No. 20-55777

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITEWATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT, HEREFORD NATURAL RESOURCE CONSERVATION DISTRICT, ARIZONA ASSOCIATION OF CONSERVATION DISTRICTS, CALIFORNIANS FOR POPULATION STABILIZATION, SCIENTISTS AND ENVIRONMENTALISTS FOR POPULATION STABILIZATION, NEW MEXICO CATTLE GROWERS ASSOCIATION, GLEN COLTON, and RALPH POPE,
Plaintiffs-Appellants,

v.

CHAD WOLF, in his official capacity as Secretary of the Department of Homeland Security, and THE DEPARTMENT OF HOMELAND SECURITY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
(3:16-cv-02583-L-BLM)
Hon. M. James Lorenz

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants state as follows:

Plaintiffs-Appellants The Whitewater Draw Natural Resource Conservation District and the Hereford Natural Resource Conservation District are governmental entities statutorily authorized by A.R.S. § 37 Chapter 6.

Plaintiffs-Appellants The Arizona Association of Conservation Districts and Californians for Population Stabilization are 501(c)(3) nonprofit organizations. Neither has a parent corporation and there is no publicly held corporation that owns 10% or more of their stock.

Plaintiff-Appellant Scientists and Environmentalists For Population Stabilization is an unincorporated, non-governmental association.

Plaintiff-Appellant New Mexico Cattle Growers Association is a 501(c)(5) nonprofit association. It has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Plaintiffs-Appellants Glen Colton and Ralph Pope are individuals.

Floridians for a Sustainable Population, now defunct, was a Plaintiff in the District Court. It was a 501(c)(3) nonprofit organization. It had no parent corporation and there was no publicly held corporation that owned 10% or more of their stock.

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this action under 28 U.S.C. § 1331, 5 U.S.C. § 701 *et seq.*, 28 U.S.C. § 1361, and 28 U.S.C. § 2202 because there was federal question jurisdiction, an action involving review under the Administrative Procedures Act ("APA"), mandamus and a request for declaratory judgement and further relief. First Amended Complaint ("FAC") ¶ 8, Excerpts of Record (ER) at 2:34. The District Court entered its Final Judgment on June 1, 2020 (ER 1:1) and a Partial Judgment dismissing Counts I and II of the complaint on September 30, 2018 (ER 1:19).

Plaintiffs-Appellants filed their Notice of Appeal from both the partial and Final Judgement on July 30, 2020. ER 4:632. The Notice of Appeal was timely pursuant to 28 U.S.C. § 2107(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether the Department of Homeland Security Manual ("Manual"), which is binding on agencies, is a final action that is reviewable under the Administrative Procedures Act ("APA").

II. Whether the amended complaint alleged with sufficient detail specific agency actions that were subject to environmental assessment under the National Environmental Policy Act ("NEPA").

III. Whether the District Court erred in holding that Plaintiffs-Appellants (landowners and conservation districts whose property has been devastated by cross-border illegal immigration together with others directly impacted by immigration-induced population growth) lacked standing where they alleged, in sworn affidavits, specific injuries tied to the government's immigration policies and actions, and asserted standing to challenge the government's failure to conduct NEPA-required environmental assessments.

PRIMARY AUTHORITIES

See Appendix

STATEMENT OF THE CASE

This is an appeal of the District Court's granting of the Government's motion to dismiss Counts I and II for failure to state a claim, and the District Court's granting of the Government's motion for summary judgment based on lack of Article III standing and dismissal of counts III through V.

The National Environmental Policy Act, 42 U.S.C. § 4331 et seq. (2012) ("NEPA"), requires that the federal government consider environmental impacts before acting. One of the key impacts on the environment, set out in the statute itself, is population growth. *See* 42 U.S.C. § 4331(a) ("The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the

natural environment, particularly the profound influences of population growth,…."); *id.* § 4331(b) (describing the purpose of NEPA as including "achiev[ing] a balance between population and resource use"). In recent decades, most of the population growth in the United States has been, and continues to be, due to immigration. FAC ¶ 50(iii), ER 2:70. The Department of Homeland Security ("DHS") regulates the entry and settlement of foreign nationals into the United States primarily through the eight federal programs at issue here. Yet with few exceptions, DHS has not conducted *any* of the environmental impact assessments required by NEPA, allowing it to turn a blind eye for decades to the substantial environmental impacts, including cumulative impacts, resulting from these immigration programs.

The core purpose of NEPA is to ensure that a federal agency considers the range of potential environmental impacts a federal action may have on the "human environment" before a federal agency undertakes the action. *See* 42 U.S.C. § 4332(C). This is to ensure that decisions affecting the human environment are made in full view of the public so that all implications of federal actions on natural resources will be understood.

DHS is woefully deficient in complying with this Congressional mandate with respect to its programs which regulate entry and settlement of foreign nationals. DHS did adopt NEPA procedures in 2014. *See* DHS Directive 023-01,

Implementation of the National Environmental Policy Act ("DHS Directive"), FAC Ex. 1, ER 2:111; Instruction 023-01-001-01, Instruction Manual on Implementation of the National Environmental Policy Act ("Manual"), FAC Ex. 2, ER 2:117. But those procedures utterly fail to recognize that one of DHS's core missions is the regulation of the entry into and settlement of foreign nationals in the United States. The procedures accordingly fail to provide any analysis as to whether or the extent to which the programs that implement that mission might affect the environment. As a result, DHS has failed to undertake any NEPA review of most of its immigration-related actions, in direct contravention of its statutory obligation.

Plaintiffs fall into two groups. In the first group are two Arizona water conservation districts, the Arizona Association of Conservation Districts, the New Mexico Cattle growers' Association, and an individual who co-owns a 160-acre ranch near the U.S.-Mexico border (collectively, the "Border Plaintiffs"). Each of the organizations operate in the border states of Arizona and New Mexico, and have officials and/or members who are individual owners of ranch land near the U.S.-Mexico border. Both the organizations themselves and their members, as well as individual Plaintiff Ralph Pope, have been and continue to be severely impacted by the environmental consequences of cross-border illegal immigration which Plaintiffs alleged is exacerbated, at least in part, by the Government's immigration policies.

The second group of Plaintiffs consists of Colorado resident Glen Colton and two organizations—Californians for Population Stabilization ("CAPS")) and Scientists and Environmentalists For Population Stabilization ("SEPS")—whose memberships include residents of California and Colorado, two states severely impacted by immigration-induced population growth (collectively, the "Population-Impacted Plaintiffs").[1] In addition to Plaintiff Colton, CAPS member Richard Lamm, the former Governor of Colorado, resides in Colorado. CAPS members Don Rosenberg, Claude Willey, Ric Oberlink, Richard Schneider, and Stuart Hurlbert all live in California. They all describe in their affidavits, attached to the Amended Complaint (and described in more detail below), how immigration-induced population growth, driven at least in part by immigration policies implemented and enforced by DHS, has impacted them and the communities in which they live.

Plaintiffs brought this action seeking to compel DHS to comply with its NEPA obligations.

In Count I of their Amended Complaint, Plaintiffs asserted that the NEPA procedures DHS adopted in 2014 violate the APA and NEPA because they are arbitrary and capricious. FAC ¶ 102, ER 2:100. In Count II, Plaintiffs asserted that

[1] A third organizational Plaintiff, Floridians for Population Stabilization, had members who resided in Florida, another State severely impacted by immigration-induced population growth. FAC ¶ 46, ER 2:64. That organization is now defunct, and is not part of this appeal.

DHS violated the APA and NEPA because of its failure to initiate NEPA compliance for 81 discrete regulatory actions taken to implement eight specific programs utilized by DHS to regulate the entry into and settlement of foreign nationals in the United States, namely: 1) employment based immigration; 2) family based immigration; 3) long term nonimmigrant visas; 4) parole; 5) Temporary Protective Status ("TPS"); 6) refugees; 7) asylum; and 8) Deferred Action for Childhood Arrivals ("DACA"). FAC ¶¶ 1, 7, 107, ER 2:29, 32, 101. In Count III, Plaintiffs asserted that Categorical Exclusion A3 ("CATEX A3") adopted by DHS on November 6, 2014, is arbitrary and capricious on its face. FAC ¶ 114, ER 2:103. Count IV challenges four times that DHS promulgated immigration rules that it deemed categorically excluded from NEPA review under CATEX A3. Plaintiffs asserted that the application of CATEX A3 on these four separate occasions was arbitrary and capricious as applied, in violation of the APA and NEPA. FAC ¶ 120, ER 2:106. Finally, in Count V, Plaintiffs challenged as inadequate the cursory NEPA review DHS completed for its June 2, 2014 Action, "Response to the Influx of Unaccompanied Alien Children." FAC ¶ 124, ER 2:107.

The Government moved to dismiss Count I for lack of jurisdiction under Fed. R. Civ. Proc. 12(b)(1), and Count II for failure to state a claim under Fed. R. Civ. Proc. 12(b)(6). Dkt. No. 47, ER 4:695. The District Court granted the motion to dismiss for both counts under FRCP 12(b)(6). ER 1:19.

The parties then filed cross motions for summary judgement as to counts III-V. Dkt. Nos. 70, 71, ER 4:698. The Government's motion for summary judgment asserted that Plaintiffs lacked Article III standing. The District Court granted the Government's motion for summary judgement, dismissing Counts III through V for lack of subject matter jurisdiction, denying Plaintiffs' motion for summary judgement as moot, and dismissing the action in its entirety. ER 1:1.

SUMMARY OF THE ARGUMENT

With respect to Count I, the District Court erred in holding that the DHS Manual, which was adopted in 2014 to establish procedures binding on all of DHS's constituent components, is not a final action that was reviewable under the Administrative Procedures Act ("APA"). Contrary to the District Court's holding, the Manual meets both components of the two-part test utilized by the Supreme Court and this Court to determine whether an agency action is final under the APA: It marks the consummation of the agency's decision-making process, and it determines rights or obligations from which legal consequences will flow.

With respect to Count II, the Amended Complaint, together with its accompanying expert evidence and affidavits, alleged with sufficient detail specific agency actions that were subject to environmental assessment under NEPA. The District Court erroneously treated Plaintiffs' challenge to DHS's failure to comply with NEPA when taking discreet actions to implement its immigration programs as

though it were a broad programmatic challenge to the programs themselves rather than simply a challenge to DHS's failure to comply with NEPA.

Finally, the District Court erred in holding that Plaintiffs lacked standing to press their NEPA claims in Counts III, IV, and V. It erroneously held that there was "no evidence" supporting the Population-Impacted Plaintiffs' contention that the rules modifications challenged in Count IV, which DHS had categorically exempted from NEPA review, "contributed to population growth." Plaintiffs offered sufficient evidence on that score, and the Government itself has acknowledged that the purpose of the rules modifications was to entice additional foreign nationals to come to (or remain in) the United States. The District Court also held, alternatively, that whatever population increases might result were the result of the independent actions of third parties. This, too, was error, for the court failed to consider, as it was required to do, whether such population increases were a "predictable effect of Government action on the decisions of third parties." Plaintiffs therefore had standing to pursue its as-applied challenge to DHS's categorical exclusion (Count IV), and likewise had standing for its facial challenge to the categorical exclusion (Count III) because of the "concrete applications" of that exclusion at issue in Count IV. As for Count V, the District Court's holding that the significant environmental harms the Border Plaintiffs have suffered from illegal border crossings were insufficient to provide standing because the court erroneously considered

only the "direct" impacts of government's actions with respect to the 2014 border influx crisis, rather than the "indirect" and "cumulative" effects of those actions, as NEPA and CEQ regulations in place at the time required.

ARGUMENT

I. The District Court Erred In Holding That The DHS Manual Was Not A Final Action Reviewable Under The Administrative Procedures Act.

The Administrative Procedures Act ("APA") provides for judicial review of final actions of federal agencies. 5 U.S.C. § 704. Agency policies and procedures qualify as federal actions under NEPA. *See* 40 C.F.R. § 1508.18(a) (providing at the time this action was commenced[2] that federal actions include "new or revised agency rules, regulations, plans, *policies, or procedures*; and legislative proposals") (emphasis added). Because the Manual, together with its accompanying DHS Directive, "establish the policy and procedures DHS follows to comply with" NEPA), it represents a "rule" under 5 U.S.C. § 551(4) and qualifies as an "agency action" under 5 U.S.C. § 551(13).

Under the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of

[2] The regulations adopted by the Council for Environmental Quality in 1978 to ensure compliance with NEPA were significantly revised in September 2020. *See* 85 Fed. Reg. 43304 (July 16, 2020). Because the actions at issue in this litigation were taken when the old regulations were in effect, Plaintiffs cite to the prior regulations throughout.

discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In Count I, Plaintiffs alleged that the Manual DHS adopted in 2014 to establish the NEPA procedures to be utilized by its constituent components was "arbitrary and capricious, in violation of the APA and NEPA." FAC ¶¶ 7, 102, ER 2:33, 100. In granting the Government's motion to dismiss for failure to state a claim under FRCP 12(b)(6), the District Court erroneously held that the Manual was not reviewable under the APA because it was not a *final* agency action. ER 1:23 (emphasis added). The standard of review for a District Court's order granting a motion to dismiss under Rule 12(b)(6) is de novo review. *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011).

A two-part test determines whether an agency action is final under the APA: "First, the action must mark the consummation of the agency's decisionmaking process . . . [a]nd second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). The focus is "on the practical and legal effects of the agency action." *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). "It is the effect of the action and not its label that must be considered." *Id*. at 985 (internal quotation marks and citation omitted). In determining whether an agency's action is final, courts look to whether the action "amounts to a definitive

statement of the agency's position" or if "immediate compliance [with the terms] is expected." *Id.* The "finality element must be interpreted in a pragmatic and flexible manner." *Id.* at 982 (quoting *Oregon Natural Res. Council v. Harrell*, 52 F.3d 1499, 1504 (9th Cir.1995)).

The court below determined that the Manual failed both prongs of the "final agency action" test. With respect to whether the Manual is the consummation of the agency's decision-making process, the court found that it "is a 'decision-making tool' to be used 'prior to making decisions,'" and therefore "does not represent DHS's final decision regarding NEPA review." ER 1:23 (quoting FAC Ex. 2, p. 19, ER 2:129). The court below held that the second prong was also not met because "the Manual does not impose any obligations or consequences on the DHS that are not already imposed by NEPA itself, but only provides a procedural framework for compliance without imposing consequences for violating the Manual's guidelines." ER 1:24. Neither conclusion is correct.

A. The Manual marks the consummation of DHS's decision-making process.

An agency action qualifies as the "consummation of the agency's decisionmaking process" when it represents the agency's "last word in the matter" in the sense that "an action is final and is ripe for judicial review," as opposed to "merely tentative or interlocutory in nature." *Oregon Natural Desert Ass'n*, 465 F.3d at 984 (internal quotation marks and citations omitted). "[T]he core question

is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 982 (quoting *Indus. Customers of NW Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005)).

