), struck out ''or is designated as a pilot program country with probationary status under subsection (g) of this section'' after ''subsection (c) of this section''.

Subsec. (b)(2). Pub. L. 104–208, §308(e)(9), substituted ''removal of'' for ''deportation against''.

Subsec. (c)(1). Pub. L. 104–208, §635(a)(2), substituted ''Attorney General, in consultation with the Secretary of State,'' for ''Attorney General and the Secretary of State acting jointly''.

Subsec. (c)(3)(A)(i). Pub. L. 104–208, §308(d)(4)(F), substituted ''denied admission at the time of arrival'' for ''excluded from admission''.

Subsec. (d). Pub. L. 104–208, §635(a)(3), substituted ''Attorney General, in consultation with the Secretary of State'' for ''Attorney General and the Secretary of State, acting jointly''.

Subsec. (f). Pub. L. 104–208, §635(b), substituted ''1997.'' for ''1996''.

Subsec. (g). Pub. L. 104–208, §635(c)(1), amended heading and text of subsec. (g) generally. Prior to amendment, text provided authority for Attorney General and Secretary of State to designate countries as pilot program countries with probationary status.

Subsec. (g)(4)(A)(i). Pub. L. 104–208, §308(d)(4)(F), substituted ''denied admission at the time of arrival'' for ''excluded from admission''.

1994—Subsec. (a)(2)(B). Pub. L. 103–416, §211(1), inserted before period at end ''or is designated as a pilot program country with probationary status under subsection (g) of this section''.

Subsec. (c)(2). Pub. L. 103–416, §211(3), substituted ''Except as provided in subsection (g)(4) of this section, a country'' for ''A country''.

Subsec. (f). Pub. L. 103–416, §210, substituted ''1996'' for ''1995.''.

Pub. L. 103–415 substituted ''1995'' for ''1994''.

Subsec. (g). Pub. L. 103–416, §211(2), added subsec. (g).

1991—Subsec. (a). Pub. L. 102–232, §307(*l*)(3), substituted ''paragraph (7)(B)(i)(II)'' for ''paragraph (26)(B)''.

Subsec. (a)(4). Pub. L. 102–232, §303(a)(1)(A), in heading substituted ''into the United States'' for ''by sea or air''.

Subsec. (b). Pub. L. 102–232, §303(a)(1)(B), made technical amendment to heading.

Subsec. (e)(1). Pub. L. 102–232, §303(a)(2), substituted ''subsection (a)(4)'' for ''subsection (a)(4)(C)''.

1990—Subsec. (a)(2). Pub. L. 101–649, §201(a)(1), inserted '', and presents a passport issued by,'' after ''is a national of''.

Subsec. (a)(3). Pub. L. 101–649, §201(a)(2), in heading substituted reference to immigration forms for reference to entry control and waiver forms, and in text substituted ''completes such immigration form as the Attorney General shall establish'' for ''—

''(A) completes such immigration form as the Attorney General shall establish under subsection (b)(3) of this section, and

''(B) executes a waiver of review and appeal described in subsection (b)(4) of this section''.

Subsec. (a)(4). Pub. L. 101–649, §201(a)(3), added par. (4) and struck out former par. (4) which waived visa requirement for certain aliens having round-trip transportation tickets.

Subsec. (a)(7). Pub. L. 101–649, §201(a)(4), added par. (7).

Subsec. (b). Pub. L. 101–649, §201(a)(5), redesignated subsec. (b)(4) as subsec. (b) and subpars. (A) and (B) as pars. (1) and (2), respectively, and struck out subsec. (b) heading ''Conditions before pilot program can be put into operation'' and pars. (1) to (3) which related to prior notice to Congress, automated data arrival and departure system, and visa waiver information form, respectively.

Subsec. (c)(1). Pub. L. 101–649, §201(a)(6)(A), substituted in heading, ''In general'' for ''Up to 8 countries'' and in text substituted ''any country as a pilot program country if it meets the requirements of paragraph (2)'' for ''up to eight countries as pilot program countries for purposes of the pilot program''.

Subsec. (c)(2). Pub. L. 101–649, §201(a)(6)(B), substituted ''Qualifications'' for ''Initial qualifications'' in heading and ''A country'' for ''For the initial period de-

scribed in paragraph (4), a country'' in introductory provisions, and added subpars. (C) and (D).

