No. 10-___

IN THE

Supreme Court of the United States

LIVINGSTON RONDELL JOHNSON,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Former Immigration and Nationality Act ("INA") subsection 212(c), 8 U.S.C. § 1182 (repealed), permitted discretionary relief from exclusion, notwithstanding certain convictions, to certain returning permanent resident immigrants. While by its terms § 212(c) applied only to immigrants in exclusion proceedings (proceedings in which immigrants were seeking to "be admitted" to the United States after "temporarily proceed[ing] abroad voluntarily"), it was construed as also being available to immigrants in deportation proceedings (proceedings in which the Government seeks to remove from the country an immigrant who has already been "admitted"). *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001). But, an immigrant in deportation proceedings could obtain § 212(c) relief only if the act or conviction triggering deportability had a counterpart among the statutory grounds of exclusion.

In 1996, Congress repealed § 212(c). In *St. Cyr*, this Court held that the repeal did not apply retroactively to an immigrant who had been convicted before the repeal, through a plea agreement, of a crime that would make him inadmissible. Such immigrants, this Court held, may avail themselves of § 212(c) relief notwithstanding its repeal if they face deportation based on such a pre-1996 conviction.

This petition for a writ of certiorari presents two questions:

1. Whether this Court's holding in *St. Cyr* concerning the non-retroactivity of Congress's 1996 repeal of § 212(c) is a matter of statutory

interpretation that applies equally to all immigrants, or instead is non-retroactive only as to immigrants who can demonstrate reliance (either objectively or subjectively) on the continued availability of § 212(c) relief, such that the meaning of the statute repealing § 212(c) differs from case to case.

2. Whether, the "statutory counterpart" rule for eligibility for § 212(c) relief, as applied by the Board of Immigration Appeals nine years after the repeal of § 212(c), wrongly ignores the substance of an immigrant's conviction and its prior focus on treating similarly situated people similarly in favor of comparing the immigrant's listed ground for deportability with the language of the grounds found in the excludability statute.

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OTHER AUTHORITIES

OPINIONS BELOW

An order of removal entered by an Immigration Judge ("IJ") (Pet. App. 11a-13a), accompanied by oral decision (Pet. App. 14a-19a), and a decision entered by the Board of Immigration Appeals ("BIA") dismissing an appeal from the IJ's order (Pet. App. 7a-10a), are unreported.

The order of the United States Court of Appeals for the Seventh Circuit denying Johnson's Petition for Review of the IJ's and BIA's orders (Pet. App. 1a-6a), and that court's order denying rehearing and rehearing *en banc* (Pet. App. 20a), are also unreported.

JURISDICTION

The Seventh Circuit's order denying Johnson's Petition for Review was entered on July 19, 2010. Pet. App. 1a. The Seventh Circuit's order denying rehearing en banc was entered on October 6, 2010. Pet. App. 20a. This Petition is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 (Pet. App. 21a.)

8 U.S.C. § 1101 (Pet. App. 21a.)

8 U.S.C. § 1182 (Pet. App. 21a.)

8 U.S.C. § 1227 (Pet. App. 56a.)

8 U.S.C. § 1229b (Pet. App. 60a.)

8 C.F.R. § 1212.3(f)(5) (Pet. App. 71a.)

8 U.S.C. § 1182 (1995) (Pet. App. 71a.)

STATEMENT

This petition for certiorari places before this Court two well-developed and entrenched circuit splits. The proper resolution of these issues by this Court could make the difference between petitioner Livingston Johnson, a lawful permanent resident of the United States for nearly three decades, being able to remain here, or instead being uprooted and sent to Jamaica based on a single conviction from 18 years ago. While that result would be personally catastrophic for Johnson, the Seventh Circuit opinion endorsing it is more broadly problematic for countless other immigrants in that circuit and others like it, who must live under much harsher interpretations of INA § 212(c) waiver law than immigrants in various other circuits. By this petition, Johnson asks this Court grant certiorari to restore consistency to the law of § 212(c) deportability waivers.

1. Before 1996, if an immigrant was convicted of certain offenses that would render him deportable, he could seek a waiver of deportation from the Attorney General under § 212(c) so long as he could establish lawful unrelinquished domicile of seven consecutive years in this country.[1] Between 1989 and 1995, over 50 percent (and more than 10,000 in total) of these discretionary waiver applications were granted. *INS v. St. Cyr*, 533 U.S. 289, 296 & n.5 (2001).

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[1] As discussed more fully below, the language of § 212(c) technically applies only to excludable immigrants who were returning from trips abroad, but it has been interpreted for decades to apply to similarly-situated deportable immigrants as well. *See St. Cyr*, 533 U.S. at 295.

That waiver law changed dramatically in the 1990s. In 1990, Congress amended § 212(c) to preclude relief for anyone convicted of an aggravated felony who had served a prison term of at least 5 years. *Id.* at 297; Pub. L. No. 101-649, § 511, 104 Stat. 5052. Then in 1996, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") eliminated the availability of § 212(c) waivers for any immigrant convicted of "one or more aggravated felonies." Pub. L. No. 104-132, § 440, 110 Stat. 1277. Later in 1996, § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub L. No. 104-208, § 304(b), 110 Stat. 3009-597, repealed § 212(c) altogether and replaced it with a "cancellation of removal" proceeding, again unavailable to anyone "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

In *St. Cyr*, this Court held that the repeal of § 212(c) could not be retroactively applied to an immigrant who pled guilty and was convicted before 1996 of an offense that would have made him deportable, but for which § 212(c) relief would have been available before its repeal. Analyzing retroactivity under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the Court first determined that there was no clear indication from Congress that it intended the repeal to be retroactive. 533 U.S. at 316. It then held that applying that repeal retroactively would attach a new disability to transactions or considerations already past. *Id.* at 321. In St. Cyr's case, for instance, St. Cyr pled guilty before 1996, likely as a way to maximize his chances of receiving a future § 212(c) waiver. *Id.* at 321-23. Moreover, the Court opined that the discretionary nature of a § 212(c) waiver was

discretionary did not assuage these retroactivity concerns, for "[t]here is a clear difference, for the purposes of retroactivity, between facing possible deportation and facing certain deportation." *Id.* at 325.

Since *St. Cyr* was decided, the Courts of Appeals have splintered over application in cases not directly on all fours with the facts of *St. Cyr*. The Third and Eighth Circuits have held, as a matter of statutory interpretation, that the 1996 repeal is generally inapplicable as to convictions that predated the repeal; that analysis recognizes that retroactivity analysis under *Landgraf* turns on whether a change in law adds a "new disability" to "transactions or considerations already past," 511 U.S. at 269, which the repeal of § 212(c) certainly did.

The Seventh Circuit, in contrast, has joined four others (including the First, Sixth, Ninth, and Eleventh Circuits) in essentially limiting *St. Cyr* to its facts. Approaching the question of retroactivity not as one of statutory interpretation, but as one of individual reliance and hardship, those courts hold that the 1996 repeal is not retroactive only as to those pre-repeal felonies that resulted from guilty pleas. An immigrant who went to trial, the reasoning goes, could not have relied on the possibility of a § 212(c) waiver, and thus the repeal can retroactively be applied to such convictions.

Other courts have taken still different positions. The Second and Fifth Circuits permit the repeal of § 212(c) to function retroactively except for immigrants who can establish subjective reliance on the availability of § 212(c) relief, even where the immigrant did not plead guilty, after a case-by-case

analysis. The Tenth Circuit also requires reliance, but does not require a showing of individualized subjective reliance; it applies a "group-based" approach which bars retroactive application when it would be objectively reasonable to have relied on § 212(c) relief in those circumstances.

2. For those individuals who may yet call upon § 212(c) relief despite its 1996 repeal, there is a second question of the kinds of removability from which it can provide discretionary relief. Section 212(c) by its own terms applies only to persons in exclusion proceedings; it was through judicial and agency decisions that it was extended to immigrants facing deportation (now called removal).[2] Those decisions limit the availability of § 212(c) relief in deportation proceedings, however, to those cases where the ground on which deportation is based has a "statutory counterpart" in the enumerated grounds for exclusion. *See* 8 C.F.R. § 1212.3(f)(5) (codifying this the "statutory counterpart" test). Put differently, where a conviction is of a kind that it could serve both as a ground for deportation, and as a ground for exclusion, § 212(c) relief is available for that conviction in deportation proceedings.

While this much is common ground, the Courts of Appeals disagree on how this "statutory counterpart" test applies. The Seventh Circuit, along with eight other circuits, follow the BIA's test, which asks whether the ground of deportability charged by the government has a mirror-image in the grounds of

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[2] *See* Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. For consistency and ease of comprehension, this petition uses only the term deportation when referring to such proceedings.

exclusion found in 8 U.S.C. § 1182. For instance, while an "aggravated felony" is a ground for deportation, *see* 8 U.S.C. § 1227(a)(2)(A)(iii), and "aggravated felony" is defined to include "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), neither the phrase "aggravated felony" nor "sexual abuse of a minor" appears in the list of grounds for exclusion. *See generally* 8 U.S.C. § 1182(a). Accordingly, these courts reason, § 212(c) relief is categorically unavailable to immigrants deportable on that ground.

The Second Circuit, in contrast, rejects the mirror-image test for the statute, asking instead whether a similarly situated individual who traveled abroad would be, or was previously, excludable on grounds permitting § 212(c) eligibility. While there is no ground of excludability for the "aggravated felony" category, a conviction for a "crime involving moral turpitude" renders a person inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I). Rather than limiting the comparison to the language of the statutory grounds for deportation and exclusion, that court holds that one must actually look at the conviction, and determine whether it would trigger excludability as a crime of moral turpitude. If a similarly situated person who is in or could have been subject to exclusion proceedings would be eligible for relief, so, too, an immigrant qualifies for § 212(c) relief in deportation proceedings.

3. A citizen of Jamaica, Livingston Johnson came to the United States in 1978 and has resided here as a lawful permanent resident since 1981. In 1992, he was convicted of sexual assault on a minor and sentenced to 30 months of supervised probation and 9

months of work release. Pet. App. 2a. In 2003, years after he completed his sentence, he applied to become a naturalized citizen. The DHS denied his application on the basis of his conviction and in 2006 arrested him and put him in deportation proceedings for committing an aggravated felony after being admitted into the United States. *Id.* 2a-3a.

Before an IJ, Johnson conceded the factual allegations against him and sought waivers of deportation or inadmissibility under current § 212(h) and also § 212(c), which had been repealed in 1996—after his conviction but before his deportation proceedings. *Id.* 3a. The IJ ruled that § 212(h) was unavailable on account of his aggravated felony conviction. *Id.* 18a. Following Seventh Circuit precedent, the IJ also ruled that the 1996 repeal rendered § 212(c) unavailable to Johnson, distinguishing *St. Cyr* because Johnson was convicted of an aggravated felony after a bench trial rather than after a guilty plea. *Id.* 16a-17a. Alternatively, the IJ ruled that even if § 212(c) were available, Johnson would not qualify because he was being deported based on his commission of an "aggravated felony," a ground that has no statutory counterpart for exclusion under § 212(a). *Id.* 17a-18a.

The BIA dismissed his appeal in July 2009, affirming the IJ decision in all particulars. Pet. App. 7a-10a. A panel of the United States Court of Appeals for the Seventh Circuit—exercising its jurisdiction under 8 U.S.C. § 1252—denied Johnson's petition for review on July 19, 2010, *id.* 1a-6a, and the court denied *en banc* review on October 6, 2010, *id.* 20a.

4. The importance of these two frequently recurring issues, both to Johnson and more broadly, is undeniable. The conflicts they have created are entrenched, expanding, and frequently reoccurring. Indeed, thousands of immigrants seek § 212(c) relief each year, and thousands will continue to do so, as immigration officials bring new deportation proceedings even as immigrants' pre-1996 convictions become more distant history. The confused state of the law in this area also has a direct impact on how courts analyze the retroactivity of other changes in immigration law, and indeed retroactivity issues arising outside the immigration context. This case provides an excellent vehicle—a rare opportunity to resolve these two major circuit conflicts concerning the law of deportation waiver in a single case. The Court should grant certiorari to finally resolve these long unsettled issues.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE BADLY SPLINTERED IN THEIR APPROACHES TO THE RETROACTIVITY OF THE REPEAL OF THE § 212(C) WAIVER.

Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Thus, due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf*, 511 U.S. at 266.