The DHS Manual sets out the procedures and requirements its constituent components "*must*" follow in implementing NEPA. Environmental Planning and Historic Preservation Program, 79 Fed. Reg. 70538, 70538 (Nov. 26, 2014) (emphasis added) (ER 4:615). As this Court recently held in *Safer Chemicals, Healthy Families v. EPA*, mandatory language in a rule establishing criteria for future agency actions "clearly qualif[ies] as final agency action." 943 F.3d 397, 418 (9th Cir. 2019) (citing *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1049 (9th Cir. 2016)).

The District Court's error below was in assuming that only projects undertaken by an agency are "final actions" subject to judicial review under the APA, but as this Court made clear in *Cal. Sea Urchin Comm'n*, a rule that lays out mandatory criteria for how an agency will conduct its subsequent project-specific assessments is also a final action subject to APA review. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1049. "The 1987 Final Rule" which "laid out the criteria" for the subsequent agency action at issue in that case "was clearly a final agency action," this Court held, "but so too was the 2012 program termination" itself. *Id.* In other

words, the creation of a rule by which subsequent determinations are to be made, as well as the subsequent project-specific determinations themselves, can both be "final agency actions" subject to APA review, at the point each is final. The issue is not whether the criteria-setting rule is made "prior to making decisions" on the subsequent project assessment, as the District Court believed, but whether the rule is the agency's "final word" on the criteria that will be used. And on that question, there is no doubt. The notice published by DHS in the Federal Register announcing the rule expressly noted that it was "the *final* update to its policy and procedures for implementing" NEPA. 79 Fed. Reg. at 70538 (emphasis added) (ER 4:615). The government conceded that point in its brief in support of its cross-motion for summary judgement below, contending (in contrast to what it had earlier contended when successfully seeking to have Count I dismissed) that "[t]he NEPA procedures [set out in the Manual] were published *in final form* in November 2014." Dkt. #71, p. 6 (citing 79 Fed. Reg. at 70538), ER 3:614.[3]

As if that were not enough, the Manual itself repeatedly indicates that it is setting forth requirements that "must" be following by DHS components when undertaking project-specific NEPA assessments. The Manual states in its

[3] In its earlier Memorandum in support of its motion to dismiss, the Government had argued that the Manual was only "an internal DHS guidance document that is not a "final agency action" subject to review under the" APA. Dkt. #47, p. 1, ER 3:580.

introduction that it "serves as the DHS implementing procedures for NEPA (as required by 40 C.F.R. §§ 1505.1 and 1507.3) which supplement the CEQ regulations and therefore must be read in conjunction with them." FAC Ex. 2 at III-1, ER 2:129. The Manual is a critical instrument in DHS's regulation of foreign nationals entering the country and is used to "establish the policy and procedures DHS follows to comply with" NEPA. *Id*. It notes that "[t]he requirements of this Instruction Manual apply to the exclusion of all NEPA activities across DHS," and it specifies that "proponents of programs, projects, and activities implement the *requirements* of … this Instruction Manual in consultation" with the planning manager of the specific division or component within DHS implementing the NEPA requirements. *Id*. (emphasis added). Components within DHS have the option of developing *Supplemental* Instructions for implementing NEPA, to be sure, but the Manual itself must be implemented and the Component must specify the manner in which it will do so if it chooses to take this step. *Id*. at IV:12-13, ER 2:141-42.

When DHS takes specific actions, these actions must comply with the standards and conditions set out in the Manual as well as applicable federal law. Section V of the Manual sets out the "Procedures for Implementing NEPA," as well as Categorical Exclusions and a Record of Environmental Considerations to be completed in the event of a Categorical Exclusion. *See Id.* at V-1, V-3, C-1, ER 2:147, 149, 178. Through the detail and thoroughness of this Manual, it is clear that

components of DHS must comply with the requirements set out in it, and the inclusion of flow charts and checklists bolsters the mandatory nature of the Manual. *See Id.* at V-3, A-1, ER 2:149, 175.

Therefore, the Manual is DHS's "last word," "mark[ing] the consummation of the agency's decisionmaking process" as to how its constituent parts must conduct NEPA assessments on their proposed programs. The District Court erred in holding otherwise.

B. The Manual also has a legal effect, in that it imposes obligations on DHS's component agencies.

In *Bennett*, the Supreme Court held that an agency action that consummated the agency's decision-making process would be final if the action is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennet*, 520 U.S. at 178 (internal quotation marks omitted). This Court has since specified that "[t]he general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix *some* legal relationship as a consummation of the administrative process." *Oregon Natural Desert Ass'n*, 465 F.3d at 987 (quoting *Ukiah Valley Med. Ctr. v. F.T.C.*, 911 F.2d 261, 264 (1948)) (emphasis added).

The Manual clearly meets that requirement of the "final agency action" determination as well. Unlike the Claims Manual at issue in the case relied on by the government below, *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981), which the

Supreme Court described has a handbook for internal use that "has no legal force" and "does not bind the" Social Security Administration, the DHS Manual at issue here quite expressly imposes on each of DHS's components the "obligation," *Bennett*, 520 U.S. at 178, to comply with its requirements when undertaking any NEPA assessment. For example, the Manual requires notification to a regulatory department within DHS of certain NEPA activities which are specified in the Manual. ER 2:131. The Manual sets forth its own procedure and requirements which "ensure that the appropriate NEPA analysis and documentation is completed before a decision is made that irretrievably commits resources or limits the choice of reasonable alternatives to satisfy an objective…or develop a program." ER 2:130.

This Court also considers "whether the [action] has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." *Oregon Natural Desert Ass'n*, 465 F.3d at 987 (quoting *Ukiah Valley Med. Ctr.*, 911 F.2d at 264). Although the District Court held that the Manual does not impose any obligations on the DHS that are not already imposed by NEPA itself, ER 1:24, that is not the case. The Manual integrates NEPA with "review and compliance requirements under other Federal laws, regulations, Executive Orders, and other requirements for the stewardship and protection of the human environment…" ER 2:130. It states that "compliance with NEPA does not relieve DHS from complying with these other requirements." *Id*. Compliance with these

requirements certainly does not depend on NEPA for enforcement; rather it relies on the Manual itself to ensure that DHS's many employees do so. This document is therefore a final action for the DHS as it is the primary tool DHS uses to guarantee that its employees comply with a variety of federal laws and requirements.

When interpreting the finality of the Manual in a "pragmatic and flexible manner," as this Court instructed in *Oregon Natural Desert Ass'n*, 465 F.3d at 982, the binding obligations which flow from the Manual compel the conclusion that it represents DHS's last word and that it is binding. Compliance with the Manual ensures that the government actors have followed through to the end of DHS's decision-making process and therefore directly effects parties, such as Plaintiffs here, who have procedural rights to seek NEPA compliance. Thus, the Manual is a final agency action reviewable under the APA, and the District Court's holding to the contrary is erroneous.

II. The District Court Erroneously Treated Plaintiffs' Count II Challenge To DHS's Failure To Comply With NEPA With Respect To 8 Specific Programs As Though It Were A Challenge To The Programs Themselves.

In Count II, Plaintiffs sought judicial review of DHS's failure to conduct *any* of the environmental assessments required by NEPA with respect to its implementation of "seven immigration statutes pertaining to employment based immigration, family based immigration, long term nonimmigrant visas, parole, Temporary Protected Status, refugees, and asylum, and DACA, an immigration non-enforcement

policy of the DHS." ER 1:25; 2:100-101. The District Court dismissed this count as a "broad programmatic attack" on the programs themselves and not a "final agency action," and granted the Government's motion to dismiss. ER 1:25-27. The standard of review for a District Court's order granting a motion to dismiss under Rule 12(b)(6) is de novo review. *Starr*, 652 F.3d at 1205.

Judicial review of DHS's failure to comply with NEPA with respect to DHS's implementation of seven immigration statutes and the DACA executive directive, specified in Count II, is proper under 5 U.S.C. § 706(2)(A), which allows review of agency action "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and 5 U.S.C. § 706(1), which may apply to "compel agency action unlawfully withheld or unreasonably delayed." In addition, DHS's implementation of these seven statutes and the DACA non-enforcement policy are subject to judicial review as "programs" under 40 C.F.R. § 1508.18(b)(3), which provides that a major federal action tends to fall within the category of the "adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." This regulation further provides that an action "include[s] the circumstances where the responsible officials fail to act and that failure to act is

reviewable by courts or administrative tribunals under the [APA] or other applicable law as agency action." 40 C.F.R. § 1508.18.

In their Amended Complaint, Plaintiffs identified eight programs, the implementation of which, individually and certainly cumulatively, allows for the majority of foreign nationals' entry and long-term settlement into the United States. FAC ¶ 55, ER 2:72-73). The eight programs are:

1) Employment based immigration authorized by INA § 203(b), 8 U.S.C. § 1153(b);

2) Family-based immigration, authorized by INA § 203(a), 8 U.S.C. § 1153(a);

3) Long-term nonimmigrant visas, authorized by INA § 214, 8 U.S.C. § 1184;

4) Parole, authorized by INA § 212 (d)(5)(A), 8 U.S.C. § 1182(d)(5);

5) Temporary Protective Status, authorized by INA § 244, 8 U.S.C. § 1254a;

6) Refugees, authorized by INA § 207, 8 U.S.C. § 1157;

7) Asylum, authorized by INA § 208, 8 U.S.C. § 1158; and

8) Deferred Action for Childhood Arrivals ("DACA"), authorized by executive memorandum, *see* Memo from Janet Napolitano, Secretary of Homeland Security, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) ER 2:254-56.

Attached to Plaintiffs' Amended Complaint and thereby incorporated therein was a thorough report compiled by Jessica Vaughan, an expert on United States

immigration law, policy and practice, which identified 81 specific, discrete instances where DHS has undertaken regulatory action to implement each of the eight programs without *ever* conducting any environmental assessment, as required by NEPA. *See* FAC Ex. 3-C, ER 2:216-21. Because the implementation of these eight programs has also been substantially affected by ad-hoc policy decisions that DHS never promulgated as regulations, Ms. Vaughan also identified and included five specific instances of policy memoranda revising the programs. These five are listed and included in full. *See id.,* ER 2:221-22. Plaintiffs argued that "[b]ecause these actions cumulatively[4] carr[ied] out DHS's statutory mandate to regulate the entry into and settlement of foreign nationals in the United States, NEPA review should have been initiated long ago. DHS has repeatedly failed to initiate NEPA compliance at any point during its administration of these ongoing programs, including promulgation of specific regulations or adoption of final action through policy memoranda pursuant to its authority to accept foreign nationals into the country…" FAC ¶ 60, ER 2:77.

Relying on language in a portion of the Supreme Court's decision in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004), that did not even

[4] The requirement that agencies consider the "cumulative effects" of their actions, was adopted by the Council for Environmental Quality in 1978 and codified at 40 C.F.R. § 1508.7. Although that provision was repealed on September 14 of this year, *see* 40 C.F.R. § 1508.1(g), it was in effect when this lawsuit was brought, and at the time each of the discrete regulatory actions at issue here were taken.

involve the NEPA challenge addressed later in the opinion, the District Court incorrectly concluded that Plaintiffs proposed a "broad programmatic review" of the programs themselves. ER 1:26. In so holding, the District Court misconstrued *Norton* and, as a result, erroneously applied that case's rejection of "broad programmatic review" to the distinctively different NEPA challenges brought by Plaintiffs here.

Norton was a suit by the Southern Utah Wilderness Alliance and other organizations ("SUWA") alleging that the Bureau of Land Management had failed "to act to protect public lands in Utah from damage caused by [off-road vehicle] use." 542 U.S. at 60. SUWA made three claims, which it asserted could be brought under the APA: (1) that BLM had violated its non-impairment obligation under 43 U.S.C. § 1782(c) by allowing degradation in certain Wilderness Study Areas; (2) that BLM had failed to implement provisions in its land use plans relating to off-road vehicle use; and (3) that BLM had failed to take a "hard look" at whether, pursuant to NEPA, it should undertake supplemental environmental analyses for areas in which off-road vehicle use had increased. *Norton*, 542 U.S. at 60-61.

The language rejecting "broad programmatic review" under the APA, relied upon by the court below, precedes the Court's discussion of SUWA's first claim, that BLM had violated its statutory mandate to "continue to manage" Wilderness

Study Areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness." *Id.* at 65. The Court rejected that claim, noting that even though Section 1782 was "mandatory as to the object to be achieved, … it leaves BLM a great deal of discretion in deciding how to achieve it." "It assuredly does not mandate," the Court continued, "with the clarity necessary to support judicial action under [APA] § 706(1), the total exclusion of [off-road vehicle] use" sought by SUWA. *Id.* at 66. To hold otherwise, the Court added, would be to entangle the judiciary "in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.*

Had Plaintiffs here challenged DHS's policy judgements in implementing its immigration programs, the *Norton* Court's rejection of "broad programmatic review" under the APA might have been relevant, but that is not what this case is about. Rather, Plaintiffs simply seek to compel DHS to perform the environmental assessments mandated by NEPA before it implements those programs. And on this, *Norton* was quite clear: "[A] claim under [APA] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*." 542 U.S. at 64 (emphasis in original); *see also* 5 U.S.C. § 551(13) (defining "agency action" to "include[e] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*" (emphasis added)).

The *Norton* Court did also reject SUWA's NEPA claim, but not because it sought to make a "broad programmatic review," as the court below apparently thought, but because it was seeking to require a supplemental environmental assessment when there was "no ongoing 'major Federal action' that could require supplementation." *Norton*, 542 U.S. at 73. Plaintiffs' claims here are in a distinctively different posture, as Plaintiffs have alleged numerous discrete federal actions that, cumulatively, raise significant environmental concerns that should have triggered environmental assessments under NEPA. Those assessments are the discrete agency actions that, under NEPA, DHS was required to take, but did not. *Norton* therefore supports rather than forecloses claims such as those raised by Plaintiffs in Count II when, as here, Plaintiffs have alleged specific harms tied to the challenged government actions, including environmental harms tied to immigration-induced population growth and environmental harms caused by illegal immigration across the southern border.

As alleged in the Amended Complaint, the DHS programs at issue have a significant effect on the size and growth of the United States' population, as well as on the particular distribution of that population growth. Population growth itself is a significant environmental impact, as Congress itself noted in NEPA. *See* 42 U.S.C. § 4331(a) (recognizing "the profound influences of population growth" on "the natural environment"). As noted by sustainability expert Dr. Phil Cafaro in a

report attached to Plaintiffs' Amended Complaint, "overall population size is a key factor in determining a wide variety of environmental impacts." Dr. Phil Cafaro, "The Environmental Impact of Immigration into the United States." FAC Ex. 5, ER 2:281. For example, immigration-driven population growth leads to urban sprawl and farmland loss, habitat and biodiversity loss, an increase in worldwide levels of greenhouse gas emissions, and an increase of water demands and water withdrawals from natural systems. *Id.*, ER 2:279.