Subsec. (d). Pub. L. 101–649, §201(a)(7), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101–649, §201(a)(7), (8), redesignated subsec. (d) as (e) and added subpar. (C) at end of par. (1). Former subsec. (e) redesignated (f).

Subsec. (f). Pub. L. 101–649, §201(a)(7), (9), redesignated subsec. (e) as (f) and substituted ''on October 1, 1988, and ending on September 30, 1994'' for ''at the end of the 30-day period referred to in subsection (b)(1) of this section and ending on the last day of the third fiscal year which begins after such 30-day period''.

1988—Pub. L. 100–525, §2(p)(1), made technical amendment to directory language of Pub. L. 99–603, §313(a), which enacted this section.

Subsec. (a). Pub. L. 100–525, §2(p)(2), substituted ''hereinafter'' for ''hereafter''.

CHANGE OF NAME

Committee on International Relations of House of Representatives changed to Committee on Foreign Affairs of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

EFFECTIVE DATE OF 2007 AMENDMENT

Pub. L. 110–53, title VII, §711(d)(2), Aug. 3, 2007, 121 Stat. 345, provided that: ''Section 217(a)(11) of the Immigration and Nationality Act [8 U.S.C. 1187(a)(11)], as added by paragraph (1)(A)(ii), shall take effect on the date that is 60 days after the date on which the Secretary of Homeland Security publishes notice in the Federal Register of the requirement under such paragraph. [Notice published in Federal Register, Nov. 13, 2008, 73 F.R. 67354.]''

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 308(d)(4)(F), (e)(9) of Pub. L. 104–208 effective, with certain transitional provisions, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub. L. 104–208, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by section 303(a)(1), (2) of Pub. L. 102–232 effective as if included in the enactment of the Immigration Act of 1990, Pub. L. 101–649, see section 310(1) of Pub. L. 102–232, set out as a note under section 1101 of this title.

Pub. L. 102–232, title III, §307(*l*), Dec. 12, 1991, 105 Stat. 1756, provided that the amendment made by section 307(*l*) is effective as if included in section 603(a) of the Immigration Act of 1990, Pub. L. 101–649.

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101–649, title II, §201(d), Nov. 29, 1990, 104 Stat. 5014, provided that: ''The amendments made by this section [amending this section and section 1323 of this title] shall take effect as of the date of the enactment of this Act [Nov. 29, 1990].''

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–525 effective as if included in enactment of Immigration Reform and Control Act of 1986, Pub. L. 99–603, see section 2(s) of Pub. L. 100–525, set out as a note under section 1101 of this title.

ABOLITION OF IMMIGRATION AND NATURALIZATION SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

MODERNIZING AND STRENGTHENING OF SECURITY OF VISA WAIVER PROGRAM

Pub. L. 110–53, title VII, §711(b), Aug. 3, 2007, 121 Stat. 338, provided that: ''It is the sense of Congress that—

''(1) the United States should modernize and strengthen the security of the visa waiver program under section 217 of the Immigration and Nationality Act (8 U.S.C. 1187) by simultaneously—

''(A) enhancing program security requirements; and

''(B) extending visa-free travel privileges to nationals of foreign countries that are partners in the war on terrorism—

''(i) that are actively cooperating with the United States to prevent terrorist travel, including sharing counterterrorism and law enforcement information; and

''(ii) whose nationals have demonstrated their compliance with the provisions of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] regarding the purpose and duration of their admission to the United States; and

''(2) the modernization described in paragraph (1) will—

''(A) enhance bilateral cooperation on critical counterterrorism and information sharing initiatives;

''(B) support and expand tourism and business opportunities to enhance long-term economic competitiveness; and

''(C) strengthen bilateral relationships.''

MACHINE READABLE PASSPORTS

Pub. L. 107–56, title IV, §417(a), (b), Oct. 26, 2001, 115 Stat. 355, provided that:

''(a) AUDITS.—The Secretary of State shall, each fiscal year until September 30, 2007—

''(1) perform annual audits of the implementation of section 217(c)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1187(c)(2)(B));

''(2) check for the implementation of precautionary measures to prevent the counterfeiting and theft of passports; and

''(3) ascertain that countries designated under the visa waiver program have established a program to develop tamper-resistant passports.