As a matter of statutory construction, this Court has long adhered to a "presumption against

retroactive legislation" that is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *St. Cyr*, 533 U.S. at 316. But several Courts of Appeals have misapplied this Court's decision in *St. Cyr*, treating that case as establishing an exception to a statutory rule rather than a construction of the statute. Two circuits have correctly held that after *St. Cyr*, the 1996 repeal of § 212(c) does not apply to any pre-1996 convictions, finding that reliance need not be the dispositive question in a *Landgraf* analysis; this approach yields one statutory meaning for one statutory text. In contrast, the Seventh Circuit and four others categorically allow retroactive application of the repeal to any pre-1996 convictions following trial, concluding that an immigrant who went to trial instead of pleading guilty could never have relied on § 212(c) relief. Under that rule, the same statute means two different things to two different groups. Three circuits have adopted approaches which call for even more individualized assessment in order to discern the statutory meaning. Two circuits allow the repeal to apply retroactively except where an individual can make a subjective showing of reliance on § 212(c) relief; under that view, the statute has no fixed meaning, but differs with the facts of each individual case. One circuit requires reliance, but applies a group-based, objective reliance approach to preclude retroactive repeal of § 212(c) relief categorically to individuals who waived appeal of their convictions; this approach permits a multiplicity of statutory meanings, but not the infinite variety of meanings permitted by the pure subjective approach. Clarification from this Court is urgently needed.

A. The Third And Eighth Circuits Bar Retroactive Application Of The Repeal To Any Pre-1996 Conviction.

The Third and Eighth Circuits read *St. Cyr* to bar retroactive application of the 1996 repeal of § 212(c) to any pre-1996 conviction, regardless of any particularized showing of reliance, and regardless of whether the conviction was obtained after trial or after a guilty plea. As these courts recognize, this Court's decision in *Landgraf* established a two part test for determining whether a statute applies retroactively. *First*, courts ask "whether Congress has expressly prescribed the statute's proper [temporal] reach." *Landgraf*, 511 U.S. at 280. *Second*, if the court cannot ascertain congressional intent, it must consider whether the statute has a retroactive effect. *Id.* A provision has a retroactive effect if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 269 (citation omitted). If a retroactive effect exists, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* at 280. In making this determination, courts are guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270.

As the Third Circuit has explained, against this backdrop "[i]mpermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." *Atkinson v. Attorney Gen.*, 479 F.3d 222, 229 (3d Cir. 2007); *see also Lovan v. Holder*, 574 F.3d

990, 993 (8th Cir. 2009).[3] Instead, while reliance may be a factor, *Atkinson*, 479 F.3d at 229, the dispositive question under *Landgraf* is merely whether the change imposes a "new disability in respect to transactions or considerations already past." *Id.* at 227 (citation and punctuation omitted).

After *St. Cyr*, as these two circuits have recognized, that question is easily answered in the context of § 212(c). Prior to the 1996 repeal, "[an immigrant] remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony." *Atkinson*, 479 F.3d at 230. After the repeal, "he lost that right; applying basic principles of retroactivity, [the repeal] attached a new legal consequence to Atkinson's conviction: the certainty—rather than the possibility—of deportation." *Id.*; *see also Lovan*, 574 F.3d at 994. So these two Circuits do not allow the 1996 appeal of § 212(c) to apply retroactively to deny relief for pre-1996 convictions.

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[3] In a case involving a conviction barring reentry into the United States, a panel of the Fourth Circuit seemed to follow the same reasoning, emphasizing that regardless of reliance at the time of conviction, the repeal attached new legal consequences to the immigrant's conviction, which is the central question of a *Landgraf* retroactivity analysis. *See Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004). But as described *infra*, other Fourth Circuit panels before and after *Olatunji* have taken a different approach, allowing retroactive application of the repeal any time the immigrant challenged a conviction at trial.

B. Five Circuits Categorically Allow Retroactive Application Of The Repeal For All Pre-1996 Convictions Obtained After Trial.

At the opposite pole, taking the most extreme approach, the First, Sixth, Seventh, Ninth, and Eleventh Circuits categorically allow retroactive application of the repeal any time a pre-1996 conviction was obtained after trial. These circuits not only find reliance to be the *sine qua non* of retroactivity analysis, but they deem reliance to be impossible any time an immigrant chose to go to trial before he was convicted. *See, e.g.*, *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010); *Ferguson v. Attorney Gen.*, 563 F.3d 1254 (11th Cir. 2009); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (per curiam)[4]; *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002).[5] Before and after *Olatunji*, which followed the Third and Eighth Circuit's approach, panels of the Fourth Circuit also

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[4] Other Seventh Circuit panels, including *De Horta Garcia* and the panel in this case, followed *Montenegro* without additional in-depth analysis. *See, e.g.*, *Zamora v. Gonzales*, 240 F. App'x 150, 153 (7th Cir. 2007); *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008); *Esquivel v. Mukasey*, 543 F.3d 919, 922 (7th Cir. 2008). But at least one Seventh Circuit judge has written a separate concurrence, finding the court bound by circuit precedent but hoping that the precedent would be rejected in favor of the Third and Eighth Circuit's approach. *See De Horta Garcia*, 519 F.3d at 662 (Rovner, J. concurring).

[5] The Seventh Circuit provides a limited exception to this rule for immigrants who contested criminal charges at trial but who conceded deportability before the repeal and can show reliance on § 212(c). *See De Horta Garcia*, 519 F.3d at 661.

have taken this extreme position. *See Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002).

This Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), demonstrates the flaw of conclusively presuming that immigrants who challenge allegations at trial did not rely on the availability § 212(c) relief when adopting a trial strategy. In *Padilla*, the Court ruled that misadvice as to the immigration consequences of a conviction could be constitutionally defective, rejecting the argument that such advice could never be constitutionally deficient because immigration consequences are "collateral" to the conviction itself. To the contrary, the Court concluded, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 1480. Similarly, it makes no sense in the context of § 212(c) retroactivity for courts to conclusively presume that individuals who challenge criminal allegations through trial never rely on the availability of § 212(c) relief in making strategic decisions such as whether to appeal or whether to focus on the sentencing phase of trial. Instead, the correct analysis is the one that *Landgraf* requires, which focuses on the change in law attaches a new disability to transactions or considerations already past.

But perhaps the most significant problem with this approach is that it leads to wildly inconsistent applications of the same statute in different cases. Because retroactivity analysis is a matter of statutory interpretation, a single statutory provision

should not be construed differently based on the particular factual circumstances of the parties before the court—such as whether they can demonstrate reliance. In *Clark v. Martinez*, 543 U.S. 371 (2005), for example, the Court held that the INA's detention provision, 8 U.S.C. § 1231(a)(6), must be given the same meaning when applied to excludable as well as deportable immigrants. 543 U.S. at 378-81. Earlier, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court interpreted the detention provision to avoid a constitutional concern over indefinite detention of permanent resident immigrants. *Id.* at 696-99. The *Zadvydas* Court limited its holding to deportable immigrants, announcing that "[a]liens who have not yet gained initial admission to this country would present a very different question." *Id.* at 682. But when confronted in *Clark* with that question, the Court held that *Zadvydas* in fact compelled the "same answer." *Clark*, 543 U.S. at 379. Because the statutory text contained no distinction between those groups, the Court held that "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 378. Though the constitutional doubts driving the statutory construction in *Zadvydas* were of debatable applicability to excludable immigrants such as Clark, such a difference "cannot justify giving the *same* detention provision a different meaning when such [excludable] aliens are involved." *Id.* at 380. As the Court explained, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The

lowest common denominator, as it were, must govern." *Id.*

Likewise here, nothing in IIRIRA's 1996 repeal of § 212(c) differentiates between immigrants who pled guilty and those who were convicted after trial. *See generally* Pub L. No. 104-208, § 304(b), 110 Stat. 3009-597. The *Landgraf* analysis is one of statutory construction, and whether the repeal of § 212(c) attaches a new legal consequence to pre-enactment convictions is a question that must be answered for the provision as a whole, not by giving "the *same* . . . provision a different meaning when [different] aliens are involved." *Clark*, 543 U.S. at 380.

C. Three Circuits Take One Of Two Intermediate Approaches.

Other circuits come out somewhere in between. Two of them, the Second and Fifth, hold that whether the 1996 repeal applies retroactively to pre-1996 convictions turns on whether the immigrant can make an individualized showing that he relied on § 212(c) waiver authority when responding to criminal charges. These courts require an immigrant to establish that he subjectively relied in some way on the availability of § 212(c) waiver in responding to his criminal charges. *See Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007). For these courts, like the five courts of appeals who allow retroactive application absent a plea deal, a showing of reliance is paramount to the retroactivity question. But unlike those courts in these two circuits, the reliance inquiry is not categorical, but instead turns on the individual circumstances of the case.

The Tenth Circuit, in contrast, does not require a showing of individualized subjective reliance, but instead looks to "the objective group-based interests that Congress could practically have assessed ex ante," *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006), asking whether it would be objectively reasonable for particular classes of individuals to have relied on the continued availability of § 212(c) relief. *Id.* In *Hem*, the Tenth Circuit ruled that all immigrants who forwent an appeal of their convictions (when a successful appeal could have deprived them of § 212(c) eligibility) could prevent retroactive application of the repeal. *Id.* at 1199. Thus, in the Tenth Circuit, evidence of reliance is again the central question in the retroactivity question. But the answer may differ for different categories of immigrants, and a subjective showing of individual reliance is not necessary.

II. THE CIRCUITS HAVE ALSO SPLIT ON APPLICATION OF THE "STATUTORY COUNTERPART" RULE FOR § 212(C) ELIGIBILITY.

Assuming that an immigrant is not categorically ineligible for § 212(c) relief based on the 1996 repeal, he should be eligible for that relief so long as he meets the requirements of that provision. On this question, too, the decision below implicates another circuit split worthy of this Court's consideration.

By its terms, § 212(c) applied only to lawful resident immigrants who were put into exclusion proceedings upon return to the United States from a brief trip abroad. Since the enactment of § 212(c), and indeed, predating that precise form of relief, the BIA had a practice of permitting *nunc pro tunc*

applications by residents who had been erroneously admitted despite their excludability, and thereafter put into deportation proceedings. *See, e.g.*, *Matter of Tanori*, 15 I. & N. Dec. 566, 567-68 (BIA 1976) (collecting cases); *Matter of L-*, 1 I. & N. Dec. 1 (BIA 1940). This was subsequently expanded to individuals who had never traveled abroad, based on the Second Circuit's conclusion in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), that there was no rational basis to distinguish between those immigrants in deportation proceedings who had traveled, and those who had never left. The Board adopted this interpretation in *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). Not all deportable immigrants were eligible for § 212(c) relief. Only those who could have sought § 212(c) relief in exclusion proceedings were considered eligible. *See id.* at 30. Ultimately, the class of "similarly situated" deportable immigrants eligible for § 212(c) relief was limited to those whose grounds for deportation, as listed in § 241, 8 U.S.C. § 1227,[6] had a "statutory counterpart" in the enumerated grounds for exclusion in § 212(a). In 2004, this statutory counterpart rule was codified as part of a regulation implementing *St. Cyr*'s holding on the retroactivity of § 212(c) relief. *See* 8 C.F.R. § 1212.3(f)(5).

Both before and after this 2004 regulation was promulgated, the BIA often held that § 212(c) relief was available for immigrants deportable for aggravated felonies that could also be considered crimes involving moral turpitude. *See Matter of*

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[6] In 1996, § 241 was renumbered § 237 of the INA and recodified at 8 U.S.C. § 1227. *See* Pub. L. No. 104-208, § 305(a)(2), 110 Stat. 3009-598.

Meza, 20 I. & N. Dec. 257, 259 (BIA 1991). Such aggravated felonies for which § 212(c) relief was available included "crimes of violence" under 8 U.S.C. § 1101(a)(43)(F), *see, e.g.*, *Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-91 (BIA 1992), and sexual abuse of a minor under § 1101(a)(43)(A), *see, e.g.*, *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004).

But in 2005, nine years after *St. Cyr*, the BIA changed course and interpreted this rule to turn on "whether Congress has employed similar language to describe substantially equivalent categories of offenses" in the separate provisions governing grounds for deportability and grounds for excludability (and without regard to the relevant categories of exclusion and deportation at the time of the conviction or plea). *In re Blake* ("*Blake I*"), 23 I. & N. Dec. 722, 728 (BIA 2005). Since 1996, the definition of "aggravated felony" has included "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A), and conviction of an aggravated felony is a ground of removability. 8 U.S.C. § 1227(a)(2)(A)(iii). Neither an "aggravated felony" nor "sexual abuse of a minor" is, as such, a listed ground for exclusion under § 212(a)—although a "crime involving moral turpitude" is. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Accordingly, numerous circuits, following the BIA's statutory comparison test, hold that a person being deported for committing sexual abuse of a minor cannot receive § 212(c) relief.[7]

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[7] *See, e.g.*, *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62, 64-65 (1st Cir. 2008); *Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Sudol v. Attorney Gen.*, 300 F. App'x 157, 158-59 (3d Cir. 2008) (per curiam); *Calderon-Minchola v. Attorney General*, 258 F.