In the affidavits accompanying the Amended Complaint, several of the Plaintiffs referenced the specific population growth in their cities to which DHS's actions have contributed. *See, e.g.*, Lamm Aff., FAC Ex. 8 ¶ 8, ER 3:403-04; Schneider Aff., FAC Ex. 12 ¶ 25, ER 3:464; Colton Aff., FAC Ex. 14 ¶ 4, ER 3:490. Dr. Cafaro stated in his report that under the status quo immigration scenario, "two rapidly growing regions in the country – the Southwest and the Southeast – will experience very grave problems with water availability that will have significant adverse effects on urban areas, agriculture and the already beleaguered aquatic ecosystems of these areas." FAC Ex. 5, ER 3:360. Plaintiffs living in California and Colorado have already felt particularly impacted by population growth in relation to increased water demands. Richard D. Lamm, former governor of Colorado and resident of the state since 1961, discussed the difficulties of drought caused by increased water demands and the environmental damages caused by

damming rivers. *See* Lamm Aff., FAC Ex. 8 ¶¶ 8, 10, ER 3:403-06. Don Rosenberg, resident of California, describes water restrictions put in place because of inadequate resources to support the growing population. *See* Rosenberg Aff., FAC Ex. 9 ¶ 6, ER 3:416-17. Another result of the growing population is felt by Plaintiffs living in larger cities in the form of exacerbated greenhouse gas emissions causing pollution. *See*, *e.g.*, *id.* at ¶ 5, ER 3:415-16. A particularly environmentally conscious resident of California, Claude Willey, has long commuted to work in the Los Angeles area by bicycle. Willey Decl., FAC Ex. 10 ¶ 5, ER 3:429. He has noticed the impact the bad air quality has had on his lungs and now wears a pollution mask. *Id.* at ¶ 6, ER 3:430. As a resident and bicycle-commuter in an area that is particularly heavily crowded with legal and illegal immigrants, he stated in his declaration that he is "very specifically affected by immigration in a way most Americans are not." *Id.* at ¶ 7, ER 3:430. Finally, population growth has a significant impact on the environment through urban sprawl, from which several of the Plaintiffs have specifically been affected. Richard Schneider, resident of Oakland and Chair of the Californians for Population Stabilization, details this rapid loss of land to development and its resulting loss of open space and species habitat in his affidavit. Schneider Aff., FAC Ex. 12 ¶¶ 15, 18, 19, ER 3:457-60. He has dedicated much of his time and professional efforts to combating this, and fully realizes the importance of preserving land in his home state because

"[h]abitat loss due to human population growth presents the single biggest problem facing native plants and animals in California." *Id.* at ¶¶ 11-14, 21, ER 3:455-57, 460-61; *see* Lamm Aff., FAC Ex. 8 at ¶ 8, ER 3:404; Rosenberg Aff., FAC Ex. 9 at ¶¶ 4-6, ER 3:414-17; Willey Decl., FAC Ex. 10 at ¶¶ 4-8, ER 3:428-31; Hurlbert Aff., FAC Ex. 13 at ¶¶ 5-7, ER 3:471-72; Colton Aff., FAC Ex. 14 at ¶¶ 3-4, ER 3:489-90. In addition, Plaintiffs' affiants detail harms that are directly traceable to population growth largely resulting from settlement of foreign nationals which is (at least in part) the consequence of Defendant's actions. FAC ¶¶ 30-47, ER 2:44-67.

Furthermore, the Amended Complaint does include expert evidence of actual numbers of immigrants in areas where affiants live, and documents "impacts to the human environment" resulting from this population growth. FAC ¶¶ 79-91, ER 2:91-97; *see also, generally*, FAC Ex. 5, ER 2:278-3:371. Steven Camarota, Ph.D., is an expert on the demographic impacts of immigration and produced a report (attached to the Amended Complaint as Exhibit 4) addressing the impact of immigration upon population growth. He states: "There is consensus among demographers that immigration is the primary factor driving future U.S. population growth." FAC Ex. 4, ER 2:265. Using Census Bureau data, Dr. Camarota was able to estimate that new immigration and births to immigrants from 2010 to 2014 were responsible for 87% of U.S. population growth over this time-period. *Id.,* ER

2:266. Despite this easily traceable impact of DHS policy, DHS has utterly failed to consider the compound environmental impact resulting from immigration, which is responsible for most of the population growth in the United States. Plaintiffs' affidavits have made it clear that this impact is being felt across the country in general, but also specifically in their particular regions.

Jessica Vaughan, Director of Policy Studies for the Center for Immigration Studies ("CIS"), is also an expert in immigration policy and operations, covering topics such as visa programs, immigration benefits and immigration law enforcement. Vaughan Aff., FAC Ex. 3 at ¶ 1, ER 2:183. Vaughan identified that the eight programs at issue in Count II have collectively had at least two significant impacts on the human environment which have specifically injured Plaintiffs. *Id.* at ¶ 4, ER 2:185-86. These impacts are:

> 1) a substantial increase in the population through the actions themselves, population growth itself being a primary concern of the National Environmental Policy Act ("NEPA"), and entailing a host of environmental impacts (See discussion of the environmental impacts of population by Phil Cafaro, Exhibit 5); and
>
> 2) severe environmental degradation on the Southwest border caused by the passage of illegal aliens entering the country in reaction to these programs and other actions by DHS."

Id. Also attached to Vaughan's Affidavit was a report she authored entitled "DHS PROGRAMS CREATING POPULATION GROWTH," which provides a discussion of the implementation of the eight programs and their population impacts, a set of tables and graphs including timelines and geographic distribution of these impacts in areas where Plaintiffs reside, and a list of citations to the regulations and copies of the policy memoranda wherein DHS took defined, specific actions to adopt or revise these programs. Vaughan Aff., FAC Ex. 3 (Exhibits A, B, and C), ER 2:188-258.

Although the population growth induced by DHS's administration of the programs at issue results in significant environmental impacts, DHS has never even acknowledged, much less evaluated, these impacts despite its recognition that NEPA applies to its programs and actions. FAC ¶ 88, ER 2:95-96.

Further, the Parole, TPS, Asylum, and DACA programs all have the effect of encouraging further illegal entry across the Southwest border because, as expert Jessica Vaughan describes in her report on the Southwest border, "[h]istorical experience demonstrates that a real or even perceived change in enforcement policies, both at the border and in the interior, can significantly affect the number of people attempting to cross the border illegally." FAC Ex. 3-D, ER 2:260. Vaughan's assessment is supported by a Border Patrol intelligence report from 2014 based on interviews with migrants, which revealed that 95% of migrants stated their "main

reason" for coming entering the United States was because they heard they would receive permission to stay. FAC ¶ 89, ER 2:96-97; *see also* Vaughan Aff., FAC Ex. 3-D, ER 2:261. Although DHS policies are not the sole factor in all of these components of the illegal border-crossing phenomenon, there is no doubt they are a significant factor.

The District Court's dismissal of Count II was therefore in error.

III. The District Court's Holding That Plaintiffs Lacked Standing For Counts III And IV Was Based On The Erroneous Claim That Plaintiffs Offered No Evidence That DHS's Categorical Exclusion—Both On Its Face And As Applied—Contributed To Immigration-Induced Population Growth.

The standard of review for a District Court's order granting or denying a motion for summary judgment is de novo review. *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001). Plaintiffs have the burden of establishing federal jurisdiction as the party asserting it, but as the non-moving party for the government's summary judgement motion, their "evidence … is to be believed, and all justifiable inferences are to be drawn in [their] favor." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

To establish Article III standing, Plaintiffs must show: (1) injury-in-fact, (2) causation, and (3) redressability. *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In a NEPA case, in which Plaintiffs assert procedural rights, the causation and

redressability standards are relaxed. *Lujan* 504 U.S at 573, n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Pub. Citizen v. Dep't of Transp.,* 316 F.3d 1002, 1016 (9th Cir. 2003); *rev'd on other grounds,* 541 U.S. 752 (2004); *Comm. To Save the Rio Hondo v. Lucero,* 102 F.3d 445, 452 (10th Cir. 1996).

"To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Pub. Citizen,* 316 F.3d at 1015 (quoting *Cantrell v. City of Long Beach,* 241 F.3d 674, 679 (9th Cir. 2001)); *Lujan*, 504 U.S. at 573, n.8. A plaintiff need not present evidence of actual environmental harm, *Laidlaw*, 528 U.S. at 182, because requiring a NEPA plaintiff to prove "that the challenged federal project will have particular environmental effects, … would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *Citizens for Better Forestry v. U.S. Dep't of Agric.,* 341 F.3d 961, 972 (9th Cir. 2003); *see also Ocean Advocates v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 860 (9th Cir. 2005) ("'To require actual evidence of environmental harm … misunderstands the nature of environmental harm' and would unduly limit the enforcement of statutory environmental protections.") (quoting *Ecological Rights*

Fund. v. Pacific Lumber Co., 230 F.3d 1141, 1151 (9th Cir. 2000)). Instead, a plaintiff need only show (1) the agency violated its procedural obligations; (2) these procedural obligations were meant to protect plaintiff's concrete interests; and (3) it is reasonably probable that the challenged action will threaten plaintiffs' concrete interests. *See Citizens for Better Forestry*, 341 F.3d at 969-70; *see also Rio Hondo*, 102 F.3d at 448-52.

The District Court incorrectly concluded that Plaintiffs failed to meet these requirements for standing.

A. Plaintiffs' evidence of concrete interests reasonably likely to be threatened by the rules modifications DHS deemed categorically exempt from NEPA review is more than sufficient to establish Plaintiffs' standing to challenge those rules.

Count IV of the Amended Complaint alleged that DHS violated NEPA by categorically excluding four specific rules modifications from environmental review. Because DHS does not dispute that it did not conduct *any* NEPA review of these four programs beyond the determination to categorically exclude them, the first element of Plaintiffs' standing is not at issue. If the use of a categorical exemption for these programs was improper because, as Plaintiffs alleged, they contribute to immigration-induced population growth, FAC ¶ 118, ER 2:105, then the agency violated its procedural obligations under NEPA. For purposes of establishing standing, particularly at the summary judgement stage, Plaintiffs allegation on that score must be taken as true.

Neither is there any dispute about the second element. NEPA's very purpose is to ensure that before it acts, the government considers potential environmental harms including, particularly, environmental harms caused by population growth. Plaintiffs' Amended Complaint, together with its accompanying affidavits, is full of verified allegations about how Plaintiffs have been harmed by immigration-induced population growth. Again, those allegations must be taken as true for purposes of assessing Plaintiffs' standing.

At issue, then, is the third element necessary to establish standing for a procedural injury, namely, whether it is reasonably probable that the challenged action will threaten Plaintiffs' concrete interests. The court below held that Plaintiffs lacked standing because there was no evidence the particular rules modifications challenged in Count IV contributed to population growth and, alternatively, that Plaintiffs lacked standing because any increase in population which may result from the challenged rules would be due to independent third-party decision making rather than the rules themselves. ER 1:14-16. The District Court was incorrect on both fronts.

i. By adopting the four rules challenged in Count IV, DHS deliberately sought to entice more people to enter the united states.

The District Court's holding that Plaintiffs lacked standing because there was no evidence that the particular programs challenged in Count IV contributed to population growth is factually incorrect. Indeed, DHS itself has acknowledged that

each of the rules at issue in Count IV was adopted in order to entice *more* people to come to the United States.

In its Federal Register notice modifying the Student and Exchange Visitor Program rules, for example, DHS admitted that "[t]he rule … provides *greater incentive* for international students to study in the United States …." Adjustments to Limitations on Designated School Official Assignment and Study by F-2 and M-2 Nonimmigrants, 80 Fed. Reg. 23680 (Apr. 29, 2015) (emphasis added), ER 4:618. The 2015 Rule change had two components: Increasing the number of Designated School Officials ("DSOs") at each receiving school, and allowing the F-2 and M-2 visa-holding spouses and children of F-1 and M-1 Student Visa holders to access U.S. educational opportunities while in the United States. *Id.* Both of these components of the rule incentivized additional foreign students to come to the United States, according to DHS. Expanding the number of DSOs did so because DSOs "are essential to making nonimmigrant study in the United States attractive to international students," wrote DHS. 80 Fed. Reg. at 23681, ER 4:619. Removing the limit would "enhance the attractiveness of nonimmigrant study in the United States for international students and increase the program's success." *Id.* Allowing F-2 and M-2 visa spouses and children to access to education while in the United States "also increases the attractiveness of studying in the United States for foreign students" holding F-1 and M-1 student visas, wrote the DHS, adding that "[t]he

existing limitations on study to F-2 or M-2 nonimmigrant education potentially deter high quality F-1 and M-1 students from studying in the United States." *Id.* In other words, DHS quite explicitly modified these rules to incentivize more foreign students to come to the United States for study. An increase in population, even if only temporary, has environmental impacts that should have precluded treating this rule change as categorically exempt from environmental assessment, and Plaintiffs' affidavits evidencing extensive injury from the cumulative impacts of immigration-induced population growth are more than sufficient to confer standing to challenge that procedural violation.

The March 2016 rule entitled Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students ("STEM Rule"), allowed nonimmigrant students with degrees in STEM fields (science, technology, engineering or mathematics) from United States universities to participate in training opportunities for an additional 24 months (on top of the 12 months previously authorized) after earning their degree. As DHS itself acknowledged, the extension would help U.S. universities "remain globally competitive in *attracting* international students" and would also benefit the nation by "the increased *retention* of such students in the United States." 81 Fed. Reg. 13040, 13043 (March 11, 2016) (emphasis added), ER 4:631. There were already 34,000 students in the United States on a 12-month STEM OPT

extension at the time it issued its Notice of Proposed Rulemaking in 2015, and "hundreds of thousands of international students then pursuing STEM degrees, some of whom, DHS acknowledged, "may have considered the opportunities offered by the STEM OPT extension when deciding whether to pursue their degree in the United States." 81 Fed. Reg. at 13046. In other words, as with the Student and Exchange Visitor Program rules, DHS modified the STEM rules to attract more students to come to the United States, and to retain those student for a longer period of time in the United States.

The November 2018 rule entitled Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers ("AC21 Rule") amended regulations regarding several existing employment-based visa programs to enable U.S. employers to employ highly skilled workers with employment-based visas and increase the ability of visa-holding workers to change positions or employers. 81 Fed. Reg. 82398 (Nov. 18, 2016), ER 4:638. Again, by the DHS's own admission, the rule change was designed to "improv[e] the ability of U.S. employers to hire and retain high-skilled workers" while those workers were "waiting to become lawful permanent residents…." 81 Fed. Reg. at 82399, ER 4:639; *see also id.* at 82405, ER 4:645 (asserting that the "benefits from these amendments add value to the U.S. economy by *retaining* high-skilled workers") (emphasis added). Among other things, the rule allowed H-

1B nonimmigrant workers and their families in H-4 nonimmigrant status "to extend their nonimmigrant stay beyond the otherwise applicable 6-year limit." *Id.* at 82400, ER 4:640. It allowed employment authorization for certain high-skilled workers "who cannot obtain an immigrant visa due to statutory limits on the number of nonimmigrant visas," thereby "incentiviz[ing] such skilled nonimmigrant workers … to continue seeking LPR status." *Id.* at 82401, 82406, ER 4:641, 646. And it provided new exemptions to the H-1B cap that, by DHS's own admission, "[m]ay expand the numbers of petitioners that are cap exempt and thus allow certain employers greater access to H-1B workers." *Id.* at 82406, ER 4:646.