''(b) PERIODIC REPORTS.—Beginning one year after the date of enactment of this Act [Oct. 26, 2001], and every year thereafter until 2007, the Secretary of State shall submit a report to Congress setting forth the findings of the most recent audit conducted under subsection (a)(1).''

REPORT REQUIRED

Pub. L. 106–396, title IV, §403(e), Oct. 30, 2000, 114 Stat. 1649, provided that: ''Not later than two years after the date of the enactment of this Act [Oct. 30, 2000], the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate assessing the effectiveness of the program implemented under the amendments made by this section [amending this section] for simplifying the admission of business travelers from visa waiver program countries and compliance with the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] by such travelers under that program.''

TRANSITION PROVISIONS

Pub. L. 104–208, div. C, title VI, §635(c)(2), Sept. 30, 1996, 110 Stat. 3009–703, provided that: ''A country designated as a pilot program country with probationary status under section 217(g) of the Immigration and Nationality Act [8 U.S.C. 1187(g)] (as in effect on the day before the date of the enactment of this Act [Sept. 30, 1996]) shall be considered to be designated as a pilot program country on and after such date, subject to placement in probationary status or termination of such designation under such section (as amended by paragraph (1)).''

OPERATION OF AUTOMATED DATA ARRIVAL AND DEPARTURE CONTROL SYSTEM; REPORT TO CONGRESS

Pub. L. 101–649, title II, §201(c), Nov. 29, 1990, 104 Stat. 5014, provided that: ''By not later than January 1, 1992,

the Attorney General, in consultation with the Secretary of State, shall submit to the Committees on the Judiciary of the House of Representatives and of the Senate a report on the operation of the automated data arrival and departure control system for foreign visitors and on admission refusals and overstays for such visitors who have entered under the visa waiver program.''

REPORT ON VISA WAIVER PILOT PROGRAM

Pub. L. 99–603, title IV, § 405, Nov. 6, 1986, 100 Stat. 3442, provided that:

''(a) MONITORING AND REPORT ON THE PILOT PROGRAM.—The Attorney General and the Secretary of State shall jointly monitor the pilot program established under section 217 of the Immigration and Nationality Act [8 U.S.C. 1187] and shall report to the Congress not later than two years after the beginning of the program.

''(b) DETAILS IN REPORT.—The report shall include—

''(1) an evaluation of the program, including its impact—

''(A) on the control of alien visitors to the United States,

''(B) on consular operations in the countries designated under the program, as well as on consular operations in other countries in which additional consular personnel have been relocated as a result of the implementation of the program, and

''(C) on the United States tourism industry; and

''(2) recommendations—

''(A) on extending the pilot program period, and

''(B) on increasing the number of countries that may be designated under the program.''

§ 1188. Admission of temporary H–2A workers

(a) Conditions for approval of H–2A petitions

(1) A petition to import an alien as an H–2A worker (as defined in subsection (i)(2) of this section) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

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

(2) The Secretary of Labor may require by regulation, as a condition of issuing the certification, the payment of a fee to recover the reasonable costs of processing applications for certification.

(b) Conditions for denial of labor certification

The Secretary of Labor may not issue a certification under subsection (a) of this section with respect to an employer if the conditions described in that subsection are not met or if any of the following conditions are met:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H–2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment under this paragraph shall terminate on the date the H–2A workers depart for the employer's place of employment.

(c) Special rules for consideration of applications

The following rules shall apply in the case of the filing and consideration of an application for a labor certification under this section:

(1) Deadline for filing applications

The Secretary of Labor may not require that the application be filed more than 45 days before the first date the employer requires the labor or services of the H–2A worker.

(2) Notice within seven days of deficiencies

(A) The employer shall be notified in writing within seven days of the date of filing if the application does not meet the standards (other than that described in subsection (a)(1)(A) of this section) for approval.

(B) If the application does not meet such standards, the notice shall include the reasons therefor and the Secretary shall provide an opportunity for the prompt resubmission of a modified application.

(3) Issuance of certification

(A) The Secretary of Labor shall make, not later than 30 days before the date such labor or services are first required to be performed, the certification described in subsection (a)(1) of this section if—

(i) the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary), and

(ii) the employer does not actually have, or has not been provided with referrals of, qualified eligible individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.