The Second Circuit, however, holds differently. Considering the case (among others) of an immigrant convicted of sexual abuse of a minor, the Second Circuit ruled the BIA's statutory counterpart test constitutionally deficient. *Blake v. Carbone* ("*Blake II*"), 489 F.3d 88, 104 (2d Cir. 2007). "[W]hat makes one alien similarly situated to another," the court reasoned, "is his or her act or offense," not the language Congress chose to describe it. *Id.* And since "sexual abuse of a minor" qualifies as a "crime involving moral turpitude," the court held it inappropriate to deny § 212(c) relief for all immigrants convicted of sexual abuse of a minor based simply on comparing the language used to describe the offense in deportation proceedings and the language Congress chose in enumerating the acts, offenses or groups of offenses, that constitute grounds for exclusion and deportation. *Id.*

App'x 425, 427-28 (3d Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3d Cir. 2007); *Hakimi v. Holder*, 360 F. App'x 497, 497 (4th Cir. 2010) (per curiam); *Singh v. Keisler*, 255 F. App'x 710, 713 (4th Cir. 2007); *Garza-Garcia v. Mukasey*, 293 F. App'x 282, 283 (5th Cir. 2008); *Brieva-Perez v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007); *Koussan v. Holder*, 556 F.3d 403, 408-09, 412-14 (6th Cir. 2009); *Gjonaj v. I.N.S.*, 47 F.3d 824, 827 (6th Cir. 1995); *De Leon v. Holder*, 334 F. App'x 28, 29-30 (7th Cir. 2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 683-84 (7th Cir.2008); *Lovan*, 574 F.3d at 993-97; *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Soriano v. Gonzales*, 489 F.3d 909, 909 (8th Cir. 2006) (per curiam); *Abebe v. Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (per curiam); *Alvarez v. Mukasey*, 282 F. App'x 718, 723 (10th Cir. 2008); *Falaniko v. Mukasey*. 272 F. App'x 742, 746-49 (10th Cir. 2008); *Hernandez v. Attorney Gen.*, No. 10-10872, 2010 WL 3836121, at *2 (11th Cir. Oct. 4, 2010); *De la Rosa v. Holder*, 579 F.3d 1327, 1337-40 (11th Cir. 2009) (per curiam).

(remanding to the BIA for the particularized determination).

While the majority of circuits disagrees with the Second Circuit's opinion in *Blake II*, most have done so without legitimate justification. Often, these courts seem motivated in large part by the conclusion that the Second Circuit in *Francis*, in the first instance, imposed the wrong remedy for the equal-protection violation when, rather than simply strike the statute, it interpreted § 212(c) to be available for potential deportees who never left the country. *See, e.g.*, *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 684-85 (7th Cir. 2008). In particular, the Seventh Circuit has opined that, because "§ 212(c) has already been 'stretched beyond its language' in response to 'equal protection concerns,'" *see id.* at 692 (quoting *Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992)), "[a]dditional 'judicial redrafting would serve only to pull the statute further from its moorings in the legislative will,'" *id.* (quoting *Farquaharson v. Attorney Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001)).

But this concern does not justify parting with *Blake II*'s independent holding on the statutory counterpart test. For all the hand-wringing about "judicial redrafting," the Agency in fact not only accepted *Francis*'s holding, it codified it. The *Blake II* approach does not reject the statutory counterpart test, but is faithful to that codification; without unnecessary statutory contortions, the Second Circuit interprets it in a manner which vindicates its rationale, treating similarly situated people the same. By contrast, the BIA's formalistic linguistic approach treats similar people differently, violating

Equal Protection and reaching an unnecessarily illogical result.

In fact, only the Second Circuit's approach avoids the back-door result of retroactive application of the § 212(c) repeal through the BIA's interpretation of the statutory counterpart rule. This case proves the point. Johnson was not deportable. Section 241's list of deportable offenses included aggravated felonies, but the definition of aggravated felony did not include sexual abuse of a minor. The list also included crimes of moral turpitude, but only if committed within 5 years of earning lawful permanent resident status. *See* 8 U.S.C. § 1227(a)(2). However, Johnson would have been excludable (and still is), as § 212(a)'s list of excludable offenses includes all felony crimes involving moral turpitude. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Thus, before 1996, as Johnson faced a threat of exclusion but not deportation, Johnson could have sought a § 212(c) waiver, prospectively or upon return from travel abroad. *See* 8 C.F.R. § 212.3(b). The BIA's approach, however, holds that while § 212(c) itself was not repealed retroactively, a separate statutory provision amending the aggravated felony definition—a provision not purporting to repeal § 212(c)—*sub silentio* repealed § 212(c) retroactively as to people like Johnson. That makes no sense.

III. THIS COURT'S GUIDANCE IS NEEDED ON THESE TWO ISSUES, AND THIS CASE PRESENTS AN EXCELLENT VEHICLE IN WHICH TO ADDRESS THEM.

This case provides a rare opportunity to resolve two circuit splits that are entrenched, well-defined, and vital, with new circuits having weighed in on the

issues as recently as this year. These matters are important not only for the thousands of immigrants who have sought § 212(c) waiver each year, but also (as to the retroactivity issue) to anyone litigating the retroactivity of a statute in any context, as the fundamental nature of the Court's retroactivity analysis has been muddied by the Circuits' wildly differing reactions to *St. Cyr*. This Court should use this case to clarify the law on both of these matters.

A. The Circuit Conflicts Are Entrenched.

Nearly all circuits have now had the opportunity to address both issues presented in this case. If anything, rather than developing a consensus, the circuits seem to be drifting further apart.

On the retroactivity issue, last year, the Eighth Circuit became the eleventh court of appeals to weigh in, adopting the Third Circuit rule and following *St. Cyr* to reject retroactive application of the repeal to any pre-1996 conviction. *See Lovan*, 574 F.3d at 994. This year, the Sixth Circuit became the twelfth court of appeals to do so, adopting the polar opposite approach and siding with the Seventh Circuit and others. *See Kellerman*, 592 F.3d at 707. Nothing suggests that further percolation would be beneficial, and there appears to be no hope for resolution absent this Court's intervention.

On the "statutory counterpart" issue, the Second Circuit, having been intimately involved in the genesis of the rule after *Francis*, took a clear stand in *Blake II*, against a wooden, linguistic approach to determining whether deportable crimes have a statutory counterpart in the enumerated list of excludable crimes. Other Circuits, though, have expressly considered and rejected *Blake*'s approach.

At this point, eleven circuits have addressed the matter. This issue, too, is now ripe for this Court's attention.

B. The Issues Involved Are Frequently Recurring, Important For Immigrants Across The Country, And Important For Retroactivity Analysis In General.

As this Court observed in *St. Cyr*, § 212(c) waivers are sought by (and granted to) thousands of immigrants each year. *See* 533 U.S. at 296 & n.5. As shown by the dozens of appellate court decisions on the issue to come down only in the last few years,[8]

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[8] *See, e.g.*, *Myers v. Holder*, No. 07-72858, 2010 WL 3938203, at *1 (9th Cir. Oct. 8, 2010); *Johnson v. Holder*, No. 09-3084, 2010 WL 2836302, at *2 (7th Cir. July 9, 2010); *Canto v. Holder*, 593 F.3d 638, 643-45 (7th Cir. 2010); *Kellermann*, 592 F.3d at 705-07; *Telemaque v. Attorney Gen.*, 358 F. App'x. 145, 146-47 (11th Cir. 2009) (per curiam); *De la Rosa*, 579 F.3d at 1329; *Lovan*, 574 F.3d at 993-97; *Van Don Nguyen v. Holder*, 571 F.3d 524, 527 (6th Cir. 2009); *Johnson v. Holder*, 564 F.3d 95, 97-100 (2d Cir. 2009); *Ferguson*, 563 F.3d at 1259-71; *Nadal-Ginard v. Holder*, 558 F.3d 61, 70 (1st Cir. 2009); *Haque v. Holder*, 312 F. App'x 946, 947 (9th Cir. 2009); *McKenzie v. Attorney Gen.*, 301 F. App'x 915, 918 (11th Cir. 2008); *Morgorichev v. Mukasey*, 274 F. App'x. 98, 100-01 (2d Cir. 2008); *Ibanez v. Attorney Gen.*, 270 F. App'x 816, 817-18 (11th Cir. 2008) (per curiam); *Rodriguez v. Carbone*, 269 F. App'x 114, 115 n.1 (2d Cir. 2008); *De Horta Garcia*, 519 F.3d at 661; *Walcott v. Chertoff*, 517 F.3d 149, 153-55 (2d Cir. 2008); *Singh v. Mukasey*, 520 F.3d 119, 123-25 (2d Cir. 2008) (per curiam); *Eski v. Mukasey*, 266 F. App'x 669, 670 n.1 (9th Cir. 2008); *De Freitas v. Mukasey*, 256 F. App'x 985, 987-88 (9th Cir. 2007); *Maiwand v. Gonzales*, 501 F.3d 101, 104-05 (2d Cir. 2007); *Zamora*, 240 F. App'x at 152-54; *Hamilton v. Attorney Gen.* 239 F. App'x. 496, 498 (11th Cir. 2007) (per curiam); *Lee v. Attorney Gen.*, 242 F. App'x 637, 639 (11th Cir. 2007) (per curiam); *Cerbacio-Diaz v. Gonzales*, 234 F. App'x 583, 583 (9th Cir. 2007); *United States v. Gibbs*, 226 F. App'x 6, 7 (D.C. Cir. 2007); *Saravia-Paguada v. Gonzales*, 488 F.3d 1122,

the issue of § 212(c)'s repeal and its retroactivity shows no sign of abating. And what is at stake in these cases, the ability to remain in the United States, where immigrants such as Johnson have often lived for nearly all of their lives, is "an integral part—indeed, sometimes the most important part—" of a criminal proceeding involving an immigrant. *Padilla*, 130 S. Ct. at 1480.

The confusion in this area of retroactivity has also crept into other parts of immigration law. *See, e.g.*, *Zuluaga Martinez v. INS*, 523 F.3d 365, 386 (2d Cir. 2008) (Straub. J., concurring) (in an analysis of INA § 240A(d)(1), the court noting that "whether—and to what extent—a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, 'should be re-visited' or reviewed.") (quoting *United States v. De Horta Garcia*, 519 F.3d 658, 666 (7th Cir. 2008) (Rovner, J., concurring)); *id.* at 664 (discussing § 212(c) cases in analyzing retroactivity of the stop-time rule in 8 U.S.C. § 1229b(d)(1)); *see also Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007) (considering INA § 244(a)(2), noting that "*St Cyr* has produced considerable disagreement among the courts of appeals concerning whether 'reasonable reliance' on pre-IIRIRA relief

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1129-35 (9th Cir. 2007); *Bernate v. Gonzales*, 229 F. App'x 767, 768-69 (10th Cir. 2007); *Tilley v. Gonzales*, 228 F. App'x 585, 587-88 (6th Cir. 2007); *Lopez-Bazante v. Gonzales*, 237 F. App'x 131, 132 n.1 (9th 2007); *Mbea*, 482 F.3d at 280-82; *Irabor v. Attorney Gen.*, 219 F. App'x 964, 968 (11th Cir. 2007) (per curiam); *Atkinson*, 479 F.3d at 226-31; *United States v. Munoz-Recillas*, 224 F. App'x 621, 623 (9th Cir. 2007); *Johnson v. Gonzales*, 478 F.3d 795, 797-800 (7th Cir. 2007).

from deportation is a required element of a *Landgraf* claim . . . "); *id.* at 941 (adopting the Tenth Circuit's objective reliance standard in *Hem*); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 602 (9th Cir. 2002) (considering INA § 240A(d), allowing retroactive application due to lack of reliance); *Hernandez v. Gonzales*, 437 F.3d 341, 352 (3d Cir. 2006) (distinguishing *Jimenez-Angeles* and *Karageorgious v. Ashcroft*, 374 F.3d 152 (2d Cir. 2004), "[b]ecause our colleagues in the Second and Ninth Circuits engage in a retroactivity analysis different from the one we apply").

And in fact, this confusion over the role of reliance in a retroactivity analysis has even spilled over from immigration to entirely unrelated parts of the law. For example, citing *Olatunji* among other cases, the Federal Circuit recently noted that the Courts of Appeals have disagreed on "[t]he weight to be given" to the reliance interests mentioned in *Landgraf*. *Princess Cruise Lines, Inc. v. United States*, 397 F.3d 1358, 1366 (Fed. Cir. 2005). The court ultimately avoided the difficult issue, concluding that it did not "need [to] resolve the relative weight to be given to [reliance] because it points in the same direction as [other factors in the retroactivity analysis]." *Id.* Indeed, it is becoming increasingly common for courts to leave the question unanswered. *See, e.g.*, *In re Jones*, 226 F.3d 328, 331-32 (4th Cir. 2000) ("[W]e need not define the appropriate reliance standard[.]"). And when the role of reliance cannot be avoided, Circuit court panels often find themselves divided. *See Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640 (6th Cir. 2006) (en banc) (allowing retroactive application of a change in adjudication of disability benefits in part because of a lack of reliance on

existing rules); *id.* at 673 (Clay, J., dissenting) (taking issue with the majority's reliance analysis); *see also generally Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003) (en banc) (allowing retroactive application of decisional law based on the particular circumstances of the defendant); *id.* at 1229 (Edmondson, J., dissenting) (contending that "the sweep of the Court's decision" reaches all defendants, and once the court "decide[s] to apply a rule retroactively," the court "must apply the rule retroactively to all whose cases are still pending"). While this is perhaps understandable given the muddled state of the law, it only confirms that this Court's guidance is urgently needed.[9]

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[9] Despite the broad implications of this important issue, the Solicitor General has previously opposed certiorari on this circuit split, arguing that the issue of the retroactivity of the repeal of § 212(c) is becoming less frequent as pre-1996 convictions become more and more distant past. *See, e.g.*, Brief for Respondent in Opposition at 13, *Zamora v. Mukasey*, 533 U.S. 1004 (2008) (No. 07-820), 2008 WL 809105. Of course, this argument could conceivably be raised to avoid this Court's review of any retroactivity issue; by definition, they all involve a change in law that becomes more distant history with each passing day. But that was not a bar to this Court's review in *St. Cyr*, *Landgraf*, *Hughes*, or any other retroactivity case, and it should never be a reason to deny an otherwise *cert*-worthy retroactivity case. Moreover, as this case itself shows, the fact that a conviction is decades old does not prevent the DHS from arresting an immigrant and initiating deportation proceedings. The issue is here to stay, and the countless thousands of immigrants with pre-1996 convictions deserve the Court's attention.