Finally, the January 2017 International Entrepreneur Rule established criteria for DHS to parole into the United States individual entrepreneurs of startup businesses, as well as their spouses and dependent children, for up to five years. 82 Fed. Reg. 5238, 5239 (Jan. 17, 2017), ER 4:653 (providing for 2.5 years of parole); *see also id.* at 5240, ER 4:654 (allowing for additional 2.5 years). It was designed so that "additional international entrepreneurs will be able to pursue their entrepreneurial endeavors *in the United States*." *Id.* at 5273 (emphasis added). Indeed, DHS expressly acknowledged that "[t]he purpose of the rule is to attract talented entrepreneurs to the United States who might otherwise choose to pursue such innovative activities abroad." *Id.* at 5274. The rule even provided that "individuals may be paroled into the United States even if they are inadmissible under

section 212(a) of the INA, 8 U.S.C. § 1182(a)." *Id.* at 5243. That section makes "ineligible to be admitted to the United States" anyone who is determined to "have a communicable disease of public health significance," who fails to provide documentation of having received vaccination against diseases such as polio and hepatitis B, who has a physical or mental disorder that may pose or has posed a threat to property or safety of the alien or others, or who is "a drug abuser or addict." 8 U.S.C. § 1182(a)(1)(A)(i-iv).

As Plaintiffs noted in their Amended Complaint, these four regulatory actions, each of which expanded incentives for aliens to come to the United States, "result in population growth." FAC ¶ 118, ER 2:105. This is particularly true when the growth-inducing effects of these particular actions are considered "cumulatively" with the myriad of other DHS actions inducing immigration-driven population growth, as CEQ regulations in place at the time required. *See* 40 C.F.R. § 1508.7 (repealed Sept. 14, 2020, *see* 40 C.F.R. § 1508.1(g)). DHS deemed these actions categorically exempt from environmental assessments required by NEPA despite the fact that, under CEQ regulations in place at the time, a categorical exclusion was only to be utilized for "a category of actions which do not individually *or cumulatively* have a significant effect on the human environment." 40 C.F.R. § 1508.4. It was therefore improper for DHS to have categorically exempted these actions from NEPA review, and the significant cumulative effect on the human

environment to which population growth induced by these actions contributed is precisely the environmental harm that Plaintiffs alleged they have suffered. FAC ¶ 115, ER 2:105.

ii. The District Court's holding that Plaintiffs lacked standing because any increase in population which may result from the challenged rules would be due to independent third-party decision making rather than the rules themselves is wrong as a matter of law.

The District Court also held, alternatively, that Plaintiffs lacked standing because any increase in population which may result from the challenged rules would be due to independent third-party decision making rather than the rules themselves. "Plaintiffs must show that their 'injury is dependent upon the agency's policy' rather than 'result[ing from] independent incentive governing a third party's decisionmaking process.,'" the court held. ER 1:15 (quoting *Citizens for Better Forestry*, 741 F.3d at 969-70, 975, and 973 n.8).

The District Court failed to appreciate the significance of the word "independent" in both *Citizens for Better Forestry* and in *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517-18 (9th Cir. 1992), cited therein, which emphasized the word. The effects of actions of third parties that are not truly "independent," but are instead induced by or the predictable consequence of the challenged government action, also give standing to those—like Plaintiffs here—who are harmed by those effects. The District Court's holding to the contrary is, moreover, simply

incompatible with the Supreme Court's recent decision in *Dep't of Commerce v. New York*, in which the Court held that "Article III 'requires no more than *de facto* causality.'" 139 S. Ct. 2551, 2566 (2019) (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Circ. 1986) (Scalia, J.). *De facto* causality was met in that case because the Plaintiffs' "theory of standing … [did] not rest on mere speculation about the decisions of third parties; it relie[d] instead on the predictable effect of Government action on the decisions of third parties." *Id.* DHS's own descriptions of the rules modifications at issue here acknowledges the obvious—that a good number of people invited into the United States by virtue of these "temporary" programs end up applying for, and receiving, permanent status. *See, e.g.*, 81 Fed. Reg. at 82398, ER 4:638 (noting that the AC21 rule was "primarily aimed at improving the ability of U.S. employers to hire and retain high-skilled workers who … are waiting to become lawful permanent residents"); *see also* Vaughan Aff., FAC Ex. 3-A, ER 2:196 ("large numbers of these nonimmigrants in fact settle permanently in the United States"). And a good many more predictably overstay their "temporary" visas. *See* Vaughan Aff., FAC Ex. 3-D, ER 2:262. Thus, even the expansions to immigration programs of a "temporary" nature contribute to permanent population growth, the environmental harms from which Plaintiffs allege they have suffered and will continue to suffer. The District Court therefore erred in holding that Plaintiffs did not have standing to challenge these programs.

B. Plaintiffs' standing to challenge the categorical exemption as applied also gives them standing to challenge the categorical exemption facially.

The District Court also held that Plaintiffs lacked standing to challenge the categorical exemption rule on its face. Even assuming Plaintiffs had established a procedural injury from the Categorical Exemption, that was insufficient for standing, the court held. "[P]rocedural injury, standing on its own, cannot serve as in injury-in-fact," the court noted. "A concrete and particular project must be connected to the procedural loss." ER 1:13 (quoting *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009))). Because "CATEX A3 is not a concrete and particular project," the court reasoned, "[n]one of Plaintiffs' evidence support[ed] a reasonable inference that CATEX A3 causes an increase in immigration." *Id.* As a result, Plaintiffs lacked Article III standing on Count III because they had "not shown with reasonable probability that CATEX A3 on its face threaten[ed] their interest in the environment or that their claimed environmental injury is dependent on CATEX A3." *Id.*

The District Court's holding on his score is incorrect, both factually and legally.

It is factually incorrect for the reasons set out in subsection III.A above. Each of the DHS rules challenged in Count IV were designed to entice additional

people to come to the United States, and the environmental effects of those population growth impacts, particularly as considered cumulatively, were not analyzed, as NEPA requires, because DHS deemed them categorically exempt from NEPA analysis by virtue of CATEX A3. In other words, but for CATEX A3, the rules at issue in Count IV would have undergone the required NEPA analysis. The same evidence that establishes Plaintiffs' standing for the "as-applied" challenges in Count IV therefore supports its standing for the facial challenge in Count III.

More significantly, the District Court's holding is also legally incorrect. The Supreme Court's decision in *Summers* involved a challenge to Forest Service regulations that, like CATEX A3 here, exempted certain Forest Service projects from procedural requirements. At issue was "whether [plaintiffs had] standing to challenge the regulations *in the absence of a live dispute over a concrete application of those regulations*." *Summers*, 555 U.S. at 490 (emphasis added). The Court acknowledged that Plaintiffs initially had standing to challenge one application of the procedural regulation (and hence, also, the regulation itself "in the abstract"), but once that aspect of the case was settled, it held that Plaintiffs no longer had standing to challenge the procedural regulation itself. "We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from

any concrete application that threatens imminent harm to his interests." *Id.* at 494; *see also Wilderness Society*, 622 F.3d at 1254-55 (acknowledging and applying *Summers*).

The District Court therefore erred in denying Plaintiffs' standing to bring a facial challenge to CATEX A3.

IV. The District Court's Holding that Plaintiffs Did Not Have Standing to Challenge DHS's Response to the Influx of Unaccompanied Children and Family Units Illegally Crossing the Southern Border Failed to Consider the Predictable Consequences of DHS's Lax Enforcement and Release Decisions.

In Count V, Plaintiffs challenged the two environmental assessments that DHS issued regarding actions it was considering to deal with a massive influx of illegal immigrants across the southern border in 2014: 1) a "Programmatic Environmental Assessment for Actions to Address an Increased Influx of Unaccompanied Alien Children and Family Units Across the Southwest Border of the United States" ("PEA"); and 2) a "Finding of No Significant Impact" ("FONSI") with regard to DHS's decision to construct an additional detention facility to house the increased number of detainees. FAC ¶¶ 76-78, 121-24, ER 2:89-91, 106-07. The gravamen of Plaintiffs' challenge is that the assessments only considered the "direct physical impacts resulting from DHS's temporary custody of foreign nationals," and not the predictable indirect and cumulative impacts of cross-border illegal immigration induced (at least in part) on the front end by DHS's lax enforcement

of existing immigration laws and, on the back end, by DHS's decision to release the illegal aliens into the United States. FAC ¶ 78, ER 2:90. "[T]he PEA and the FONSI issued for this action fail to address the environmental impacts on the Southwest border resulting from the crossing of these foreign nationals, or the population growth resulting from their presence," Plaintiffs alleged. *Id.*

The District Court held that Plaintiffs had no standing to challenge either the PEA or the supplemental FONSI issued in conjunction with DHS's decision to build an additional facility in Texas to house the influx of detainees. "Plaintiffs have not provided sufficient evidence to show it is reasonably probable that *this* DHS action will increase illegal crossings, as the action was taken *in response* to the illegal crossings already in progress," the court noted. ER 1:17 (emphasis added). Moreover, the court rejected Plaintiffs' contention that DHS should consider the environmental consequences of the "border crisis itself," because that crisis was, according to the court, not tied to a "concrete and particular" DHS action. *Id.* Finally, the District Court held that, even if illegal crossers will settle in the United States after leaving the Texas housing facility, that would be the result of a separate DHS action (if DHS granted them legal permission to remain) or the independent decision-making of the illegal crossers themselves (if they decided to settle in the United States illegally). In either case, the court held, "the result is independent of" DHS's response to the crisis, so Plaintiffs' myriad allegations of harm

from cross-border illegal immigration or resulting population growth did not meet either the injury-in-fact or causation elements necessary to establish standing. ER 1:18.

The District Court's holding is based on too narrow a reading of Plaintiffs' allegations. Those included the following:

- According to the expert report attached to the complaint, "[h]istorical experience demonstrates that a real or even perceived change in enforcement policies, both at the border and in the interior, can significantly affect the number of people attempting to cross the border illegally." FAC ¶ 89, ER 2:96 (citing FAC Ex. 3 at 177, ER 2:260).
- A "Border Patrol intelligence report from 2014 [the year that DHS's actions in response to the influx crisis occurred] based on interviews with migrants reveals that 95% stated that their 'main reason' for coming was because they had heard they would receive a 'permiso,' or permission to stay." FAC ¶ 89, ER 2:97 (citing FAC Ex. 3 at 177, ER 2:261).
- "Though DHS policies are not the sole factor in [the numerous] components of the illegal border-crossing phenomenon, there is no doubt they are a factor." FAC ¶ 90, ER 2:97.
- "[T]he foreign nationals comprising the 'increased influx of unaccompanied alien children and family units' subject to the June 2, 2014, action

entered the United States with the intent to settle in this nation [and] [m]any have indeed settled in the United States." FAC ¶ 78, ER 2:90. In other words, Plaintiffs challenged the environmental assessments conducted incident to DHS's actions in response to the influx crisis as entirely failing to consider the government's own actions that gave rise to the crisis (lax enforcement or at least the perception of lax enforcement), or the population-growth consequences of DHS releasing into the interior of the United States those who had entered illegally with intent to remain. And for those challenges, Plaintiffs allegations of harm are more than sufficient to establish standing.

Several members of the Whitewater Draw Natural Resource Conservation District, Hereford Natural Resource Conservation District, and the Arizona Association of Conservation Districts, live along the Southwest border, which has been environmentally damaged as a result of DHS's discretionary actions relating to border enforcement and immigration law. FAC ¶ 29, ER 2:44. For example, Fred Davis, Chairman of Whitewater Draw and member of the Arizona Association of Conservation Districts, lives 25 miles from the US/Mexico border, and detailed in his affidavit permanent damage to his property and native grassland from constant trampling of the land, as well as destruction of native plants which are protected by Arizona state law. F. Davis Aff., FAC Ex. 6 ¶¶ 1, 2, 13, ER 3:375, 381. He stated that the DHS actions at issue in this case "have real, concrete, harmful ongoing

impacts on [him], [his] family, [their] land, and the general border environment." *Id*. at ¶ 20, ER 3:385. *See also* P. Davis Aff., FAC Ex. 7 ¶¶ 4-5, ER 3:390-95; Ladd Aff., FAC Ex. 16 ¶¶ 3-6, ER 3:509-11.

The massive numbers of people illegally crossing the southwest border have left a host of environmental impacts in their wake, such as the destruction of native and at-risks species and habitats from the trampling of the native vegetation, garbage dumping on a massive scale, water pollution, and the setting of fires, many of which turn out of control, for the purposes of heat, cooking, or to distract Border Patrol agents. FAC ¶ 90, ER 2:97. These and other environmental degradations are detailed in the affidavits of Fred Davis, Peggy Davis, Caren Cowan, John Ladd, and Ralph Pope. *See* FAC Exs. 6, 7, 15, 16, at 18, ER 3:374, 388, 501, 507, and 518.

A stark example of the trash left behind is detailed in John Ladd's affidavit. John Ladd lives on the Arizona/Mexico border and has had to pick up approximately 20 tons of trash on his property that is left behind by illegal aliens crossing through. FAC Ex. 16 at ¶ 6, ER 3:511. This is an overwhelming amount for him and his family to pick up and the unfortunate reality is that whatever they are unable to pick up ends up in the San Pedro River in Cochise County. *Id*. Although the San Pedro River is part of the San Pedro Riparian National Conservation area which provides an invaluable habitat for hundreds of species of mammals,

amphibians, reptiles, and bird, it is now a corridor of illegal immigration and the environmental damage done to it has been compounded by the contamination of human waste. *Id.* at ¶ 7, ER 3:511. Other Plaintiffs detail environmental harm to their property in the form of trash and human waste left behind. Peggy Davis, who lives on a 10,000 acre ranch with her family 25 miles from the Arizona/Mexico border, describes picking up endless amounts of trash on her property "including diapers, baby bottles, clothes, electronic blankets, hypodermic needles and even pregnancy tests!" FAC Ex. 7 at ¶¶ 1, 4, ER 3:389-90. Her husband Fred Davis describes picking up the same trash, as well as finding "human feces in abundance" on their property in his affidavit. FAC Ex. 6 at ¶ 11, ER 3:380.

Moreover, the harms to the *human* environment along the Southwest border are severe and have altered the lives of Plaintiffs living along it. Caren Cowan, executive director of the New Mexico Cattle Growers' Association, details the horrors seen on her property and others located on the Arizona and New Mexico borders with Mexico. According to her affidavit, she and other members of the NMCGA (some of whom have family ranches that stretch back as far as 14 generations) regularly deal with break-ins to their homes and theft of personal belongings including vehicles, weapons, and livestock. FAC Ex. 15 ¶¶ 2, 7, ER 3:502-04. A member and friend was murdered on his ranch with his dog. *Id.* at ¶ 8, ER 3:504. As a result of this long time assault on her property, friends, and livelihood, she

stated, "[t]he stark reality is that it is no longer safe for my family and friends to even go to the barn to feed and care for animals without a weapon." *Id.* at ¶ 7, ER 3:503.