C. This Case Is The Perfect Vehicle To Decide Two Related Issues On Which The Circuits Have Split, And The Proper Resolution Of These Issues Could Dramatically Affect Johnson's Life.

Finally, unlike the vast majority of petitions for certiorari on the retroactivity of § 212(c)'s repeal,[10] this case also squarely presents the second conflict involving application of the "statutory counterpart" test for § 212(c) eligibility. The answers to both of these questions could produce a dramatically different result in this case than the one rendered by the Seventh Circuit.

That Johnson's case could have been adjudicated differently in a court of appeals where § 212(c) relief is available for an aggravated felony is self-evident.[11]

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[10] *See, e.g.*, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010); *Molina-De La Villa v. Holder*, 130 S. Ct. 1882 (2010); *Cruz-Garcia v. Holder*, 129 S. Ct. 2424 (2009); *Aguilar v. Mukasey*, 128 S. Ct. 2961 (2008); *Zamora v. Mukasey*, 553 U.S. 1004 (2008); *Hernandez-Castillo v. Gonzales*, 549 U.S. 810 (2006); *Thom v. Gonzales*, 546 U.S. 828 (2005); *Stephens v. Ashcroft*, 543 U.S. 1124 (2005); *Reyes v. McElroy*, 543 U.S. 1057 (2005); *Lawrence v. Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003).

[11] This is true even if the Court were to adopt one of the intermediate positions, short of full non-retroactivity of the § 212(c) repeal for all immigrants. Johnson demonstrated objective reliance when he declined to appeal his criminal conviction, having received a probationary sentence which did not bar him from § 212(c) relief. *Cf. Hem*, 458 F. 3d at 1199 (finding objectively reasonable reliance where appeal could have resulted in remand for retrial or resentencing which might have barred relief). Subjectively, Johnson could have sought waiver of deportation earlier, but he did not; Johnson expected § 212(c) relief would be available in future years, at which time he could

Moreover, as to the second issue, if Johnson's case were in the Second Circuit, *Blake II* would control, and he would be eligible for § 212(c) relief. Johnson was convicted of the same offense as Blake—sexual abuse of a minor—and Johnson raises the same issue—whether the absence of "aggravated felony" per se on the list of excludable offenses categorically precludes him from § 212(c) eligibility despite the distinct possibility that the offense qualifies as a "crime involving moral turpitude."

Nor are there any other evident vehicle problems. Indeed, Johnson did not challenge the facts underlying his conviction. Pet. App. 3a. The issues are purely legal, and the circuit conflicts are well-established. This is a rare opportunity for the Court to address and resolve *both* of these major circuit splits, which continue to befuddle the lower courts, once and for all.

CONCLUSION

The petition should be granted.

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demonstrate a stronger record of constructive, law-abiding behavior on which to base his discretionary waiver claim. Delaying a claim for a § 212(c) waiver "could thus have reasonably been motivated by the availability of § 212(c) relief" in the future. 458 F. 3d at 1199. If reliance is a prerequisite at all, and if case-by-case (or category-by-category) retroactivity analysis is tenable, this should be enough for Johnson to be eligible for the § 212(c) waiver.

DECEMBER 1, 2010

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APPENDIX

APPENDIX A

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued May 19, 2010
Decided July 19, 2010

Before

Hon. Joel M. Flaum, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. David F. Hamilton, *Circuit Judge*

No. 09-3084

Livingston Rondell Johnson,
Petitioner,
v.
Eric H. Holder, Jr., U.S. Attorney General,
Respondent.

Petition for Review from a Decision of the Board of Immigration Appeals
Agency No. A 022-691-337

ORDER

Livingston Johnson is a citizen of Jamaica and has resided here as a lawful permanent resident for almost three decades. He was convicted of sexual assault on a minor and as a result the Department of Homeland Security charged him with removability, which was commonly known as deportation. Before the Immigration Judge, he applied for waivers of removability and inadmissibility that would allow the judge to use his discretion and decide whether Johnson could stay here. But both were denied: the nature and circumstances of his conviction made him ineligible for either waiver. Upon review, the Board of Immigration Appeals affirmed and now Johnson appeals. Because we agree that Johnson's previous conviction renders him ineligible for either form of relief, we deny the petition for review.

I.

Livingston Johnson came to America in 1978, and since 1981 he has resided here as a lawful permanent resident. In 1992, he was charged with sexual assault on a minor—the minor was his step-daughter. He opted for a bench trial, was convicted, and sentenced to 30 months of supervised probation and 9 months of work release.

For over a decade, Johnson's immigration status was unchanged. Then in 2003, he applied to become a naturalized citizen. After reviewing his application, the Department of Homeland Security ("DHS") denied his application because of his poor moral character, evidenced by his conviction.

Three years later, in 2006, DHS arrested him and charged him with removability for committing an aggravated felony, after being admitted into the

United States. An aggravated felony is defined as "murder, rape, or sexual abuse of a minor." 8 U.S.C. § 101(a)(43)(A). Johnson, with counsel, appeared before an Immigration Judge and admitted the factual allegations underlying his removability, namely, he was a lawful permanent resident and convicted of an aggravated felony.

While conceding his removability, Johnson also sought a section 212(c) waiver of removability and a section 212(h) waiver of inadmissability. Under both sections and in certain limited circumstances, an alien may stay in the United States despite having committed a removable offense. The judge found that Johnson was ineligible for either form of relief because he had not pleaded guilty but was convicted after a bench trial, and his conviction was for an aggravated felony. Johnson appeals, challenging the determination that he was ineligible for either a section 212(c) or a section 212(h) waiver.

II.

Historically, when an alien committed a crime, the government could remove a lawful permanent resident from this country by either deporting them after they entered the country or by excluding them upon re-entry. *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 683 (7th Cir. 2008). With this broad power, the Attorney General also had discretion to admit certain aliens otherwise excludable under the Act. Much of this discretion was vested in section 212(c), and when the Attorney General exercised this discretion it was commonly called a section 212 waiver. Over the years, federal courts and the Board of Immigration Appeals broadened the scope of section 212(c),

applying waivers in both deportation proceedings and exclusion proceedings. *Id.* at 684.

Congress eventually passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which repealed section 212(c) entirely. *Id.* at 687. In its place Congress enacted 8 U.S.C. § 1229b, which gives the Attorney General authority to cancel removal for a narrow class of inadmissible or deportable aliens; notably, that class excludes anyone previously convicted of "any aggravated felony." 8 U.S.C. § 1229b(a)(3); *see also INS v. St. Cyr*, 533 U.S. 289, 297 (2001). Johnson's conviction qualifies as an aggravated felony. 8 U.S.C. § 1101(a)(43)(A). And this exclusion of aliens convicted of an aggravated felony is retroactive. It applies to "all criminal violations committed by an alien after entry into the United States, regardless of whether they were committed before or after the amended definition went into affect." *Flores-Leon v. INS*, 272 F.3d 433, 439 (7th Cir. 2001).

Following Congress's repeal of section 212(c), a waiver under it remains available in two limited category of cases, only one of which is at issue here. *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004). The Supreme Court has held the door open for such waivers to aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) waivers at the time of their pleas under the law then in effect." *Zamora-Mallari*, 514 F.3d at 690-91. In *St. Cyr*, the Supreme Court reasoned that many alien defendants have abandoned their Sixth Amendment right to a trial and pleaded guilty relying on the availability of a

section 212(c) waiver. 533 U.S. at 321-22. Eliminating the possibility of a waiver "for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (quotation omitted). Thus, it held that section 212(c) waivers remain available for those who pleaded guilty in reliance and would have been eligible for a such a waiver. *Id.* at 322.

But this exception does not apply to aliens like Johnson who chose to go to trial. *Esquivel v. Mukasey*, 543 F.3d 919, 922 (7th Cir. 2008). Defendants who went to trial are in a different category, because they "did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief." *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004). Consistent with our case law on this issue, the regulations make this point clear: "Aliens are not eligible to apply for section 212(c) relief under provisions of this paragraph with *respect to convictions entered after trial*." 8 C.F.R. § 1212.3(h) (emphasis added). Thus, Johnson cannot seek relief under *St. Cyr* for a section 212(c) waiver.

Johnson also appeals the denial of his waiver under section 212(h). That section authorizes a discretionary waiver if the denial would result in extreme hardship to a spouse, parent, or child who is a United States citizen or lawful resident. 8 U.S.C. § 1182(h)(1)(B). But it provides that "[n]o 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 [] since the date of such

admission the alien has been convicted of an aggravated felony." *Id.* Johnson's conviction qualifies as an aggravated felony; thus, he is also ineligible for a section 212(h) waiver.

III.

Johnson's conviction for sexual assault of a minor precludes the Immigration Judge or the Board of Immigration Appeals from granting him a waiver under either section 212(c) or 212(h). Thus, the petition for review is DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia
22041

Decision of the Board
of Immigration Appeals

File: A022 691 337 -
Chicago, IL

Date: JUL 24 2009

In re: LIVINGSTON RONDELL JOHNSON a.k.a.
Livingston R Johnson

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Malcolm B. Gerber

ON BEHALF OF DHS: Marc A. Jones
Assistant Chief
Counsel

CHARGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] —
Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility under
former section 212(c); continuance;

waiver of inadmissibility under section 212(h)

The respondent, a native and citizen of Jamaica, has appealed an Immigration Judge's December 17, 2007, decision denying his request for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). In addition, the respondent challenges the Immigration Judge's denial of a continuance and his failure to address his request for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The Department of Homeland Security (DHS) has filed a motion for summary affirmance. The appeal will be dismissed.

The respondent adjusted his status to that of a lawful permanent resident on April 17, 1981. Subsequently, on November 17, 1992, he was convicted of Aggravated Criminal Sexual Abuse in violation of Chapter 38 section 12-16(b) of the Illinois Revised Statutes. The respondent was convicted after a bench trial (Exh. 6). The Immigration Judge concluded that the respondent's conviction constitutes an aggravated felony under section 101(a)(43)(A) of the Act (I.J. at 3). Because the respondent did not plead guilty, but rather was convicted after a bench trial, the Immigration Judge found that he cannot rely on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), to establish eligibility for a section 212(c) waiver (I.J. at 4). Further, the Immigration Judge held that even if the respondent was eligible for a section 212(c) waiver, he would still be ineligible for the waiver because the aggravated felony for which he is removable has no comparable ground of exclusion or

inadmissibility. *See* 8 C.F.R. § 1212.3(f)(5); *Matter of Blake*, 23 I&N Dec, 722 (BIA 200S); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007).

The respondent argues on appeal that we should follow the reasoning in *Pannapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), in that *St. Cyr*, *supra*, extends to aliens, like himself, who pled not guilty and proceeded to trial. We do not find that *Pannapula v. Ashcroft*, *supra*, controls the matter before us, particularly because the case before us arises in the Seventh Circuit, not the Third. In addition, we are bound by the regulations governing eligibility for section 212(c) relief, and the regulations limit relief to those aliens who entered a plea agreement. *See* 8 C.F.R. § 1003.44(b).

The respondent also argues that the Immigration Judge should have granted a continuance in light of conflicting circuit court decisions on the issue presented in *Matter of Blake*, *supra*. *See, e.g.*, *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). However, the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this matter arises, has recently rejected similar arguments in upholding *Matter of Blake*, *supra*, and rejecting the Second Circuit's holding in *Blake v. Carbone*, *supra*. *See Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008). Consistent with our holding in *Matter of Blake*, *supra*, the respondent's conviction renders him ineligible for a section 212(c) waiver as an alien convicted of an aggravated felony under section 101 (a)(43)(A) of the Act (sexual abuse of a minor) for which there is no comparable ground of inadmissibility. *See also* 8 C.F.R. § 1212.3(t)(5). The Seventh Circuit also rejected the argument that the

respondent has made that this interpretation constitutes an equal protection violation. *Zamora-Mallari v. Mukasey*, *supra*, at 692-93. The Seventh Circuit further rejected the argument that a removal order is an "excessive fine" in violation of the Eighth Amendment because a removal order is not a "fine," and thus the Excessive Fine Clause of the Eighth Amendment does not apply. *Id.* at 695. As such, the respondent does not satisfy the statutory eligibility requirements for a section 212(c) waiver.