Unfortunately, this is not a unique experience. John Ladd, who has lived on his family's 16,400 acre beef cattle ranch on the Arizona/Mexico border near the town of Naco, Arizona for 61 years, details in his affidavit the ways he is personally harmed and effected by DHS's actions and immigration policies in his affidavit. FAC Ex. 16 ¶ 1, ER 3:508. Ranching has become more difficult and expensive for him, as 57 miles of fencing along his property has been repeatedly damages by illegal aliens. *Id.* at ¶ 8, ER 3:511-12. Repairing this fence comes at a substantial financial cost to Mr. Ladd, as this fence costs about $10,000 per mile. *Id*. In general, Mr. Ladd and his family have found life on their own property to become more stressful as they increasingly fear for their own safety as more drug cartels are crossing the border onto their property. *Id.* at ¶ 10, ER 3:513; *see also* P. Davis Aff., FAC Ex. 7 at ¶ 3, ER 3:390 (explaining her inability to work for many years due to having to drive rural roads where drug-trafficking takes place); F. Davis Aff., FAC Ex. 6 at ¶ 14, ER 3:382 (describing the stress of life on a property where constant illegal border crossings take place).

NEPA requires that federal agencies take a "hard look" at the environmental impacts of their actions, and prepare an EIS if the adverse environmental impacts

of a proposed federal action are potentially significant. 42 U.S.C. § 4332(C). In preparing an EA or EIS, an agency must consider direct, indirect, and cumulative effects. *See* 40 C.F.R. §§ 1502.16, 1508.8, 1508.9, 1508.27 (2017). DHS determined that the Southwest Border Memo and the actions DHS took in response to it constitute a federal action subject to NEPA. Accordingly, DHS prepared a "Programmatic Environmental Assessment for Actions to Address an Increased Influx of Unaccompanied Alien Children and Family Units Across the Southwest Border of the United States" ("PEA"), FAC Ex. 20 (ER 3:539), together with a FONSI that was issued on August 12, 2014, FAC Ex. 21 (ER 3:574).

However, in preparing the EA for this action, DHS failed to adequately consider, in addition to the direct impacts, the indirect and cumulative impacts of the actions upon the human environment, in violation of 40 C.F.R. § 1508.9. These impacts include, but are not limited to, those population and border impacts described in Appellants' affidavits (FAC Exs. 6, 7, 15, 16, 18, ER 3: 374, 388, 501, 507, 518), as well as described in the experts reports written by Steven Camarota Ph.D. (FAC Ex. 4, ER 2:264), Phil Cafaro, Ph.D. (FAC Ex. 5, ER 2:278), and Jessica Vaughan (FAC Ex. 3, ER 2:182). FAC ¶ 123, ER 2:106-07. The FONSI issued for this action failed to address the broader environmental impacts on the Southwest border by failing to recognize that the increased influx of foreign nationals entering the United States as a result of this action entered with the intent to

settle permanently, and instead focused solely on the direct physical impacts resulting from DHS's temporary custody of foreign nationals. FAC ¶ 78, ER 2:90-91; FAC Ex. 21, ER 3:574. As Jessica Vaughan noted in the expert analysis attached to Plaintiffs' complaint, "[t]he dramatic increase in the number of new arrivals [of unaccompanied minors and families from Central America and asylum seekers from Africa, Caribbean nations and Asia that began in 2012] can be traced to policy changes that occurred in 2008 (the Trafficking Victims Protection Reauthorization Act) and 2009 (Credible Fear Parole)." FAC Ex. 3-d, ER 2:261.

Conducting an environmental assessment on the response to the influx phenomena without considering the environmental consequences of the government-induced influx itself is like considering the environmental effects of the *cleanup* of an airline crash site without considering the environmental effects of the crash itself where, as here, the primary harm was itself caused (at least in part) by government policy decisions. DHS's reliance upon an inadequate and incomplete EA, without full compliance with NEPA, constitutes a violation of Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(C), as well as the implementing CEQ regulations in place at the time, as set forth at 40 C.F.R. § 1500 *et seq.*, and is unreasonable, arbitrary, an abuse of discretion, and not in accordance with law under the APA. FAC ¶ 124, ER 2:107. Through its failure to address the broader environmental impacts

damaging Plaintiffs' concrete interests, DHS has cause them an injury, and Plaintiffs therefore have standing to force compliance with NEPA in order to address it.

CONCLUSION

NEPA was adopted by Congress to ensure that government agencies adequately consider the environmental impacts of their actions, and to ensure that members of the public who are affected by those impacts have an opportunity to voice their concerns. The immigrations agencies housed in the Department of Homeland Security have *never* conducted the environmental assessments required by NEPA with respect to a host of their immigration policy decisions, including those that give rise to large, immigration-induced population growth in general and those that give rise to the massive environmental harms that result from cross-border illegal immigration in the southwest United States. Plaintiffs here have all suffered in one way or another from these environmental harms, and they not only have standing to challenge DHS's failure to comply with NEPA, but the specific actions they have challenged are all subject to judicial review under both the APA and NEPA. The District Court's holdings to the contrary insulates DHS from even minimal compliance with NEPA, and should be reversed.

DATED: October 28, 2020.

Respectfully submitted,

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s/ John C. Eastman
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Counsel for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

APPENDIX: PRINCIPAL STATUTES

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National Environmental Policy Act

42 U.S.C. § 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact

involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Administrative Procedures Act

5 U.S.C. § 551. Definitions

For the purpose of this subchapter--

***
(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

***
(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title),

and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Relevant Provisions of the Immigration and Nationality Act, As Amended

8 U.S.C. § 1153. Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in

paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general
The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) Prohibition
No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 1255 of this title,

until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Statutory construction
Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 1154(a) of this title, or the filing of an application for adjustment of status under section 1255 of this title, by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) Effective date
The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) before the enactment date of this subsection. In the case of a physician for whom an application for a waiver was filed under subsection (b)(2)(B) prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to subsection (b)(2)(B) except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general
Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers
Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals
Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers
Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers
Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required
An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants
Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made

available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.

(5) Employment creation

(A) In general
Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)--

(i) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general
Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) “Targeted employment area” defined
In this paragraph, the term “targeted employment area” means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) “Rural area” defined
In this paragraph, the term “rural area” means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general
Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas
The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

(iii) Adjustment for high employment areas
In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined
In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved
Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications
The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by ⅓ of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level
The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling
In the case of a foreign state subject to section 1152(e) of this title in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by ⅓ of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

8 U.S.C. § 1157. Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b), the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e)), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(b) Determinations by President respecting number of admissions for humanitarian concerns

If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

(2) (A) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

(B) An unmarried alien who seeks to accompany, or follow to join, a parent granted admission as a refugee under this subsection, and who was under 21 years of age on the date on which such parent applied for refugee status under this section, shall continue to be classified as a child for purposes of this paragraph, if the alien attained 21 years of age after such application was filed but while it was pending.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission.

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) or with respect to the admission of refugees in response to an emergency refugee situation under subsection (b), the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3) (A) After the President initiates appropriate consultation prior to making a determination under subsection (a), a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.
(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b), that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined
For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

(f) Training

(1) The Attorney General, in consultation with the Secretary of State, shall provide all United States officials adjudicating refugee cases under this section with the same training as that provided to officers adjudicating asylum cases under section 1158 of this title.

(2) Such training shall include country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country between the nature of and treatment of various religious practices and believers.

8 U.S.C. § 1158. Asylum

(a) Authority to apply for asylum
(1) In general
Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.
(2) Exceptions
(A) Safe third country
Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.
(B) Time limit
Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.
(C) Previous asylum applications
Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.
(D) Changed circumstances
An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).
(E) Applicability
Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).
(3) Limitation on judicial review
No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).
(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise

eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of Title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General--

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that--

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with

permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall--

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that--

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands

The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and

including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

8 U.S.C. § 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;[1]
(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.

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8 U.S.C. § 1184. Admission of nonimmigrants

(a) Regulations

(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States. No alien admitted to Guam or the Commonwealth of the Northern Mariana Islands without a visa pursuant to section 1182(l) of this title may be authorized to enter or stay in the United States other than in Guam or the Commonwealth of the Northern Mariana Islands or to remain in Guam or the Commonwealth of the Northern Mariana Islands for a period exceeding 45 days from date of admission to Guam or the Commonwealth of the Northern Mariana Islands. No alien admitted to the United States without a visa pursuant to section 1187 of this title may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

(2)(A) The period of authorized status as a nonimmigrant described in section 1101(a)(15)(O) of this title shall be for such period as the Attorney General may specify in order to provide for the event (or events) for which the nonimmigrant is admitted.

(B) The period of authorized status as a nonimmigrant described in section 1101(a)(15)(P) of this title shall be for such period as the Attorney General may specify in order to provide for the competition, event, or performance for which the nonimmigrant is admitted. In the case of nonimmigrants admitted as individual athletes under section 1101(a)(15)(P) of this title, the period of authorized status may be for an initial period (not to exceed 5 years) during which the nonimmigrant will perform as an athlete and such period may be extended by the Attorney General for an additional period of up to 5 years.

(b) Presumption of status; written waiver

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 1101(a)(15) of this title, and other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a

nonimmigrant status under section 1101(a)(15) of this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act, or an alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

(c) Petition of importing employer

(1) The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 1101(a)(15) of this title (excluding nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant. For purposes of this subsection with respect to nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture. The provisions of section 1188 of this title shall apply to the question of importing any alien as a nonimmigrant under section 1101(a)(15)(H)(ii)(a) of this title.

(2)(A) The Attorney General shall provide for a procedure under which an importing employer which meets requirements established by the Attorney General may file a blanket petition to import aliens as nonimmigrants described in section 1101(a)(15)(L) of this title instead of filing individual petitions under paragraph (1) to import such aliens. Such procedure shall permit the expedited processing of visas for admission of aliens covered under such a petition.

(B) For purposes of section 1101(a)(15)(L) of this title, an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

(C) The Attorney General shall provide a process for reviewing and acting upon petitions under this subsection with respect to nonimmigrants described in section 1101(a)(15)(L) of this title within 30 days after the date a completed petition has been filed.

(D) The period of authorized admission for--

(i) a nonimmigrant admitted to render services in a managerial or executive capacity under section 1101(a)(15)(L) of this title shall not exceed 7 years, or
(ii) a nonimmigrant admitted to render services in a capacity that involves specialized knowledge under section 1101(a)(15)(L) of this title shall not exceed 5 years.
(E) In the case of an alien spouse admitted under section 1101(a)(15)(L) of this title, who is accompanying or following to join a principal alien admitted under such section, the Attorney General shall authorize the alien spouse to engage in employment in the United States and provide the spouse with an "employment authorized" endorsement or other appropriate work permit.
(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(a)(15)(L) of this title and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101(a)(15)(L) of this title if--
(i) the alien will be controlled and supervised principally by such unaffiliated employer; or
(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.
(3) The Attorney General shall approve a petition--
(A) with respect to a nonimmigrant described in section 1101(a)(15)(O)(i) of this title only after consultation in accordance with paragraph (6) or, with respect to aliens seeking entry for a motion picture or television production, after consultation with the appropriate union representing the alien's occupational peers and a management organization in the area of the alien's ability, or
(B) with respect to a nonimmigrant described in section 1101(a)(15)(O)(ii) of this title after consultation in accordance with paragraph (6) or, in the case of such an alien seeking entry for a motion picture or television production, after consultation with such a labor organization and a management organization in the area of the alien's ability.

In the case of an alien seeking entry for a motion picture or television production, (i) any opinion under the previous sentence shall only be advisory, (ii) any such opinion that recommends denial must be in writing, (iii) in making the decision the Attorney General shall consider the exigencies and scheduling of the production, and (iv) the Attorney General shall append to the decision any such opinion. The Attorney General shall provide by regulation for the waiver of the consultation requirement under subparagraph (A) in the case of aliens who have been admitted as nonimmigrants under section 1101(a)(15)(O)(i) of this title because of

extraordinary ability in the arts and who seek readmission to perform similar services within 2 years after the date of a consultation under such subparagraph. Not later than 5 days after the date such a waiver is provided, the Attorney General shall forward a copy of the petition and all supporting documentation to the national office of an appropriate labor organization.
(4)(A) For purposes of section 1101(a)(15)(P)(i)(a) of this title, an alien is described in this subparagraph if the alien--
(i)(I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance;
(II) is a professional athlete, as defined in section 1154(i)(2) of this title;
(III) performs as an athlete, or as a coach, as part of a team or franchise that is located in the United States and a member of a foreign league or association of 15 or more amateur sports teams, if--
(aa) the foreign league or association is the highest level of amateur performance of that sport in the relevant foreign country;
(bb) participation in such league or association renders players ineligible, whether on a temporary or permanent basis, to earn a scholarship in, or participate in, that sport at a college or university in the United States under the rules of the National Collegiate Athletic Association; and
(cc) a significant number of the individuals who play in such league or association are drafted by a major sports league or a minor league affiliate of such a sports league; or
(IV) is a professional athlete or amateur athlete who performs individually or as part of a group in a theatrical ice skating production; and
(ii) seeks to enter the United States temporarily and solely for the purpose of performing--
(I) as such an athlete with respect to a specific athletic competition; or
(II) in the case of an individual described in clause (i)(IV), in a specific theatrical ice skating production or tour.
(B)(i) For purposes of section 1101(a)(15)(P)(i)(b) of this title, an alien is described in this subparagraph if the alien--
(I) performs with or is an integral and essential part of the performance of an entertainment group that has (except as provided in clause (ii)) been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time,
(II) in the case of a performer or entertainer, except as provided in clause (iii), has had a sustained and substantial relationship with that group (ordinarily for at least one year) and provides functions integral to the performance of the group, and

(III) seeks to enter the United States temporarily and solely for the purpose of performing as such a performer or entertainer or as an integral and essential part of a performance.
(ii) In the case of an entertainment group that is recognized nationally as being outstanding in its discipline for a sustained and substantial period of time, the Attorney General may, in consideration of special circumstances, waive the international recognition requirement of clause (i)(I).
(iii)(I) The one-year relationship requirement of clause (i)(II) shall not apply to 25 percent of the performers and entertainers in a group.
(II) The Attorney General may waive such one-year relationship requirement for an alien who because of illness or unanticipated and exigent circumstances replaces an essential member of the group and for an alien who augments the group by performing a critical role.
(iv) The requirements of subclauses (I) and (II) of clause (i) shall not apply to alien circus personnel who perform as part of a circus or circus group or who constitute an integral and essential part of the performance of such circus or circus group, but only if such personnel are entering the United States to join a circus that has been recognized nationally as outstanding for a sustained and substantial period of time or as part of such a circus.
(C) A person may petition the Attorney General for classification of an alien as a nonimmigrant under section 1101(a)(15)(P) of this title.
(D) The Attorney General shall approve petitions under this subsection with respect to nonimmigrants described in clause (i) or (iii) of section 1101(a)(15)(P) of this title only after consultation in accordance with paragraph (6).
(E) The Attorney General shall approve petitions under this subsection for nonimmigrants described in section 1101(a)(15)(P)(ii) of this title only after consultation with labor organizations representing artists and entertainers in the United States.
(F)(i) No nonimmigrant visa under section 1101(a)(15)(P)(i)(a) of this title shall be issued to any alien who is a national of a country that is a state sponsor of international terrorism unless the Secretary of State determines, in consultation with the Secretary of Homeland Security and the heads of other appropriate United States agencies, that such alien does not pose a threat to the safety, national security, or national interest of the United States. In making a determination under this subparagraph, the Secretary of State shall apply standards developed by the Secretary of State, in consultation with the Secretary of Homeland Security and the heads of other appropriate United States agencies, that are applicable to the nationals of such states.
(ii) In this subparagraph, the term "state sponsor of international terrorism" means any country the government of which has been determined by the Secretary of