The respondent further argues on appeal that the Immigration Judge erred in denying him the opportunity to apply for a waiver under section 212(h). The respondent, however, is not eligible for a waiver under section 212(h) because he was previously admitted as a lawful permanent resident and has been convicted of an aggravated felony since the date of his admission. *See Matter of Yeung* (BIA 1996) (holding that under section 212(h) of the Act, as amended by section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (1996) (lIRIRA), an alien who has been admitted to the United States as a lawful permanent resident and who has been convicted of an aggravated felony since the date of such admission is ineligible for a waiver).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

In the Matter of	Case No.: A22-69l-337
JOHNSON,	IN REMOVAL
LIVINGSTON	PROCEEDINGS
RONDELL	
Respondent	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 12-17-07. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[x] The respondent was ordered removed from the United States to Jamaica; ~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____
with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Withholding of removal was ( )granted ( ) denied ( ) withdrawn.

[x] A Waiver under Section 212(c) was ~~( ) granted~~ (x) denied ~~( ) withdrawn~~

[x] Cancellation of removal under section 240A(a) was ( ) granted (x) denied ( )withdrawn.
Respondent's application for:
[ ] Cancellation under section 240A(b) (1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Cancellation under section 240A(b) (2) was ( ) granted ( ) denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Adjustment of Status under Section ____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's status was rescinded under section 246.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $ _____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[x] Other: Resp's LPR status was terminated.
Date: Dec. 17 2007

/s/ Robert D. Vinikoor
ROBERT D. VINIKOOR
Immigration Judge

Appeal: Reserved. Appeal Due By: Resp. 1-16-08.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 22 691 337 December 17, 2007

In the Matter of	)	
JOHNSON,	)	IN REMOVAL
LIVINGSTON	)	PROCEEDINGS
RONDELL	)	
Respondent	)	

CHARGE: I&N Act Section 237(a) (2) (A) (iii) — convicted of an aggravated felony as defined in Section 101 (a) (43) (A);

APPLICATIONS: A waiver of inadmissibility under Section 212(c) of the Act; or in the alternative, cancellation of removal under Section 240A(a)

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Malcom Gerber	Patrick McKenna
5935 West Diversey Avenue	Assistant Chief Counsel
Second Floor	25 East Monroe Street
Chicago, Illinois 60639	Suite 1700
	Chicago, Illinois 60603

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 57-year-old single male alien, a native and citizen of Jamaica. The respondent first entered the United States on an unknown date on or

about September 12, 1978, as a nonimmigrant. He thereafter adjusted his status to that of a permanent resident on April 17, 1981. On November 17, 1992, the respondent was convicted in the Circuit Court in Lake County, Illinois for the offense of aggravated criminal sexual abuse in violation of Chapter 38, Section 12-16(b) of the Illinois Revised Statute. (*See* Exhibit No. 6). Under the Illinois Criminal Code, a person has been convicted of aggravated criminal sexual abuse under 5/12-16(b) if he commits the offense or an act of sexual conduct with a victim who is under 18 years of age when the act was committed, and the accused was a family member.

The respondent did not plead guilty, but was found guilty at a bench trial for count one of the indictment and was ordered to complete sex offender treatment and placed on supervised probation for period of 30 months. Respondent was also sentenced to a work-release program for nine months.

On August 20, 2006, respondent was placed under removal proceedings and charged with removability under Section 237(a) (2) (A) (iii) of the Act. In a removal hearing held initially on November 1, 2006, the respondent, through counsel, admitted the factual allegations contained in the Notice to Appear, but denied removability. The Government Attorney presented a certified record of conviction and also a copy of the Illinois Revised Criminal Code relating to the respondent's conviction. The respondent's attorney also filed a copy of the respondent's conviction with a written memorandum requesting relief in lieu of removal. In the written memorandum (*see* Exhibit No. 10) the respondent admitted that a

bench trial was conducted in his case, and he was found guilty on count one of the indictment.

Under the terms of the Illinois statute for which the respondent was convicted, I find that his offense constitutes an aggravated felony as defined in Section 101(a) (43) (A) of the Act. A state conviction involving the sexual abuse of a minor constitutes an "aggravated felony" under Section 10l(a)(43)(A) of the Act if the conduct necessary for conviction under the relevant state statute involves "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct for the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). Here, the respondent was found guilty for the offense referenced in count one of the indictment, which indicated that the respondent, the stepfather of Nicole Johnson, committed an act of sexual conduct with the victim who was under 18 years of age when the act was committed, in that the defendant knowingly fondled the breast of Nicole Johnson for the purpose of sexual arousal of the defendant or respondent, in violation of Section 12-16(b) of Chapter 38 of the Illinois Revised Statute. I find that respondent's offense constitutes an aggravated felony offense under Section l0l(a)(43)(A) of the Act by clear and convincing evidence.

RELIEF IN LIEU OF REMOVAL

The respondent seeks relief in lieu of removal first arguing, through his attorney, that he is eligible for a Section 2l2(c) waiver of inadmissibility. However, the respondent did not plead guilty for the criminal

offense that he committed, and therefore he cannot rely on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). In *INS v. St. Cyr*, *supra*, the Supreme Court found that an alien who pled guilty to a criminal offense on the "reliance of likelihood of receiving a Section 212(c) waiver" would be eligible to seek the 212(c) relief because it would obviously have a severe retroactive effect in that case. Here, however, the respondent did not plead guilty on the reliance of the 212(c) relief being available. The Seventh Circuit Court of Appeals has addressed this identical issue in an unreported decision *Zamora v. Gonzales*, case no. 06-2742, decided July 16, 2007. That decision cites the Seventh Circuit prior decisions holding that a respondent who did not plead guilty did not .abandon any rights or admit guilt in reliance on continued eligibility for Section 212(c) relief. *See generally Matter of Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998). Therefore, respondent is not eligible for the Section 212(c) waiver.

Even assuming that the respondent could claim eligibility for Section 212(c) waiver even though he was found guilty by the Court, the Board of Immigration Appeals decision in *In re Blake*, 23 I&N Dec. at 728 (BIA) has found that there is no counterpart to removability for an aggravated felony offense in the grounds of inadmissibility in Section 212(a). Here, the respondent's offense, sexual abuse of a minor, is identical to the offense committed in *In re Blake*. The Board found that where there is no counterpart to the grounds of removability, a waiver of inadmissibility under Section 212(c) cannot be considered. While *Blake* held that there need not be

a "perfect match" in order to satisfy the "statutory counterpart" requirement, and "overlap" in categories of crimes even a "considerable overlap" is not enough. Thus, respondent's argument that his offense also constitutes a crime involving moral turpitude, which is a ground of inadmissibility, is not sufficiently identical to the ground of removal which would make it appropriate. The Board's rationale in *Blake* was upheld by the Seventh Circuit Court of Appeals in *Valere v. Gonzales*, 473 F.3d 757 (January 11, 2007). Thus, for this reason as well, I find respondent cannot qualify for a Section 212(c) waiver.

Alternatively, respondent's attorney has submitted an application for cancellation of removal on the respondent's behalf. However, to be eligible for cancellation of removal under Section 240A(a), an applicant must show that he has not been convicted of an aggravated felony. Here, the respondent was convicted of an aggravated felony which precludes cancellation of removal eligibility.[1]

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[1] The respondent's attorney, however, did not argue that the cancellation of removal provisions are impermissibly retroactive when they relate to a criminal conviction for an aggravated felony that occurred prior to the passage of IIRIRA on September 30, 1996. However, the change in law clearly indicated that convictions that occurred before, during, or after the change in law could still be considered aggravated felonies for purposes of the law. Here, I find that the respondent' s conviction in 1992 for aggravated sexual abuse constitutes an aggravated felony under IIRlRA, and that its

Based upon the foregoing, I find that the respondent is statutorily ineligible for cancellation of removal.

Although the respondent has lived in the United States for many years and indicated it would be difficult to readjust to life in Jamaica because of lack of employment opportunity, these factors do not qualify the respondent to remain in the United States. Respondent indicated that he has no fear of returning to Jamaica, other than the poor conditions that he might face in the future. Respondent still has siblings and his mother residing in Jamaica and there is no reason to believe the respondent could not return to Jamaica under the circumstances of his case. Accordingly, the following order will be entered.

ORDER

IT IS ORDERED that the respondent's applications for a Section 212(c) waiver and his request for cancellation of removal under Section 240A(b) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's permanent resident status be terminated.

IT IS FURTHER ORDERED that the respondent be deported and removed from the United States to Jamaica on the charge contained in the Notice to Appear.

ROBERT D. VINIKOOR
U.S. Immigration Judge

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application to his eligibility for cancellation of removal is not impermissibly retroactive.

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
October 6, 2010

Before
Joel M. Flaum, *Circuit Judge*
Daniel A. Manion, *Circuit Judge*
David F. Hamilton, *Circuit Judge*

No. 09-3084	Petition for Review from a Decision of the Board of Immigration Appeals
Livingston R. Johnson, *Petitioner*,	Agency No. A 022 - 691 - 337
v.	
Eric H. Holder, Jr., U.S. Attorney General of the United States *Respondent*.	

ORDER

On consideration of the petition for rehearing en banc filed by petitioner, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX F

U.S. Constitution, Amendment XIV § 1 provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8 U.S.C. § 1101 provides:

§ 1101. Definitions

(a) As used in this chapter–

* * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

* * *

8 U.S.C. § 1182 provides:

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, 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) of this section.

(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 1101(b)(1)(F) of this title, and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

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 802 of Title 21),

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 802 of Title 21), 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 1101(h) of this title),

(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) of this section.

(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 6402 of Title 22, 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 7102 of Title 22, 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 (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) 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 chapter, 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 chapter, 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) 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 chapter, 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 1189 of this title;

(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 sub-clauses (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 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 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 genocide, as defined in section 1091(a) of Title 18, 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; 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, 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 1183a of this title 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

1151(b)(2) or 1153(a) of this title 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 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; 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 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title 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 1153(b) of this title 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 1183a of this title 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) "Professional athlete" defined

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 1154(j) of this title 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) of this section, 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 1153(b) of this title.

(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 chapter 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

chapter (including section 1324a of this title) 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) of this section.

(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), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under

section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 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) of this section.

(F) Subject of civil penalty

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(12) of this section.

(G) Student visa abusers

An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title 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 chapter, 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 chapter, 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 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(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) of this section.

(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) of this section.

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

(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 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title 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 1229a of this title 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 1254a(e)[1] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, 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 1158 of this title 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

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[1] So in original. Probably should be a reference to section 1229c of this title.

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 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 7102 of Title 22) 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 1225(b)(1) of this title, section 1229a of this title, 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 1222(c) of this title, 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.

8 U.S.C. § 1227 provides:

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who–

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of 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 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate–

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and[1]

(i) Domestic violence, stalking, and child abuse

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[1] So in original.

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions)

whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

* * *

8 U.S.C. § 1229b provides:

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien–

(A) has been physically present in the United States for a continuous period of not less than 10

years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that–

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a

connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the Title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible

evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a–

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) of this section or section 1254 (a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of Title 22, if the relative–

(i) was, on the date on which law enforcement applied for such continued presence–

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse,

child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of--

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of this title is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of Title 18, is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or

in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if–

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of Title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who–

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section

1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United

States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) of this section shall not apply to an alien who–

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such

cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

8 C.F.R. § 1212.3(f)(5) provides:

§ 1212.3 Application for the exercise of discretion under former section 212(c).

* * *

(f) Limitations on discretion to grant an application under section 212(c) of the Act. An application for relief under former section 212(c) of the Act shall be denied if:

* * *

(5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

* * *

8 U.S.C. § 1182 (1995) provides:

§ 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into 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, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) 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

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

is excludable.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(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 802 of Title 21),

is excludable.

(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 actually imposed were 5 years or more is excludable.

(C) Controlled substance traffickers

Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is excludable.

(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, entry, 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, entry, 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 excludable.

(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 1101(h) of this title),

(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 excludable.

(F) Waiver authorized

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

(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 excludable.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)),

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

(ii) Terrorist activity defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if 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) 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 or firearm (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.

(iii) Engage in terrorist activity defined

As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(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 excludable.

(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 excludable.

(ii) Exception for involuntary 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 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 persecutions or genocide

(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 excludable.

(ii) Participation in genocide

Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable.

(4) Public charge

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 excludable.

(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 excludable, 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.

(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 excludable, 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) Application of grounds

The grounds for exclusion of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(b) of this title.

(6) Illegal entrants and immigration violators

(A) Aliens previously deported

Any alien who has been excluded from admission and deported and who again seeks admission within one year of the date of such deportation is excludable, unless prior to 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) Certain aliens previously removed

Any alien who—

(i) has been arrested and deported,

(ii) has fallen into distress and has been removed pursuant to this chapter or any prior Act,

(iii) has been removed as an alien enemy, or

(iv) has been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title,

and (a) who seeks admission within 5 years of the date of such deportation or removal, or (b) who seeks admission within 20 years in the case of an alien convicted of an aggravated felony, is excludable, unless before the date of the alien's embarkation or 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 applying or reapplying for admission.

(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 entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

(D) Stowaways

Any alien who is a stowaway is excludable.

(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 excludable.

(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), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 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) of this section.

(F) Subject of civil penalty

An alien who is the subject of a final order for violation of section 1324c of this title is excludable.

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, 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 chapter, 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 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(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 excludable.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam, see subsection (l).

(iv) Visa waiver pilot program

For authority to waive the requirement of clause (i) under a pilot program, see section 1187 of this title.

(8) Ineligible for citizenship

(A) In general

Any immigrant who is permanently ineligible to citizenship is excludable.

(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 excludable, 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) Miscellaneous

(A) Practicing polygamists

Any immigrant who is coming to the United States to practice polygamy is excludable.

(B) Guardian required to accompany excluded alien

Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 1227(e) of this title, whose protection or guardianship is required by the alien ordered excluded and deported, is excludable.

(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 excludable until the child is surrendered to the person granted custody by that order.

(ii) Exception

Clause (i) shall not apply so long as the child is located in a foreign state that is a party to the Hague Convention on the Civil Aspects of International Child Abduction.

(b) Notices of denials

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 excludable under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(1) states the determination, and

(2) lists the specific provision or provisions of law under which the alien is excludable or ineligible for entry or adjustment of status.

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

(d) Temporary admission of nonimmigrants

(1) The Attorney General shall determine whether a ground for exclusion exists with respect to a nonimmigrant described in section 1101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of

subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(S) of this title, 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 deportation proceedings against an alien admitted as a nonimmigrant under section 1101(a)(15)(S) of this title 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 1101(a)(15)(S) of this title.

(2) Repealed. Pub.L.101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076.

(3) Except as provided in this subsection, an alien (A) 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) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(a)(iii), (3)(C), and (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 (B) who is inadmissible under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (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 excludable aliens applying for temporary admission under this paragraph.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) of this section 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 1228(c) of this title.

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest 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 1157 of this title.

(6) Repealed. Pub.L.101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(7) The provisions of subsection (a) of this section (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, 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 excluded from admission to the United States, shall be immediately deported in the manner provided by section 1227(a) of this title.

(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. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(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) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof) if the alien 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.

(e) Educational visitor status; foreign residence requirement; waiver

No person admitted under section 1101(a)(15)(J) of this title 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 1101(a)(15)(J) of this title 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 engaged in the field of 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 1101(a)(15)(H) or section 1101(a)(15)(L) of this title 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 of the United States Information Agency, 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 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 the waiver shall be subject to the requirements of section 1184(k) of this title: 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.

(g) Bond and conditions for admission of alien excludable on health-related grounds

The Attorney General may waive the application of—

(1) subsection (a)(1)(A)(i) of this section 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, or

(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

(2) subsection (a)(1)(A)(ii) of this section 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 his discretion after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) Waiver of subsection (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) of this section 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 excludable only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is excludable occurred more than 15 years before the date of the alien's application for a visa, entry, or adjustment of status,

(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, and

(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 exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; 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.

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

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section—

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be contrary to the national welfare, safety, or security of the United States.

(j) Limitation on immigration of foreign medical graduates

(1) The additional requirements referred to in section 1101(a)(15)(J) of this title 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 entry 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 enters 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 1101(a)(15)(H)(i)(b) of this title 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) The Director of the United States Information Agency annually shall transmit to the Congress a report on aliens who have submitted affidavits described in paragraph (1)(E), and shall include in such report the name and address of each such alien, the medical education or training program in which such alien is participating, and the status of such alien in that program.

(k) Attorney General's discretion to admit otherwise excludable aliens who possess immigrant visas

Any alien, excludable from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a) of this section, 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 exclusion 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; waiver of requirements for nonimmigrant visitors; conditions of waiver; acceptance of funds from Guam

(1) The requirement of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General, the Secretary of State, and the Secretary of the Interior, acting jointly, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay on Guam for a period not to exceed fifteen days, if the Attorney General, the Secretary of State, and the Secretary of the Interior, after consultation with the Governor of Guam, jointly determine that—

(A) an adequate arrival and departure control system has been developed on Guam, 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) 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 chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam, or

(B) to contest, other than on the basis of an application for asylum, any action for deportation against the alien.

(3) If adequate appropriated funds to carry out this subsection are not otherwise available, the Attorney General is authorized to accept from the Government of Guam such funds as may be tendered to cover all or any part of the cost of administration and enforcement of this subsection.

(m) Requirements for admission of nonimmigrant nurses during five-year period

(1) The qualifications referred to in section 1101(a)(15)(H)(i)(a) of this title, 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 or Canada;

(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 1101(a)(15)(H)(i)(a) of this title is an attestation as to the following:

(i) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.

(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) Either (I) 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, or (II) the facility is subject to an approved State plan for the recruitment and retention of nurses (described in paragraph (3)).

(v) There is not a strike or lockout in the course of a labor dispute, 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 1101(a)(15)(H)(i)(a) of this title, 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 registered nurses employed at the facility through posting in conspicuous locations.

A facility is considered not to meet clause (i) (relating to an attestation of a substantial disruption in delivery of health care services) if the facility, within the previous year, laid off registered nurses. Notwithstanding the previous sentence, a facility

that lays off a registered nurse other than a staff nurse still meets clause (i) if, in its attestation under this subparagraph, the facility has attested that it will not replace the nurse with a nonimmigrant described in section 1101(a)(15)(H)(i)(a) of this title (either through promotion or otherwise) for a period of 1 year after the date of the lay off. Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before December 18, 1989. In the case of an alien for whom an employer has filed an attestation under this subparagraph and who is performing services at a worksite other than the employer's or other than a worksite controlled by the employer, the Secretary may waive such requirements for the attestation for the worksite as may be appropriate in order to avoid duplicative attestations, in cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attestor, or for other good cause.

(B) For purposes of subparagraph (A)(iv)(I), 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 adequate support services to free registered nurses from administrative and other nonnursing duties.

(v) 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)(I). Nothing herein 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) shall—

(i) expire at the end of the 1-year period beginning on the date of its filing with the Secretary of Labor, and

(ii) apply to petitions filed during such 1-year period 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 1101(a)(15)(H)(i)(a) of this title 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 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.

(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 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 1 year for nurses to be employed by the facility.

(v) In addition to the sanctions provided 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.

(3) The Secretary of Labor shall provide for a process under which a State may submit to the Secretary a plan for the recruitment and retention of United States citizens and immigrants who are authorized to perform nursing services as registered nurses in facilities in the State. Such a plan may include counseling and educating health workers and other individuals concerning the employment opportunities available to registered nurses. The Secretary shall provide, on an annual basis in consultation with the Secretary of Health and Human Services, for the approval or disapproval of such a plan, for purposes of paragraph (2)(A)(iv)(II). Such a plan may not be considered to be approved with respect to the facility unless the plan provides for the taking of significant steps described in paragraph (2)(A)(iv)(I) with respect to registered nurses in the facility.

(4) The period of admission of an alien under section 1101(a)(15)(H)(i)(a) of this title shall be for an initial period of not to exceed 3 years, subject to an extension for a period or periods, not to exceed a total period of admission of 5 years (or a total period of

admission of 6 years in the case of extraordinary circumstances, as determined by the Attorney General).

(5) For purposes of this subsection and section 1101(a)(15)(H)(i)(a) of this title, the term "facility" includes an employer who employs registered nurses in a home setting.

(n) Labor condition application

(1) No alien may be admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title 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 a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title 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 posted notice of filing in conspicuous locations at the place of employment.

(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.

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 1101(a)(15)(H)(i)(b) of this title within 7 days of the date of the filing of the application.

(2)(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, 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) If the Secretary 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 paragraphs (1)(C) or (1)(D), a willful failure to meet a condition of paragraph (1)(A), 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 1154 or 1184(c) of this title during a period of at least 1 year for aliens to be employed by the employer.

(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 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.

(o) Requirements for receipt of immigrant visa within ninety days following departure

An alien who has been physically present in the United States shall not be eligible to receive an immigrant visa within ninety days following departure therefrom unless—

(1) the alien was maintaining a lawful nonimmigrant status at the time of such departure, or

(2) the alien is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(A) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(B) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(C) applied for benefits under section 301(a) of the Immigration Act of 1990.

APPENDIX

APPENDIX A

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued May 19, 2010
Decided July 19, 2010

Before

Hon. Joel M. Flaum, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. David F. Hamilton, *Circuit Judge*

No. 09-3084	Petition for Review from a Decision of the Board of Immigration Appeals
Livingston Rondell Johnson, *Petitioner*, *v.* Eric H. Holder, Jr., U.S. Attorney General, *Respondent*.	Agency No. A 022-691-337

ORDER

Livingston Johnson is a citizen of Jamaica and has resided here as a lawful permanent resident for almost three decades. He was convicted of sexual assault on a minor and as a result the Department of Homeland Security charged him with removability, which was commonly known as deportation. Before the Immigration Judge, he applied for waivers of removability and inadmissibility that would allow the judge to use his discretion and decide whether Johnson could stay here. But both were denied: the nature and circumstances of his conviction made him ineligible for either waiver. Upon review, the Board of Immigration Appeals affirmed and now Johnson appeals. Because we agree that Johnson's previous conviction renders him ineligible for either form of relief, we deny the petition for review.

I.

Livingston Johnson came to America in 1978, and since 1981 he has resided here as a lawful permanent resident. In 1992, he was charged with sexual assault on a minor—the minor was his step-daughter. He opted for a bench trial, was convicted, and sentenced to 30 months of supervised probation and 9 months of work release.

For over a decade, Johnson's immigration status was unchanged. Then in 2003, he applied to become a naturalized citizen. After reviewing his application, the Department of Homeland Security ("DHS") denied his application because of his poor moral character, evidenced by his conviction.

Three years later, in 2006, DHS arrested him and charged him with removability for committing an aggravated felony, after being admitted into the

United States. An aggravated felony is defined as "murder, rape, or sexual abuse of a minor." 8 U.S.C. § 101(a)(43)(A). Johnson, with counsel, appeared before an Immigration Judge and admitted the factual allegations underlying his removability, namely, he was a lawful permanent resident and convicted of an aggravated felony.

While conceding his removability, Johnson also sought a section 212(c) waiver of removability and a section 212(h) waiver of inadmissability. Under both sections and in certain limited circumstances, an alien may stay in the United States despite having committed a removable offense. The judge found that Johnson was ineligible for either form of relief because he had not pleaded guilty but was convicted after a bench trial, and his conviction was for an aggravated felony. Johnson appeals, challenging the determination that he was ineligible for either a section 212(c) or a section 212(h) waiver.

II.

Historically, when an alien committed a crime, the government could remove a lawful permanent resident from this country by either deporting them after they entered the country or by excluding them upon re-entry. *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 683 (7th Cir. 2008). With this broad power, the Attorney General also had discretion to admit certain aliens otherwise excludable under the Act. Much of this discretion was vested in section 212(c), and when the Attorney General exercised this discretion it was commonly called a section 212 waiver. Over the years, federal courts and the Board of Immigration Appeals broadened the scope of section 212(c),

applying waivers in both deportation proceedings and exclusion proceedings. *Id.* at 684.

Congress eventually passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which repealed section 212(c) entirely. *Id.* at 687. In its place Congress enacted 8 U.S.C. § 1229b, which gives the Attorney General authority to cancel removal for a narrow class of inadmissible or deportable aliens; notably, that class excludes anyone previously convicted of "any aggravated felony." 8 U.S.C. § 1229b(a)(3); *see also INS v. St. Cyr*, 533 U.S. 289, 297 (2001). Johnson's conviction qualifies as an aggravated felony. 8 U.S.C. § 1101(a)(43)(A). And this exclusion of aliens convicted of an aggravated felony is retroactive. It applies to "all criminal violations committed by an alien after entry into the United States, regardless of whether they were committed before or after the amended definition went into affect." *Flores-Leon v. INS*, 272 F.3d 433, 439 (7th Cir. 2001).

Following Congress's repeal of section 212(c), a waiver under it remains available in two limited category of cases, only one of which is at issue here. *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004). The Supreme Court has held the door open for such waivers to aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) waivers at the time of their pleas under the law then in effect." *Zamora-Mallari*, 514 F.3d at 690-91. In *St. Cyr*, the Supreme Court reasoned that many alien defendants have abandoned their Sixth Amendment right to a trial and pleaded guilty relying on the availability of a

section 212(c) waiver. 533 U.S. at 321-22. Eliminating the possibility of a waiver "for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (quotation omitted). Thus, it held that section 212(c) waivers remain available for those who pleaded guilty in reliance and would have been eligible for a such a waiver. *Id.* at 322.