State under any of the laws specified in clause (iii) to have repeatedly provided support for acts of international terrorism.
(iii) The laws specified in this clause are the following:
(I) Section 4605(j)(1)(A) of Title 50 (or successor statute).
(II) Section 2780(d) of Title 22.
(III) Section 2371(a) of Title 22.
(G) The Secretary of Homeland Security shall permit a petition under this subsection to seek classification of more than 1 alien as a nonimmigrant under section 1101(a)(15)(P)(i)(a) of this title.
(H) The Secretary of Homeland Security shall permit an athlete, or the employer of an athlete, to seek admission to the United States for such athlete under a provision of this chapter other than section 1101(a)(15)(P)(i) of this title if the athlete is eligible under such other provision.
(5)(A) In the case of an alien who is provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) or 1101(a)(15)(H)(ii)(b) of this title and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.
(B) In the case of an alien who is admitted to the United States in nonimmigrant status under section 1101(a)(15)(O) or 1101(a)(15)(P) of this title and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such nonimmigrant status and the petitioner are jointly and severally liable for the reasonable cost of return transportation of the alien abroad. The petitioner shall provide assurance satisfactory to the Attorney General that the reasonable cost of that transportation will be provided.
(6)(A)(i) To meet the consultation requirement of paragraph (3)(A) in the case of a petition for a nonimmigrant described in section 1101(a)(15)(O)(i) of this title (other than with respect to aliens seeking entry for a motion picture or television production), the petitioner shall submit with the petition an advisory opinion from a peer group (or other person or persons of its choosing, which may include a labor organization) with expertise in the specific field involved.
(ii) To meet the consultation requirement of paragraph (3)(B) in the case of a petition for a nonimmigrant described in section 1101(a)(15)(O)(ii) of this title (other than with respect to aliens seeking entry for a motion picture or television production), the petitioner shall submit with the petition an advisory opinion from a labor organization with expertise in the skill area involved.
(iii) To meet the consultation requirement of paragraph (4)(D) in the case of a petition for a nonimmigrant described in section 1101(a)(15)(P)(i) or 1101(a)(15)(P)(iii) of this title, the petitioner shall submit with the petition an

advisory opinion from a labor organization with expertise in the specific field of athletics or entertainment involved.

(B) To meet the consultation requirements of subparagraph (A), unless the petitioner submits with the petition an advisory opinion from an appropriate labor organization, the Attorney General shall forward a copy of the petition and all supporting documentation to the national office of an appropriate labor organization within 5 days of the date of receipt of the petition. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, that representative shall be the appropriate labor organization.

(C) In those cases in which a petitioner described in subparagraph (A) establishes that an appropriate peer group (including a labor organization) does not exist, the Attorney General shall adjudicate the petition without requiring an advisory opinion.

(D) Any person or organization receiving a copy of a petition described in subparagraph (A) and supporting documents shall have no more than 15 days following the date of receipt of such documents within which to submit a written advisory opinion or comment or to provide a letter of no objection. Once the 15-day period has expired and the petitioner has had an opportunity, where appropriate, to supply rebuttal evidence, the Attorney General shall adjudicate such petition in no more than 14 days. The Attorney General may shorten any specified time period for emergency reasons if no unreasonable burden would be thus imposed on any participant in the process.

(E)(i) The Attorney General shall establish by regulation expedited consultation procedures in the case of nonimmigrant artists or entertainers described in section 1101(a)(15)(O) or 1101(a)(15)(P) of this title to accommodate the exigencies and scheduling of a given production or event.

(ii) The Attorney General shall establish by regulation expedited consultation procedures in the case of nonimmigrant athletes described in section 1101(a)(15)(O)(i) or 1101(a)(15)(P)(i) of this title in the case of emergency circumstances (including trades during a season).

(F) No consultation required under this subsection by the Attorney General with a nongovernmental entity shall be construed as permitting the Attorney General to delegate any authority under this subsection to such an entity. The Attorney General shall give such weight to advisory opinions provided under this section as the Attorney General determines, in his sole discretion, to be appropriate.

(7) If a petition is filed and denied under this subsection, the Attorney General shall notify the petitioner of the determination and the reasons for the denial and of the process by which the petitioner may appeal the determination.

(8) The Attorney General shall submit annually to the Committees on the Judiciary of the House of Representatives and of the Senate a report describing, with respect to petitions under each subcategory of subparagraphs (H), (O), (P), and (Q) of section 1101(a)(15) of this title the following:
(A) The number of such petitions which have been filed.
(B) The number of such petitions which have been approved and the number of workers (by occupation) included in such approved petitions.
(C) The number of such petitions which have been denied and the number of workers (by occupation) requested in such denied petitions.
(D) The number of such petitions which have been withdrawn.
(E) The number of such petitions which are awaiting final action.
(9)(A) The Attorney General shall impose a fee on an employer (excluding any employer that is a primary or secondary education institution, an institution of higher education, as defined in section 1001(a) of Title 20, a nonprofit entity related to or affiliated with any such institution, a nonprofit entity which engages in established curriculum-related clinical training of students registered at any such institution, a nonprofit research organization, or a governmental research organization) filing before[1] a petition under paragraph (1)--
(i) initially to grant an alien nonimmigrant status described in section 1101(a)(15)(H)(i)(b) of this title;
(ii) to extend the stay of an alien having such status (unless the employer previously has obtained an extension for such alien); or
(iii) to obtain authorization for an alien having such status to change employers.
(B) The amount of the fee shall be $1,500 for each such petition except that the fee shall be half the amount for each such petition by any employer with not more than 25 full-time equivalent employees who are employed in the United States (determined by including any affiliate or subsidiary of such employer).
(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 1356(s) of this title.
(10) An amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.
(11)(A) Subject to subparagraph (B), the Secretary of Homeland Security or the Secretary of State, as appropriate, shall impose a fee on an employer who has filed an attestation described in section 1182(t) of this title--
(i) in order that an alien may be initially granted nonimmigrant status described in section 1101(a)(15)(H)(i)(b1) of this title; or

(ii) in order to satisfy the requirement of the second sentence of subsection (g)(8)(C) for an alien having such status to obtain certain extensions of stay.
(B) The amount of the fee shall be the same as the amount imposed by the Secretary of Homeland Security under paragraph (9), except that if such paragraph does not authorize such Secretary to impose any fee, no fee shall be imposed under this paragraph.
(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 1356(s) of this title.
(12)(A) In addition to any other fees authorized by law, the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition under paragraph (1)--
(i) initially to grant an alien nonimmigrant status described in subparagraph (H)(i)(b) or (L) of section 1101(a)(15) of this title; or
(ii) to obtain authorization for an alien having such status to change employers.
(B) In addition to any other fees authorized by law, the Secretary of State shall impose a fraud prevention and detection fee on an alien filing an application abroad for a visa authorizing admission to the United States as a nonimmigrant described in section 1101(a)(15)(L) of this title, if the alien is covered under a blanket petition described in paragraph (2)(A).
(C) The amount of the fee imposed under subparagraph (A) or (B) shall be $500.
(D) The fee imposed under subparagraph (A) or (B) shall only apply to principal aliens and not to the spouses or children who are accompanying or following to join such principal aliens.
(E) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 1356(v) of this title.
(13)(A) In addition to any other fees authorized by law, the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition under paragraph (1) for nonimmigrant workers described in section 1101(a)(15)(H)(ii)(b) of this title.
(B) The amount of the fee imposed under subparagraph (A) shall be $150.
(14)(A) If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 1101(a)(15)(H)(ii)(b) of this title or a willful misrepresentation of a material fact in such petition--
(i) the Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed $10,000 per violation) as the Secretary of Homeland Security determines to be appropriate; and

(ii) the Secretary of Homeland Security may deny petitions filed with respect to that employer under section 1154 of this title or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.
(B) The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i).
(C) In determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.
(D) In this paragraph, the term "substantial failure" means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.
(d) Issuance of visa to fiancée or fiancé of citizen
(1) A visa shall not be issued under the provisions of section 1101(a)(15)(K)(i) of this title until the consular officer has received a petition filed in the United States by the fiancée or fiancé of the applying alien and approved by the Secretary of Homeland Security. The petition shall be in such form and contain such information as the Secretary of Homeland Security shall, by regulation, prescribe. Such information shall include information on any criminal convictions of the petitioner for any specified crime described in paragraph (3)(B) and information on any permanent protection or restraining order issued against the petitioner related to any specified crime described in paragraph (3)(B)(i). It shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within 2 years before the date of filing the petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival, except that the Secretary of Homeland Security in his discretion may waive the requirement that the parties have previously met in person. In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 1229a and 1231 of this title.
(2)(A) Subject to subparagraphs (B) and (C), the Secretary of Homeland Security may not approve a petition under paragraph (1) unless the Secretary has verified that--
(i) the petitioner has not, previous to the pending petition, petitioned under paragraph (1) with respect to two or more applying aliens; and
(ii) if the petitioner has had such a petition previously approved, 2 years have elapsed since the filing of such previously approved petition.

(B) The Secretary of Homeland Security may, in the Secretary's discretion, waive the limitations in subparagraph (A) if justification exists for such a waiver. Except in extraordinary circumstances and subject to subparagraph (C), such a waiver shall not be granted if the petitioner has a record of violent criminal offenses against a person or persons.
(C)(i) The Secretary of Homeland Security is not limited by the criminal court record and shall grant a waiver of the condition described in the second sentence of subparagraph (B) in the case of a petitioner described in clause (ii).
(ii) A petitioner described in this clause is a petitioner who has been battered or subjected to extreme cruelty and who is or was not the primary perpetrator of violence in the relationship upon a determination that--
(I) the petitioner was acting in self-defense;
(II) the petitioner was found to have violated a protection order intended to protect the petitioner; or
(III) the petitioner committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and where there was a connection between the crime and the petitioner's having been battered or subjected to extreme cruelty.
(iii) In acting on applications under this subparagraph, the Secretary of Homeland Security 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 Secretary.
(3) In this subsection:
(A) The terms “domestic violence”, “sexual assault”, “child abuse and neglect”, “dating violence”, “elder abuse”, and “stalking” have the meaning given such terms in section 3 of the Violence Against Women and Department of Justice Reauthorization Act of 2005.
(B) The term “specified crime” means the following:
(i) Domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, stalking, or an attempt to commit any such crime.
(ii) Homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or an attempt to commit any of the crimes described in this clause.
(iii) At least three convictions for crimes relating to a controlled substance or alcohol not arising from a single act.
(e) Nonimmigrant professionals and annual numerical limit
(1) An alien who is a citizen of Canada or Mexico, and the spouse and children of any such alien if accompanying or following to join such alien, who seeks to enter the United States under and pursuant to the provisions of Section D of Annex 16-A

of the USMCA (as defined in section 4502 of Title 19) to engage in business activities at a professional level as provided for in such Annex, may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor. For purposes of this chapter, including the issuance of entry documents and the application of subsection (b), such alien shall be treated as if seeking classification, or classifiable, as a nonimmigrant under section 1101(a)(15) of this title. For purposes of this paragraph, the term "citizen of Mexico" means "citizen" as defined in article 16.1 of the USMCA.
(2) In the case of an alien spouse admitted under section 1101(a)(15)(E) of this title, who is accompanying or following to join a principal alien admitted under such section, the Attorney General shall authorize the alien spouse to engage in employment in the United States and provide the spouse with an "employment authorized" endorsement or other appropriate work permit.
(f) Denial of crewmember status in case of certain labor disputes
(1) Except as provided in paragraph (3), no alien shall be entitled to nonimmigrant status described in section 1101(a)(15)(D) of this title if the alien intends to land for the purpose of performing service on board a vessel of the United States (as defined in section 116 of Title 46) or on an aircraft of an air carrier (as defined in section 40102(a)(2) of Title 49) during a labor dispute where there is a strike or lockout in the bargaining unit of the employer in which the alien intends to perform such service.
(2) An alien described in paragraph (1)--
(A) may not be paroled into the United States pursuant to section 1182(d)(5) of this title unless the Attorney General determines that the parole of such alien is necessary to protect the national security of the United States; and
(B) shall be considered not to be a bona fide crewman for purposes of section 1282(b) of this title.
(3) Paragraph (1) shall not apply to an alien if the air carrier or owner or operator of such vessel that employs the alien provides documentation that satisfies the Attorney General that the alien--
(A) has been an employee of such employer for a period of not less than 1 year preceding the date that a strike or lawful lockout commenced;
(B) has served as a qualified crewman for such employer at least once in each of 3 months during the 12-month period preceding such date; and
(C) shall continue to provide the same services that such alien provided as such a crewman.
(g) Temporary workers and trainees; limitation on numbers
(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)--
(A) under section 1101(a)(15)(H)(i)(b) of this title, may not exceed--

(i) 65,000 in each fiscal year before fiscal year 1999;
(ii) 115,000 in fiscal year 1999;
(iii) 115,000 in fiscal year 2000;
(iv) 195,000 in fiscal year 2001;
(v) 195,000 in fiscal year 2002;
(vi) 195,000 in fiscal year 2003; and
(vii) 65,000 in each succeeding fiscal year; or
(B) under section 1101(a)(15)(H)(ii)(b) of this title may not exceed 66,000.
(2) The numerical limitations of paragraph (1) shall only apply to principal aliens and not to the spouses or children of such aliens.
(3) Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status. If an alien who was issued a visa or otherwise provided nonimmigrant status and counted against the numerical limitations of paragraph (1) is found to have been issued such visa or otherwise provided such status by fraud or willfully misrepresenting a material fact and such visa or nonimmigrant status is revoked, then one number shall be restored to the total number of aliens who may be issued visas or otherwise provided such status under the numerical limitations of paragraph (1) in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved.
(4) In the case of a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title, the period of authorized admission as such a nonimmigrant may not exceed 6 years.
(5) The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b) of this title who--
(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity;
(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
(C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 1001(a) of Title 20), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.
(6) Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 1101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those

limitations the first time the alien is employed by an employer other than one described in paragraph (5).
(7) Any alien who has already been counted, within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.
(8)(A) The agreements referred to in section 1101(a)(15)(H)(i)(b1) of this title are--
(i) the United States-Chile Free Trade Agreement; and
(ii) the United States-Singapore Free Trade Agreement.
(B)(i) The Secretary of Homeland Security shall establish annual numerical limitations on approvals of initial applications by aliens for admission under section 1101(a)(15)(H)(i)(b1) of this title.
(ii) The annual numerical limitations described in clause (i) shall not exceed--
(I) 1,400 for nationals of Chile (as defined in article 14.9 of the United States-Chile Free Trade Agreement) for any fiscal year; and
(II) 5,400 for nationals of Singapore (as defined in Annex 1A of the United States-Singapore Free Trade Agreement) for any fiscal year.
(iii) The annual numerical limitations described in clause (i) shall only apply to principal aliens and not to the spouses or children of such aliens.
(iv) The annual numerical limitation described in paragraph (1)(A) is reduced by the amount of the annual numerical limitations established under clause (i). However, if a numerical limitation established under clause (i) has not been exhausted at the end of a given fiscal year, the Secretary of Homeland Security shall adjust upwards the numerical limitation in paragraph (1)(A) for that fiscal year by the amount remaining in the numerical limitation under clause (i). Visas under section 1101(a)(15)(H)(i)(b) of this title may be issued pursuant to such adjustment within the first 45 days of the next fiscal year to aliens who had applied for such visas during the fiscal year for which the adjustment was made.
(C) The period of authorized admission as a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title shall be 1 year, and may be extended, but only in 1-year increments. After every second extension, the next following extension shall not be granted unless the Secretary of Labor had determined and certified to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title for the purpose of permitting the nonimmigrant to obtain such extension.