But this exception does not apply to aliens like Johnson who chose to go to trial. *Esquivel v. Mukasey*, 543 F.3d 919, 922 (7th Cir. 2008). Defendants who went to trial are in a different category, because they "did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief." *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004). Consistent with our case law on this issue, the regulations make this point clear: "Aliens are not eligible to apply for section 212(c) relief under provisions of this paragraph with *respect to convictions entered after trial*." 8 C.F.R. § 1212.3(h) (emphasis added). Thus, Johnson cannot seek relief under *St. Cyr* for a section 212(c) waiver.

Johnson also appeals the denial of his waiver under section 212(h). That section authorizes a discretionary waiver if the denial would result in extreme hardship to a spouse, parent, or child who is a United States citizen or lawful resident. 8 U.S.C. § 1182(h)(1)(B). But it provides that "[n]o 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 [] since the date of such

admission the alien has been convicted of an aggravated felony." *Id.* Johnson's conviction qualifies as an aggravated felony; thus, he is also ineligible for a section 212(h) waiver.

III.

Johnson's conviction for sexual assault of a minor precludes the Immigration Judge or the Board of Immigration Appeals from granting him a waiver under either section 212(c) or 212(h). Thus, the petition for review is DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia
22041

Decision of the Board
of Immigration Appeals

File: A022 691 337 -
Chicago, IL

Date: JUL 24 2009

In re: LIVINGSTON RONDELL JOHNSON a.k.a.
Livingston R Johnson

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Malcolm B. Gerber

ON BEHALF OF DHS: Marc A. Jones
Assistant Chief
Counsel

CHARGE:
Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] —
Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility under
former section 212(c); continuance;

waiver of inadmissibility under section 212(h)

The respondent, a native and citizen of Jamaica, has appealed an Immigration Judge's December 17, 2007, decision denying his request for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). In addition, the respondent challenges the Immigration Judge's denial of a continuance and his failure to address his request for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). The Department of Homeland Security (DHS) has filed a motion for summary affirmance. The appeal will be dismissed.

The respondent adjusted his status to that of a lawful permanent resident on April 17, 1981. Subsequently, on November 17, 1992, he was convicted of Aggravated Criminal Sexual Abuse in violation of Chapter 38 section 12-16(b) of the Illinois Revised Statutes. The respondent was convicted after a bench trial (Exh. 6). The Immigration Judge concluded that the respondent's conviction constitutes an aggravated felony under section 101(a)(43)(A) of the Act (I.J. at 3). Because the respondent did not plead guilty, but rather was convicted after a bench trial, the Immigration Judge found that he cannot rely on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), to establish eligibility for a section 212(c) waiver (I.J. at 4). Further, the Immigration Judge held that even if the respondent was eligible for a section 212(c) waiver, he would still be ineligible for the waiver because the aggravated felony for which he is removable has no comparable ground of exclusion or

inadmissibility. *See* 8 C.F.R. § 1212.3(f)(5); *Matter of Blake*, 23 I&N Dec, 722 (BIA 200S); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007).

The respondent argues on appeal that we should follow the reasoning in *Pannapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), in that *St. Cyr*, *supra*, extends to aliens, like himself, who pled not guilty and proceeded to trial. We do not find that *Pannapula v. Ashcroft*, *supra*, controls the matter before us, particularly because the case before us arises in the Seventh Circuit, not the Third. In addition, we are bound by the regulations governing eligibility for section 212(c) relief, and the regulations limit relief to those aliens who entered a plea agreement. *See* 8 C.F.R. § 1003.44(b).

The respondent also argues that the Immigration Judge should have granted a continuance in light of conflicting circuit court decisions on the issue presented in *Matter of Blake*, *supra*. *See, e.g.*, *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). However, the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this matter arises, has recently rejected similar arguments in upholding *Matter of Blake*, *supra*, and rejecting the Second Circuit's holding in *Blake v. Carbone*, *supra*. *See Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008). Consistent with our holding in *Matter of Blake*, *supra*, the respondent's conviction renders him ineligible for a section 212(c) waiver as an alien convicted of an aggravated felony under section 101 (a)(43)(A) of the Act (sexual abuse of a minor) for which there is no comparable ground of inadmissibility. *See also* 8 C.F.R. § 1212.3(t)(5). The Seventh Circuit also rejected the argument that the

respondent has made that this interpretation constitutes an equal protection violation. *Zamora-Mallari v. Mukasey*, *supra*, at 692-93. The Seventh Circuit further rejected the argument that a removal order is an "excessive fine" in violation of the Eighth Amendment because a removal order is not a "fine," and thus the Excessive Fine Clause of the Eighth Amendment does not apply. *Id.* at 695. As such, the respondent does not satisfy the statutory eligibility requirements for a section 212(c) waiver.

The respondent further argues on appeal that the Immigration Judge erred in denying him the opportunity to apply for a waiver under section 212(h). The respondent, however, is not eligible for a waiver under section 212(h) because he was previously admitted as a lawful permanent resident and has been convicted of an aggravated felony since the date of his admission. *See Matter of Yeung* (BIA 1996) (holding that under section 212(h) of the Act, as amended by section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 (1996) (lIRIRA), an alien who has been admitted to the United States as a lawful permanent resident and who has been convicted of an aggravated felony since the date of such admission is ineligible for a waiver).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

In the Matter of	Case No.: A22-69l-337
JOHNSON,	IN REMOVAL
LIVINGSTON	PROCEEDINGS
RONDELL	
Respondent	

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 12-17-07. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[x] The respondent was ordered removed from the United States to Jamaica; ~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____

with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Withholding of removal was ( )granted ( ) denied ( ) withdrawn.

[x] A Waiver under Section 212(c) was ~~( ) granted~~ (x) denied ~~( ) withdrawn~~

[x] Cancellation of removal under section 240A(a) was ( ) granted (x) denied ( )withdrawn.
Respondent's application for:
[ ] Cancellation under section 240A(b) (1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Cancellation under section 240A(b) (2) was ( ) granted ( ) denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Adjustment of Status under Section ____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's status was rescinded under section 246.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $ _____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[x] Other: Resp's LPR status was terminated.
Date: Dec. 17 2007

/s/ Robert D. Vinikoor
ROBERT D. VINIKOOR
Immigration Judge

Appeal: Reserved. Appeal Due By: Resp. 1-16-08.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 22 691 337 December 17, 2007

In the Matter of	)	
JOHNSON,	)	IN REMOVAL
LIVINGSTON	)	PROCEEDINGS
RONDELL	)	
Respondent	)	

CHARGE: I&N Act Section 237(a) (2) (A) (iii) — convicted of an aggravated felony as defined in Section 101 (a) (43) (A);

APPLICATIONS: A waiver of inadmissibility under Section 212(c) of the Act; or in the alternative, cancellation of removal under Section 240A(a)

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Malcom Gerber	Patrick McKenna
5935 West Diversey Avenue	Assistant Chief Counsel
Second Floor	25 East Monroe Street
Chicago, Illinois 60639	Suite 1700
	Chicago, Illinois 60603

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 57-year-old single male alien, a native and citizen of Jamaica. The respondent first entered the United States on an unknown date on or

about September 12, 1978, as a nonimmigrant. He thereafter adjusted his status to that of a permanent resident on April 17, 1981. On November 17, 1992, the respondent was convicted in the Circuit Court in Lake County, Illinois for the offense of aggravated criminal sexual abuse in violation of Chapter 38, Section 12-16(b) of the Illinois Revised Statute. (*See* Exhibit No. 6). Under the Illinois Criminal Code, a person has been convicted of aggravated criminal sexual abuse under 5/12-16(b) if he commits the offense or an act of sexual conduct with a victim who is under 18 years of age when the act was committed, and the accused was a family member.

The respondent did not plead guilty, but was found guilty at a bench trial for count one of the indictment and was ordered to complete sex offender treatment and placed on supervised probation for period of 30 months. Respondent was also sentenced to a work-release program for nine months.

On August 20, 2006, respondent was placed under removal proceedings and charged with removability under Section 237(a) (2) (A) (iii) of the Act. In a removal hearing held initially on November 1, 2006, the respondent, through counsel, admitted the factual allegations contained in the Notice to Appear, but denied removability. The Government Attorney presented a certified record of conviction and also a copy of the Illinois Revised Criminal Code relating to the respondent's conviction. The respondent's attorney also filed a copy of the respondent's conviction with a written memorandum requesting relief in lieu of removal. In the written memorandum (*see* Exhibit No. 10) the respondent admitted that a

bench trial was conducted in his case, and he was found guilty on count one of the indictment.

Under the terms of the Illinois statute for which the respondent was convicted, I find that his offense constitutes an aggravated felony as defined in Section 101(a) (43) (A) of the Act. A state conviction involving the sexual abuse of a minor constitutes an "aggravated felony" under Section 10l(a)(43)(A) of the Act if the conduct necessary for conviction under the relevant state statute involves "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct for the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). Here, the respondent was found guilty for the offense referenced in count one of the indictment, which indicated that the respondent, the stepfather of Nicole Johnson, committed an act of sexual conduct with the victim who was under 18 years of age when the act was committed, in that the defendant knowingly fondled the breast of Nicole Johnson for the purpose of sexual arousal of the defendant or respondent, in violation of Section 12-16(b) of Chapter 38 of the Illinois Revised Statute. I find that respondent's offense constitutes an aggravated felony offense under Section l0l(a)(43)(A) of the Act by clear and convincing evidence.

RELIEF IN LIEU OF REMOVAL

The respondent seeks relief in lieu of removal first arguing, through his attorney, that he is eligible for a Section 2l2(c) waiver of inadmissibility. However, the respondent did not plead guilty for the criminal

offense that he committed, and therefore he cannot rely on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). In *INS v. St. Cyr*, *supra*, the Supreme Court found that an alien who pled guilty to a criminal offense on the "reliance of likelihood of receiving a Section 212(c) waiver" would be eligible to seek the 212(c) relief because it would obviously have a severe retroactive effect in that case. Here, however, the respondent did not plead guilty on the reliance of the 212(c) relief being available. The Seventh Circuit Court of Appeals has addressed this identical issue in an unreported decision *Zamora v. Gonzales*, case no. 06-2742, decided July 16, 2007. That decision cites the Seventh Circuit prior decisions holding that a respondent who did not plead guilty did not .abandon any rights or admit guilt in reliance on continued eligibility for Section 212(c) relief. *See generally Matter of Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998). Therefore, respondent is not eligible for the Section 212(c) waiver.

Even assuming that the respondent could claim eligibility for Section 212(c) waiver even though he was found guilty by the Court, the Board of Immigration Appeals decision in *In re Blake*, 23 I&N Dec. at 728 (BIA) has found that there is no counterpart to removability for an aggravated felony offense in the grounds of inadmissibility in Section 212(a). Here, the respondent's offense, sexual abuse of a minor, is identical to the offense committed in *In re Blake*. The Board found that where there is no counterpart to the grounds of removability, a waiver of inadmissibility under Section 212(c) cannot be considered. While *Blake* held that there need not be

a "perfect match" in order to satisfy the "statutory counterpart" requirement, and "overlap" in categories of crimes even a "considerable overlap" is not enough. Thus, respondent's argument that his offense also constitutes a crime involving moral turpitude, which is a ground of inadmissibility, is not sufficiently identical to the ground of removal which would make it appropriate. The Board's rationale in *Blake* was upheld by the Seventh Circuit Court of Appeals in *Valere v. Gonzales*, 473 F.3d 757 (January 11, 2007). Thus, for this reason as well, I find respondent cannot qualify for a Section 212(c) waiver.

Alternatively, respondent's attorney has submitted an application for cancellation of removal on the respondent's behalf. However, to be eligible for cancellation of removal under Section 240A(a), an applicant must show that he has not been convicted of an aggravated felony. Here, the respondent was convicted of an aggravated felony which precludes cancellation of removal eligibility.[1]

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[1] The respondent's attorney, however, did not argue that the cancellation of removal provisions are impermissibly retroactive when they relate to a criminal conviction for an aggravated felony that occurred prior to the passage of IIRIRA on September 30, 1996. However, the change in law clearly indicated that convictions that occurred before, during, or after the change in law could still be considered aggravated felonies for purposes of the law. Here, I find that the respondent' s conviction in 1992 for aggravated sexual abuse constitutes an aggravated felony under IIRlRA, and that its

Based upon the foregoing, I find that the respondent is statutorily ineligible for cancellation of removal.

Although the respondent has lived in the United States for many years and indicated it would be difficult to readjust to life in Jamaica because of lack of employment opportunity, these factors do not qualify the respondent to remain in the United States. Respondent indicated that he has no fear of returning to Jamaica, other than the poor conditions that he might face in the future. Respondent still has siblings and his mother residing in Jamaica and there is no reason to believe the respondent could not return to Jamaica under the circumstances of his case. Accordingly, the following order will be entered.

ORDER

IT IS ORDERED that the respondent's applications for a Section 212(c) waiver and his request for cancellation of removal under Section 240A(b) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's permanent resident status be terminated.

IT IS FURTHER ORDERED that the respondent be deported and removed from the United States to Jamaica on the charge contained in the Notice to Appear.