(D) The numerical limitation described in paragraph (1)(A) for a fiscal year shall be reduced by one for each alien granted an extension under subparagraph (C) during such year who has obtained 5 or more consecutive prior extensions.
(9)(A) Subject to subparagraphs (B) and (C), an alien who has already been counted toward the numerical limitation of paragraph (1)(B) during fiscal year 2013, 2014, or 2015 shall not again be counted toward such limitation during fiscal year 2016. Such an alien shall be considered a returning worker.
(B) A petition to admit or otherwise provide status under section 1101(a)(15)(H)(ii)(b) of this title shall include, with respect to a returning worker--
(i) all information and evidence that the Secretary of Homeland Security determines is required to support a petition for status under section 1101(a)(15)(H)(ii)(b) of this title;
(ii) the full name of the alien; and
(iii) a certification to the Department of Homeland Security that the alien is a returning worker.
(C) An H-2B visa or grant of nonimmigrant status for a returning worker shall be approved only if the alien is confirmed to be a returning worker by--
(i) the Department of State; or
(ii) if the alien is visa exempt or seeking to change to status under section 1101(a)(15)(H)(ii)(b) of this title, the Department of Homeland Security.
(10) The numerical limitations of paragraph (1)(B) shall be allocated for a fiscal year so that the total number of aliens subject to such numerical limits who enter the United States pursuant to a visa or are accorded nonimmigrant status under section 1101(a)(15)(H)(ii)(b) of this title during the first 6 months of such fiscal year is not more than 33,000.
(11)(A) The Secretary of State may not approve a number of initial applications submitted for aliens described in section 1101(a)(15)(E)(iii) of this title that is more than the applicable numerical limitation set out in this paragraph.
(B) The applicable numerical limitation referred to in subparagraph (A) is 10,500 for each fiscal year.
(C) The applicable numerical limitation referred to in subparagraph (A) shall only apply to principal aliens and not to the spouses or children of such aliens.
(h) Intention to abandon foreign residence
The fact that an alien is the beneficiary of an application for a preference status filed under section 1154 of this title or has otherwise sought permanent residence in the United States shall not constitute evidence of an intention to abandon a foreign residence for purposes of obtaining a visa as a nonimmigrant described in subparagraph (H)(i)(b) or (c), (L), or (V) of section 1101(a)(15) of this title or otherwise obtaining or maintaining the status of a nonimmigrant described in such subparagraph, if the alien had obtained a change of status under section 1258 of this

title to a classification as such a nonimmigrant before the alien's most recent departure from the United States.

(i) "Specialty occupation" defined

(1) Except as provided in paragraph (3), for purposes of section 1101(a)(15)(H)(i)(b) of this title, section 1101(a)(15)(E)(iii) of this title, and paragraph (2), the term "specialty occupation" means an occupation that requires--

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are--

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

(3) For purposes of section 1101(a)(15)(H)(i)(b1) of this title, the term "specialty occupation" means an occupation that requires--

(A) theoretical and practical application of a body of specialized knowledge; and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(j) Labor disputes

(1) Notwithstanding any other provision of this chapter, an alien who is a citizen of Canada or Mexico who seeks to enter the United States under and pursuant to the provisions of Section B, Section C, or Section D of Annex 16-A of the USMCA (as defined in section 4502 of Title 19), shall not be classified as a nonimmigrant under such provisions if there is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment, unless such alien establishes, pursuant to regulations promulgated by the Attorney General, that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout. Notice of a determination under this paragraph shall be given as may be required by paragraph 3 of article 16.4 of the USMCA. For purposes of this paragraph, the term "citizen of Mexico" means "citizen" as defined in article 16.1 of the USMCA.

(2) Notwithstanding any other provision of this chapter except section 1182(t)(1) of this title, and subject to regulations promulgated by the Secretary of Homeland Security, an alien who seeks to enter the United States under and pursuant to the

provisions of an agreement listed in subsection (g)(8)(A), and the spouse and children of such an alien if accompanying or following to join the alien, may be denied admission as a nonimmigrant under subparagraph (E), (L), or (H)(i)(b1) of section 1101(a)(15) of this title if there is in progress a labor dispute in the occupational classification at the place or intended place of employment, unless such alien establishes, pursuant to regulations promulgated by the Secretary of Homeland Security after consultation with the Secretary of Labor, that the alien's entry will not affect adversely the settlement of the labor dispute or the employment of any person who is involved in the labor dispute. Notice of a determination under this paragraph shall be given as may be required by such agreement.

(k) Numerical limitations; period of admission; conditions for admission and stay; annual report

(1) The number of aliens who may be provided a visa as nonimmigrants under section 1101(a)(15)(S)(i) of this title in any fiscal year may not exceed 200. The number of aliens who may be provided a visa as nonimmigrants under section 1101(a)(15)(S)(ii) of this title in any fiscal year may not exceed 50.

(2) The period of admission of an alien as such a nonimmigrant may not exceed 3 years. Such period may not be extended by the Attorney General.

(3) As a condition for the admission, and continued stay in lawful status, of such a nonimmigrant, the nonimmigrant--

(A) shall report not less often than quarterly to the Attorney General such information concerning the alien's whereabouts and activities as the Attorney General may require;

(B) may not be convicted of any criminal offense punishable by a term of imprisonment of 1 year or more after the date of such admission;

(C) must have executed a form that waives the nonimmigrant's right to contest, other than on the basis of an application for withholding of removal, any action for removal of the alien instituted before the alien obtains lawful permanent resident status; and

(D) shall abide by any other condition, limitation, or restriction imposed by the Attorney General.

(4) The Attorney General shall submit a report annually to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate concerning--

(A) the number of such nonimmigrants admitted;

(B) the number of successful criminal prosecutions or investigations resulting from cooperation of such aliens;

(C) the number of terrorist acts prevented or frustrated resulting from cooperation of such aliens;

(D) the number of such nonimmigrants whose admission or cooperation has not resulted in successful criminal prosecution or investigation or the prevention or frustration of a terrorist act; and
(E) the number of such nonimmigrants who have failed to report quarterly (as required under paragraph (3)) or who have been convicted of crimes in the United States after the date of their admission as such a nonimmigrant.
(l) Restrictions on waiver
(1) In the case of a request by an interested State agency, or by an interested Federal agency, for a waiver of the 2-year foreign residence requirement under section 1182(e) of this title on behalf of an alien described in clause (iii) of such section, the Attorney General shall not grant such waiver unless--
(A) in the case of an alien who is otherwise contractually obligated to return to a foreign country, the government of such country furnishes the Director of the United States Information Agency with a statement in writing that it has no objection to such waiver;
(B) in the case of a request by an interested State agency, the grant of such waiver would not cause the number of waivers allotted for that State for that fiscal year to exceed 30;
(C) in the case of a request by an interested Federal agency or by an interested State agency--
(i) the alien demonstrates a bona fide offer of full-time employment at a health facility or health care organization, which employment has been determined by the Attorney General to be in the public interest; and
(ii) the alien agrees to begin employment with the health facility or health care organization within 90 days of receiving such waiver, and agrees to continue to work for a total of not less than 3 years (unless the Attorney General determines that extenuating circumstances exist, such as closure of the facility or hardship to the alien, which would justify a lesser period of employment at such health facility or health care organization, in which case the alien must demonstrate another bona fide offer of employment at a health facility or health care organization for the remainder of such 3-year period); and
(D) in the case of a request by an interested Federal agency (other than a request by an interested Federal agency to employ the alien full-time in medical research or training) or by an interested State agency, the alien agrees to practice primary care or specialty medicine in accordance with paragraph (2) for a total of not less than 3 years only in the geographic area or areas which are designated by the Secretary of Health and Human Services as having a shortage of health care professionals, except that--

(i) in the case of a request by the Department of Veterans Affairs, the alien shall not be required to practice medicine in a geographic area designated by the Secretary;
(ii) in the case of a request by an interested State agency, the head of such State agency determines that the alien is to practice medicine under such agreement in a facility that serves patients who reside in one or more geographic areas so designated by the Secretary of Health and Human Services (without regard to whether such facility is located within such a designated geographic area), and the grant of such waiver would not cause the number of the waivers granted on behalf of aliens for such State for a fiscal year (within the limitation in subparagraph (B)) in accordance with the conditions of this clause to exceed 10; and
(iii) in the case of a request by an interested Federal agency or by an interested State agency for a waiver for an alien who agrees to practice specialty medicine in a facility located in a geographic area so designated by the Secretary of Health and Human Services, the request shall demonstrate, based on criteria established by such agency, that there is a shortage of health care professionals able to provide services in the appropriate medical specialty to the patients who will be served by the alien.
(2)(A) Notwithstanding section 1258(a)(2) of this title, the Attorney General may change the status of an alien who qualifies under this subsection and section 1182(e) of this title to that of an alien described in section 1101(a)(15)(H)(i)(b) of this title. The numerical limitations contained in subsection (g)(1)(A) shall not apply to any alien whose status is changed under the preceding sentence, if the alien obtained a waiver of the 2-year foreign residence requirement upon a request by an interested Federal agency or an interested State agency.
(B) No person who has obtained a change of status under subparagraph (A) and who has failed to fulfill the terms of the contract with the health facility or health care organization named in the waiver application shall be eligible to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status, 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 2 years following departure from the United States.
(3) Notwithstanding any other provision of this subsection, the 2-year foreign residence requirement under section 1182(e) of this title shall apply with respect to an alien described in clause (iii) of such section, who has not otherwise been accorded status under section 1101(a)(27)(H) of this title, if--
(A) at any time the alien ceases to comply with any agreement entered into under subparagraph (C) or (D) of paragraph (1); or
(B) the alien's employment ceases to benefit the public interest at any time during the 3-year period described in paragraph (1)(C).

(m) Nonimmigrant elementary and secondary school students

(1) An alien may not be accorded status as a nonimmigrant under clause (i) or (iii) of section 1101(a)(15)(F) of this title in order to pursue a course of study--

(A) at a public elementary school or in a publicly funded adult education program; or

(B) at a public secondary school unless--

(i) the aggregate period of such status at such a school does not exceed 12 months with respect to any alien, and (ii) the alien demonstrates that the alien has reimbursed the local educational agency that administers the school for the full, unsubsidized per capita cost of providing education at such school for the period of the alien's attendance.

(2) An alien who obtains the status of a nonimmigrant under clause (i) or (iii) of section 1101(a)(15)(F) of this title in order to pursue a course of study at a private elementary or secondary school or in a language training program that is not publicly funded shall be considered to have violated such status, and the alien's visa under section 1101(a)(15)(F) of this title shall be void, if the alien terminates or abandons such course of study at such a school and undertakes a course of study at a public elementary school, in a publicly funded adult education program, in a publicly funded adult education language training program, or at a public secondary school (unless the requirements of paragraph (1)(B) are met).

(n) Increased portability of H-1B status

(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien--

(A) who has been lawfully admitted into the United States;

(B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

(C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

(o) Nonimmigrants guilty of trafficking in persons

(1) No alien shall be eligible for admission to the United States under section 1101(a)(15)(T) of this title if there is substantial reason to believe that the alien has committed an act of a severe form of trafficking in persons (as defined in section 7102 of Title 22).

(2) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 1101(a)(15)(T) of this title may not exceed 5,000.
(3) The numerical limitation of paragraph (2) shall only apply to principal aliens and not to the spouses, sons, daughters, siblings, or parents of such aliens.
(4) An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 1101(a)(15)(T)(i) of this title, and who was under 21 years of age on the date on which such parent applied for such status, shall continue to be classified as a child for purposes of section 1101(a)(15)(T)(ii) of this title, if the alien attains 21 years of age after such parent's application was filed but while it was pending.
(5) An alien described in clause (i) of section 1101(a)(15)(T) of this title shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's application for status under such clause (i) is filed but while it is pending.
(6) In making a determination under section 1101(a)(15)(T)(i)(III)(aa) with respect to an alien, statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons (as defined in section 7102 of Title 22) appear to have been involved, shall be considered.
(7)(A) Except as provided in subparagraph (B), an alien who is issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(T) of this title may be granted such status for a period of not more than 4 years.
(B) An alien who is issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(T) of this title may extend the period of such status beyond the period described in subparagraph (A) if--
(i) a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking or certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity;
(ii) the alien is eligible for relief under section 1255(l) of this title and is unable to obtain such relief because regulations have not been issued to implement such section; or
(iii) the Secretary of Homeland Security determines that an extension of the period of such nonimmigrant status is warranted due to exceptional circumstances.
(C) Nonimmigrant status under section 1101(a)(15)(T) of this title shall be extended during the pendency of an application for adjustment of status under section 1255(l) of this title.
(p) Requirements applicable to section 1101(a)(15)(U) visas

(1) Petitioning procedures for section 1101(a)(15)(U) visas
The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title. This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii) of this title.
(2) Numerical limitations
(A) The number of aliens who may be issued visas or otherwise provided status as nonimmigrants under section 1101(a)(15)(U) of this title in any fiscal year shall not exceed 10,000.
(B) The numerical limitations in subparagraph (A) shall only apply to principal aliens described in section 1101(a)(15)(U)(i) of this title, and not to spouses, children, or, in the case of alien children, the alien parents of such children.
(3) Duties of the Attorney General with respect to "U" visa nonimmigrants
With respect to nonimmigrant aliens described in subsection (a)(15)(U) of section 1101 of this title--
(A) the Attorney General and other government officials, where appropriate, shall provide those aliens with referrals to nongovernmental organizations to advise the aliens regarding their options while in the United States and the resources available to them; and
(B) the Attorney General shall, during the period those aliens are in lawful temporary resident status under that subsection, provide the aliens with employment authorization.
(4) Credible evidence considered
In acting on any petition filed under this subsection, the consular officer or the Attorney General, as appropriate, shall consider any credible evidence relevant to the petition.
(5) Nonexclusive relief
Nothing in this subsection limits the ability of aliens who qualify for status under section 1101(a)(15)(U) of this title to seek any other immigration benefit or status for which the alien may be eligible.
(6) Duration of status
The authorized period of status of an alien as a nonimmigrant under section 1101(a)(15)(U) of this title shall be for a period of not more than 4 years, but shall be extended upon certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating or

prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title that the alien's presence in the United States is required to assist in the investigation or prosecution of such criminal activity. The Secretary of Homeland Security may extend, beyond the 4-year period authorized under this section, the authorized period of status of an alien as a nonimmigrant under section 1101(a)(15)(U) of this title if the Secretary determines that an extension of such period is warranted due to exceptional circumstances. Such alien's nonimmigrant status shall be extended beyond the 4-year period authorized under this section if the alien is eligible for relief under section 1255(m) of this title and is unable to obtain such relief because regulations have not been issued to implement such section and shall be extended during the pendency of an application for adjustment of status under section 1255(m) of this title. The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U) of this title.