ROBERT D. VINIKOOR
U.S. Immigration Judge

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application to his eligibility for cancellation of removal is not impermissibly retroactive.

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
October 6, 2010

Before
Joel M. Flaum, *Circuit Judge*
Daniel A. Manion, *Circuit Judge*
David F. Hamilton, *Circuit Judge*

No. 09-3084	Petition for Review from a Decision of the Board of Immigration Appeals
Livingston R. Johnson, *Petitioner*,	Agency No. A 022 - 691 - 337
v.	
Eric H. Holder, Jr., U.S. Attorney General of the United States *Respondent*.	

ORDER

On consideration of the petition for rehearing en banc filed by petitioner, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX F

U.S. Constitution, Amendment XIV § 1 provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

8 U.S.C. § 1101 provides:

§ 1101. Definitions

(a) As used in this chapter–

* * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

* * *

8 U.S.C. § 1182 provides:

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, 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) of this section.

(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 1101(b)(1)(F) of this title, and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

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 802 of Title 21),

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 802 of Title 21), 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 1101(h) of this title),

(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) of this section.

(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 6402 of Title 22, 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 7102 of Title 22, 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 (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) 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 chapter, 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 chapter, 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) 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 chapter, 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 1189 of this title;

(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 sub-clauses (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 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 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 genocide, as defined in section 1091(a) of Title 18, 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; 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, 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 1183a of this title 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

1151(b)(2) or 1153(a) of this title 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 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; 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 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title 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 1153(b) of this title 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 1183a of this title 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) "Professional athlete" defined

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 1154(j) of this title 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) of this section, 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 1153(b) of this title.

(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 chapter 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

chapter (including section 1324a of this title) 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) of this section.

(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), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under

section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 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) of this section.

(F) Subject of civil penalty

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(12) of this section.

(G) Student visa abusers

An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title 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 chapter, 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 chapter, 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 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(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) of this section.

(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) of this section.

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

(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 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title 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 1229a of this title 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 1254a(e)[1] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, 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 1158 of this title 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

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[1] So in original. Probably should be a reference to section 1229c of this title.

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 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 7102 of Title 22) 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 1225(b)(1) of this title, section 1229a of this title, 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 1222(c) of this title, 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.

8 U.S.C. § 1227 provides:

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who–

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of 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 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate–

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and[1]

(i) Domestic violence, stalking, and child abuse

---

[1] So in original.

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions)

whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

* * *

8 U.S.C. § 1229b provides:

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien–

(A) has been physically present in the United States for a continuous period of not less than 10

years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that–

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2) of this section, for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a

connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2) of this section. If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the Title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible

evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a–

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) of this section or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) of this section or section 1254 (a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of Title 22, if the relative–

(i) was, on the date on which law enforcement applied for such continued presence–

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse,

child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of--

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3)(A) of this title is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of Title 18, is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or

in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if–

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of Title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who–

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section

1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United

States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) of this section shall not apply to an alien who–

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such

cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

8 C.F.R. § 1212.3(f)(5) provides:

§ 1212.3 Application for the exercise of discretion under former section 212(c).

* * *

(f) Limitations on discretion to grant an application under section 212(c) of the Act. An application for relief under former section 212(c) of the Act shall be denied if:

* * *

(5) The alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

* * *

8 U.S.C. § 1182 (1995) provides:

§ 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into 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, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) 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

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

is excludable.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(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 802 of Title 21),

is excludable.

(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 actually imposed were 5 years or more is excludable.

(C) Controlled substance traffickers

Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is excludable.

(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, entry, 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, entry, 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 excludable.

(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 1101(h) of this title),

(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 excludable.

(F) Waiver authorized

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

(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 excludable.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)),

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

(ii) Terrorist activity defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if 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) 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 or firearm (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.

(iii) Engage in terrorist activity defined

As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(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 excludable.

(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 excludable.

(ii) Exception for involuntary 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 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 persecutions or genocide

(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 excludable.

(ii) Participation in genocide

Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable.

(4) Public charge

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 excludable.

(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 excludable, 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.

(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 excludable, 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) Application of grounds

The grounds for exclusion of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(b) of this title.

(6) Illegal entrants and immigration violators

(A) Aliens previously deported

Any alien who has been excluded from admission and deported and who again seeks admission within one year of the date of such deportation is excludable, unless prior to 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) Certain aliens previously removed

Any alien who—

(i) has been arrested and deported,

(ii) has fallen into distress and has been removed pursuant to this chapter or any prior Act,

(iii) has been removed as an alien enemy, or

(iv) has been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title,

and (a) who seeks admission within 5 years of the date of such deportation or removal, or (b) who seeks admission within 20 years in the case of an alien convicted of an aggravated felony, is excludable, unless before the date of the alien's embarkation or 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 applying or reapplying for admission.

(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 entry into the United States or other benefit provided under this chapter is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

(D) Stowaways

Any alien who is a stowaway is excludable.

(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 excludable.

(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), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 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) of this section.

(F) Subject of civil penalty

An alien who is the subject of a final order for violation of section 1324c of this title is excludable.

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, 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 chapter, 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 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is excludable.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(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 excludable.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam, see subsection (l).

(iv) Visa waiver pilot program

For authority to waive the requirement of clause (i) under a pilot program, see section 1187 of this title.

(8) Ineligible for citizenship

(A) In general

Any immigrant who is permanently ineligible to citizenship is excludable.

(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 excludable, 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) Miscellaneous

(A) Practicing polygamists

Any immigrant who is coming to the United States to practice polygamy is excludable.

(B) Guardian required to accompany excluded alien

Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 1227(e) of this title, whose protection or guardianship is required by the alien ordered excluded and deported, is excludable.

(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 excludable until the child is surrendered to the person granted custody by that order.

(ii) Exception

Clause (i) shall not apply so long as the child is located in a foreign state that is a party to the Hague Convention on the Civil Aspects of International Child Abduction.

(b) Notices of denials

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 excludable under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(1) states the determination, and

(2) lists the specific provision or provisions of law under which the alien is excludable or ineligible for entry or adjustment of status.

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

(d) Temporary admission of nonimmigrants

(1) The Attorney General shall determine whether a ground for exclusion exists with respect to a nonimmigrant described in section 1101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of

subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(S) of this title, 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 deportation proceedings against an alien admitted as a nonimmigrant under section 1101(a)(15)(S) of this title 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 1101(a)(15)(S) of this title.

(2) Repealed. Pub.L.101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076.

(3) Except as provided in this subsection, an alien (A) 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) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(a)(iii), (3)(C), and (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 (B) who is inadmissible under subsection (a) of this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (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 excludable aliens applying for temporary admission under this paragraph.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) of this section 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 1228(c) of this title.

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest 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 1157 of this title.

(6) Repealed. Pub.L.101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(7) The provisions of subsection (a) of this section (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, 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 excluded from admission to the United States, shall be immediately deported in the manner provided by section 1227(a) of this title.

(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. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29, 1990, 104 Stat. 5076

(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) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof) if the alien 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.

(e) Educational visitor status; foreign residence requirement; waiver

No person admitted under section 1101(a)(15)(J) of this title 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 1101(a)(15)(J) of this title 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 engaged in the field of 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 1101(a)(15)(H) or section 1101(a)(15)(L) of this title 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 of the United States Information Agency, 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 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 the waiver shall be subject to the requirements of section 1184(k) of this title: 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.

(g) Bond and conditions for admission of alien excludable on health-related grounds

The Attorney General may waive the application of—

(1) subsection (a)(1)(A)(i) of this section 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, or

(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

(2) subsection (a)(1)(A)(ii) of this section 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 his discretion after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) Waiver of subsection (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) of this section 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 excludable only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is excludable occurred more than 15 years before the date of the alien's application for a visa, entry, or adjustment of status,

(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, and

(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 exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; 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.

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

The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C) of this section—

(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be contrary to the national welfare, safety, or security of the United States.

(j) Limitation on immigration of foreign medical graduates

(1) The additional requirements referred to in section 1101(a)(15)(J) of this title 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 entry 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 enters 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 1101(a)(15)(H)(i)(b) of this title 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) The Director of the United States Information Agency annually shall transmit to the Congress a report on aliens who have submitted affidavits described in paragraph (1)(E), and shall include in such report the name and address of each such alien, the medical education or training program in which such alien is participating, and the status of such alien in that program.

(k) Attorney General's discretion to admit otherwise excludable aliens who possess immigrant visas

Any alien, excludable from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a) of this section, 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 exclusion 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; waiver of requirements for nonimmigrant visitors; conditions of waiver; acceptance of funds from Guam

(1) The requirement of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General, the Secretary of State, and the Secretary of the Interior, acting jointly, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay on Guam for a period not to exceed fifteen days, if the Attorney General, the Secretary of State, and the Secretary of the Interior, after consultation with the Governor of Guam, jointly determine that—

(A) an adequate arrival and departure control system has been developed on Guam, 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) 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 chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam, or

(B) to contest, other than on the basis of an application for asylum, any action for deportation against the alien.

(3) If adequate appropriated funds to carry out this subsection are not otherwise available, the Attorney General is authorized to accept from the Government of Guam such funds as may be tendered to cover all or any part of the cost of administration and enforcement of this subsection.

(m) Requirements for admission of nonimmigrant nurses during five-year period

(1) The qualifications referred to in section 1101(a)(15)(H)(i)(a) of this title, 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 or Canada;

(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 1101(a)(15)(H)(i)(a) of this title is an attestation as to the following:

(i) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.

(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) Either (I) 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, or (II) the facility is subject to an approved State plan for the recruitment and retention of nurses (described in paragraph (3)).

(v) There is not a strike or lockout in the course of a labor dispute, 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 1101(a)(15)(H)(i)(a) of this title, 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 registered nurses employed at the facility through posting in conspicuous locations.

A facility is considered not to meet clause (i) (relating to an attestation of a substantial disruption in delivery of health care services) if the facility, within the previous year, laid off registered nurses. Notwithstanding the previous sentence, a facility

that lays off a registered nurse other than a staff nurse still meets clause (i) if, in its attestation under this subparagraph, the facility has attested that it will not replace the nurse with a nonimmigrant described in section 1101(a)(15)(H)(i)(a) of this title (either through promotion or otherwise) for a period of 1 year after the date of the lay off. Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before December 18, 1989. In the case of an alien for whom an employer has filed an attestation under this subparagraph and who is performing services at a worksite other than the employer's or other than a worksite controlled by the employer, the Secretary may waive such requirements for the attestation for the worksite as may be appropriate in order to avoid duplicative attestations, in cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attestor, or for other good cause.

(B) For purposes of subparagraph (A)(iv)(I), 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 adequate support services to free registered nurses from administrative and other nonnursing duties.

(v) 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)(I). Nothing herein 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) shall—

(i) expire at the end of the 1-year period beginning on the date of its filing with the Secretary of Labor, and

(ii) apply to petitions filed during such 1-year period 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 1101(a)(15)(H)(i)(a) of this title 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 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.

(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 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 1 year for nurses to be employed by the facility.

(v) In addition to the sanctions provided 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.

(3) The Secretary of Labor shall provide for a process under which a State may submit to the Secretary a plan for the recruitment and retention of United States citizens and immigrants who are authorized to perform nursing services as registered nurses in facilities in the State. Such a plan may include counseling and educating health workers and other individuals concerning the employment opportunities available to registered nurses. The Secretary shall provide, on an annual basis in consultation with the Secretary of Health and Human Services, for the approval or disapproval of such a plan, for purposes of paragraph (2)(A)(iv)(II). Such a plan may not be considered to be approved with respect to the facility unless the plan provides for the taking of significant steps described in paragraph (2)(A)(iv)(I) with respect to registered nurses in the facility.

(4) The period of admission of an alien under section 1101(a)(15)(H)(i)(a) of this title shall be for an initial period of not to exceed 3 years, subject to an extension for a period or periods, not to exceed a total period of admission of 5 years (or a total period of

admission of 6 years in the case of extraordinary circumstances, as determined by the Attorney General).

(5) For purposes of this subsection and section 1101(a)(15)(H)(i)(a) of this title, the term "facility" includes an employer who employs registered nurses in a home setting.

(n) Labor condition application

(1) No alien may be admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title 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 a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title 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 posted notice of filing in conspicuous locations at the place of employment.

(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.

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 1101(a)(15)(H)(i)(b) of this title within 7 days of the date of the filing of the application.

(2)(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, 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) If the Secretary 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 paragraphs (1)(C) or (1)(D), a willful failure to meet a condition of paragraph (1)(A), 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 1154 or 1184(c) of this title during a period of at least 1 year for aliens to be employed by the employer.

(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 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.

(o) Requirements for receipt of immigrant visa within ninety days following departure

An alien who has been physically present in the United States shall not be eligible to receive an immigrant visa within ninety days following departure therefrom unless—

(1) the alien was maintaining a lawful nonimmigrant status at the time of such departure, or

(2) the alien is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(A) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(B) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(C) applied for benefits under section 301(a) of the Immigration Act of 1990.