(7) Age determinations

(A) Children

An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 1101(a)(15)(U)(i) of this title, and who was under 21 years of age on the date on which such parent petitioned for such status, shall continue to be classified as a child for purposes of section 1101(a)(15)(U)(ii) of this title, if the alien attains 21 years of age after such parent's petition was filed but while it was pending.

(B) Principal aliens

An alien described in clause (i) of section 1101(a)(15)(U) of this title shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's application for status under such clause (i) is filed but while it is pending.

(q) Employment of nonimmigrants described in section 1101(a)(15)(V)

(1) In the case of a nonimmigrant described in section 1101(a)(15)(V) of this title--

(A) the Attorney General shall authorize the alien to engage in employment in the United States during the period of authorized admission and shall provide the alien with an “employment authorized” endorsement or other appropriate document signifying authorization of employment; and

(B) the period of authorized admission as such a nonimmigrant shall terminate 30 days after the date on which any of the following is denied:

(i) The petition filed under section 1154 of this title to accord the alien a status under section 1153(a)(2)(A) of this title (or, in the case of a child granted nonimmigrant status based on eligibility to receive a visa under section 1153(d) of this title, the petition filed to accord the child's parent a status under section 1153(a)(2)(A) of this title).

(ii) The alien's application for an immigrant visa pursuant to the approval of such petition.
(iii) The alien's application for adjustment of status under section 1255 of this title pursuant to the approval of such petition.
(2) In determining whether an alien is eligible to be admitted to the United States as a nonimmigrant under section 1101(a)(15)(V) of this title, the grounds for inadmissibility specified in section 1182(a)(9)(B) of this title shall not apply.
(3) The status of an alien physically present in the United States may be adjusted by the Attorney General, in the discretion of the Attorney General and under such regulations as the Attorney General may prescribe, to that of a nonimmigrant under section 1101(a)(15)(V) of this title, if the alien--
(A) applies for such adjustment;
(B) satisfies the requirements of such section; and
(C) is eligible to be admitted to the United States, except in determining such admissibility, the grounds for inadmissibility specified in paragraphs (6)(A), (7), and (9)(B) of section 1182(a) of this title shall not apply.
(r) Visas of nonimmigrants described in section 1101(a)(15)(K)(ii)
(1) A visa shall not be issued under the provisions of section 1101(a)(15)(K)(ii) of this title until the consular officer has received a petition filed in the United States by the spouse of the applying alien and approved by the Attorney General. The petition shall be in such form and contain such information as the Attorney General shall, by regulation, prescribe. Such information shall include information on any criminal convictions of the petitioner for any specified crime described in paragraph (5)(B) and information on any permanent protection or restraining order issued against the petitioner related to any specified crime described in subsection[2] (5)(B)(i).
(2) In the case of an alien seeking admission under section 1101(a)(15)(K)(ii) of this title who concluded a marriage with a citizen of the United States outside the United States, the alien shall be considered inadmissible under section 1182(a)(7)(B) of this title if the alien is not at the time of application for admission in possession of a valid nonimmigrant visa issued by a consular officer in the foreign state in which the marriage was concluded.
(3) In the case of a nonimmigrant described in section 1101(a)(15)(K)(ii) of this title, and any child of such a nonimmigrant who was admitted as accompanying, or following to join, such a nonimmigrant, the period of authorized admission shall terminate 30 days after the date on which any of the following is denied:
(A) The petition filed under section 1154 of this title to accord the principal alien status under section 1151(b)(2)(A)(i) of this title.
(B) The principal alien's application for an immigrant visa pursuant to the approval of such petition.

(C) The principal alien's application for adjustment of status under section 1255 of this title pursuant to the approval of such petition.
(4)(A) The Secretary of Homeland Security shall create a database for the purpose of tracking multiple visa petitions filed for fiancé(e)s and spouses under clauses (i) and (ii) of section 1101(a)(15)(K) of this title. Upon approval of a second visa petition under section 1101(a)(15)(K) of this title for a fiancé(e) or spouse filed by the same United States citizen petitioner, the petitioner shall be notified by the Secretary that information concerning the petitioner has been entered into the multiple visa petition tracking database. All subsequent fiance(e) or spouse nonimmigrant visa petitions filed by that petitioner under such section shall be entered in the database.
(B)(i) Once a petitioner has had two fiance(e) or spousal petitions approved under clause (i) or (ii) of section 1101(a)(15)(K) of this title, if a subsequent petition is filed under such section less than 10 years after the date the first visa petition was filed under such section, the Secretary of Homeland Security shall notify both the petitioner and beneficiary of any such subsequent petition about the number of previously approved fiance(e) or spousal petitions listed in the database.
(ii) To notify the beneficiary as required by clause (i), the Secretary of Homeland Security shall provide such notice to the Secretary of State for inclusion in the mailing to the beneficiary described in section 1375a(a)(5)(A)(i) of this title.
(5) In this subsection:
(A) The terms “domestic violence”, “sexual assault”, “child abuse and neglect”, “dating violence”, “elder abuse”, and “stalking” have the meaning given such terms in section 3 of the Violence Against Women and Department of Justice Reauthorization Act of 2005.
(B) The term “specified crime” means the following:
(i) Domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, stalking, or an attempt to commit any such crime.
(ii) Homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or an attempt to commit any of the crimes described in this clause.
(iii) At least three convictions for crimes relating to a controlled substance or alcohol not arising from a single act.

8 U.S.C. § 1254a. Temporary protected status

(a) Granting of status
(1) In general
In the case of an alien who is a national of a foreign state designated under subsection (b) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section--
(A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect, and
(B) shall authorize the alien to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.
(2) Duration of work authorization
Work authorization provided under this section shall be effective throughout the period the alien is in temporary protected status under this section.
(3) Notice
(A) Upon the granting of temporary protected status under this section, the Attorney General shall provide the alien with information concerning such status under this section.
(B) If, at the time of initiation of a removal proceeding against an alien, the foreign state (of which the alien is a national) is designated under subsection (b), the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.
(C) If, at the time of designation of a foreign state under subsection (b), an alien (who is a national of such state) is in a removal proceeding under this subchapter, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.
(D) Notices under this paragraph shall be provided in a form and language that the alien can understand.
(4) Temporary treatment for eligible aliens
(A) In the case of an alien who can establish a prima facie case of eligibility for benefits under paragraph (1), but for the fact that the period of registration under subsection (c)(1)(A)(iv) has not begun, until the alien has had a reasonable opportunity to register during the first 30 days of such period, the Attorney General shall provide for the benefits of paragraph (1).

(B) In the case of an alien who establishes a prima facie case of eligibility for benefits under paragraph (1), until a final determination with respect to the alien's eligibility for such benefits under paragraph (1) has been made, the alien shall be provided such benefits.

(5) Clarification

Nothing in this section shall be construed as authorizing the Attorney General to deny temporary protected status to an alien based on the alien's immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of other rights under this chapter. The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this chapter.

(b) Designations

(1) In general

The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if--

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the Attorney General finds that--

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are

(or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.

(2) Effective period of designation for foreign states

The designation of a foreign state (or part of such foreign state) under paragraph (1) shall--

(A) take effect upon the date of publication of the designation under such paragraph, or such later date as the Attorney General may specify in the notice published under such paragraph, and

(B) shall remain in effect until the effective date of the termination of the designation under paragraph (3)(B).

For purposes of this section, the initial period of designation of a foreign state (or part thereof) under paragraph (1) is the period, specified by the Attorney General, of not less than 6 months and not more than 18 months.

(3) Periodic review, terminations, and extensions of designations

(A) Periodic review

At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the Attorney General, after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met. The Attorney General shall provide on a timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.

(B) Termination of designation

If the Attorney General determines under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the Attorney General shall terminate the designation by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C).

(C) Extension of designation

If the Attorney General does not determine under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for

an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).

(4) Information concerning protected status at time of designations

At the time of a designation of a foreign state under this subsection, the Attorney General shall make available information respecting the temporary protected status made available to aliens who are nationals of such designated foreign state.

(5) Review

(A) Designations

There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.

(B) Application to individuals

The Attorney General shall establish an administrative procedure for the review of the denial of benefits to aliens under this subsection. Such procedure shall not prevent an alien from asserting protection under this section in removal proceedings if the alien demonstrates that the alien is a national of a state designated under paragraph (1).

(c) Aliens eligible for temporary protected status

(1) In general

(A) Nationals of designated foreign states

Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(1) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state), meets the requirements of this paragraph only if--

(i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state;

(ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;

(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B); and

(iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

(B) Registration fee

The Attorney General may require payment of a reasonable fee as a condition of registering an alien under subparagraph (A)(iv) (including providing an alien with an "employment authorized" endorsement or other appropriate work permit under this section). The amount of any such fee shall not exceed $50. In the case of aliens registered pursuant to a designation under this section made after July 17, 1991, the

Attorney General may impose a separate, additional fee for providing an alien with documentation of work authorization. Notwithstanding section 3302 of Title 31, all fees collected under this subparagraph shall be credited to the appropriation to be used in carrying out this section.

(2) Eligibility standards

(A) Waiver of certain grounds for inadmissibility

In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1)--

(i) the provisions of paragraphs (5) and (7)(A) of section 1182(a) of this title shall not apply;

(ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but

(iii) the Attorney General may not waive--

(I) paragraphs (2)(A) and (2)(B) (relating to criminals) of such section,

(II) paragraph (2)(C) of such section (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana, or

(III) paragraphs (3)(A), (3)(B), (3)(C), and (3)(E) of such section (relating to national security and participation in the Nazi persecutions or those who have engaged in genocide).

(B) Aliens ineligible

An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that--

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or

(ii) the alien is described in section 1158(b)(2)(A) of this title.

(3) Withdrawal of temporary protected status

The Attorney General shall withdraw temporary protected status granted to an alien under this section if--

(A) the Attorney General finds that the alien was not in fact eligible for such status under this section,

(B) except as provided in paragraph (4) and permitted in subsection (f)(3), the alien has not remained continuously physically present in the United States from the date the alien first was granted temporary protected status under this section, or

(C) the alien fails, without good cause, to register with the Attorney General annually, at the end of each 12-month period after the granting of such status, in a form and manner specified by the Attorney General.

(4) Treatment of brief, casual, and innocent departures and certain other absences

(A) For purposes of paragraphs (1)(A)(i) and (3)(B), an alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States, without regard to whether such absences were authorized by the Attorney General.

(B) For purposes of paragraph (1)(A)(ii), an alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence described in subparagraph (A) or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

(5) Construction

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for temporary protected status under this section.

(6) Confidentiality of information

The Attorney General shall establish procedures to protect the confidentiality of information provided by aliens under this section.

(d) Documentation

(1) Initial issuance

Upon the granting of temporary protected status to an alien under this section, the Attorney General shall provide for the issuance of such temporary documentation and authorization as may be necessary to carry out the purposes of this section.

(2) Period of validity

Subject to paragraph (3), such documentation shall be valid during the initial period of designation of the foreign state (or part thereof) involved and any extension of such period. The Attorney General may stagger the periods of validity of the documentation and authorization in order to provide for an orderly renewal of such documentation and authorization and for an orderly transition (under paragraph (3)) upon the termination of a designation of a foreign state (or any part of such foreign state).

(3) Effective date of terminations

If the Attorney General terminates the designation of a foreign state (or part of such foreign state) under subsection (b)(3)(B), such termination shall only apply to documentation and authorization issued or renewed after the effective date of the publication of notice of the determination under that subsection (or, at the Attorney General's option, after such period after the effective date of the determination as the Attorney General determines to be appropriate in order to provide for an orderly transition).

(4) Detention of alien

An alien provided temporary protected status under this section shall not be detained by the Attorney General on the basis of the alien's immigration status in the United States.

(e) Relation of period of temporary protected status to cancellation of removal

With respect to an alien granted temporary protected status under this section, the period of such status shall not be counted as a period of physical presence in the United States for purposes of section 1229b(a) of this title, unless the Attorney General determines that extreme hardship exists. Such period shall not cause a break in the continuity of residence of the period before and after such period for purposes of such section.

(f) Benefits and status during period of temporary protected status

During a period in which an alien is granted temporary protected status under this section--

(1) the alien shall not be considered to be permanently residing in the United States under color of law;

(2) the alien may be deemed ineligible for public assistance by a State (as defined in section 1101(a)(36) of this title) or any political subdivision thereof which furnishes such assistance;

(3) the alien may travel abroad with the prior consent of the Attorney General; and

(4) for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

(g) Exclusive remedy

Except as otherwise specifically provided, this section shall constitute the exclusive authority of the Attorney General under law to permit aliens who are or may become otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality.

(h) Limitation on consideration in Senate of legislation adjusting status

(1) In general

Except as provided in paragraph (2), it shall not be in order in the Senate to consider any bill, resolution, or amendment that--

(A) provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section, or

(B) has the effect of amending this subsection or limiting the application of this subsection.

(2) Supermajority required

Paragraph (1) may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate duly chosen and sworn shall be required

in the Senate to sustain an appeal of the ruling of the Chair on a point of order raised under paragraph (1).

(3) Rules

Paragraphs (1) and (2) are enacted--

(A) as an exercise of the rulemaking power of the Senate and as such they are deemed a part of the rules of the Senate, but applicable only with respect to the matters described in paragraph (1) and supersede other rules of the Senate only to the extent that such paragraphs are inconsistent therewith; and

(B) with full recognition of the constitutional right of the Senate to change such rules at any time, in the same manner as in the case of any other rule of the Senate.

(i) Annual report and review

(1) Annual report

Not later than March 1 of each year (beginning with 1992), the Attorney General, after consultation with the appropriate agencies of the Government, shall submit a report to the Committees on the Judiciary of the House of Representatives and of the Senate on the operation of this section during the previous year. Each report shall include--

(A) a listing of the foreign states or parts thereof designated under this section,

(B) the number of nationals of each such state who have been granted temporary protected status under this section and their immigration status before being granted such status, and

(C) an explanation of the reasons why foreign states or parts thereof were designated under subsection (b)(1) and, with respect to foreign states or parts thereof previously designated, why the designation was terminated or extended under subsection (b)(3).

(2) Committee report

No later than 180 days after the date of receipt of such a report, the Committee on the Judiciary of each House of Congress shall report to its respective House such oversight findings and legislation as it deems appropriate.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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