Statement for the Record of the Niskanen Center[1]
Submitted to
House Committee on the Judiciary
Markup of
"Visa Integrity and Security Act of 2016"
May 25, 2016

The Visa Integrity and Security Act of 2016 (H.R. 5203) intends to protect U.S. citizens from terrorism by increasing the burden on visa applicants to prove eligibility to immigrate to the United States. While several provisions would enhance U.S. security if they were narrowed and additional safeguards were implemented, others would have the effect of shutting off legal immigration to the United States with catastrophic consequences for U.S. businesses, families, and consumers.

I. Increasing the burden of proof would result in denials and delays for legitimate visa applicants.

Section 5 of H.R. 5203 would significantly increase the burden of proof for visa applicants, raising it from the current "to the satisfaction" of the consular officer or the Secretary of Homeland Security under sections 291 and 214 of the Immigration and Nationality Act (INA) to the much higher "clear and convincing" standard. This change would impose a one-sized-fits-all approach upon all visa categories and injure genuine visa applicants, U.S. citizen sponsors, and U.S. industries.

The new standard is overly burdensome for visa applicants. For comparison, it is a much higher evidentiary standard than is necessary for victory in a civil case, which requires only "a preponderance of evidence," meaning that it is more likely than not (or greater than 50 percent chance) that the facts support the plaintiff's case.[1] Clear and convincing would raise the standard to significantly more likely than not (or a much greater than 50 percent chance) that the facts support the visa application. The only higher standard than clear and convincing is "beyond a reasonable doubt," which is required only for criminal trials to prevent the taking of life or liberty from the innocent.

In other words, H.R. 5203 would create the bizarre situation in which plaintiffs could receive hundreds of millions of dollars in damages based on less certain evidence than would be required for them to travel, work, or study in the United States. Indeed, the exact same evidence could be used to produce such disparate results.

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[1] The Niskanen Center is a libertarian 501(c)(3) nonprofit think tank located in Washington, D.C. founded in 2014. https://niskanencenter.org/about/

As a consequence of this unnecessarily burdensome standard, many legitimate visa applications will be delayed or denied. This will injure U.S. citizen sponsors and impose significant costs on the U.S. economy. Here are a few examples of the types of damages that this bill will impose:

- **Nonimmigrant visas**: The higher burden would make it impossible for millions of foreign tourists, workers, and students who enter the United States temporarily to prove "nonimmigrant" intent—that is, that they plan to return to their residence abroad when their visa expires. The law requires the reading into the intentions of the visa applicant, which will inevitably lead to less than certain conclusions no matter how compelling the candidate's evidence is. But in an unprecedented move in the history of immigration law, H.R. 5203 would require consular officers to find clear and convincing evidence *for a mental state*.

  This is an incredible overreach partly due to the fact that many consular officers do not even rely on documents to determine intent. One embassy website actually states, "Visa officers seldom dwell upon documents. What is at issue is intent [...]. If [an applicant's] visa was refused, it is highly unlikely that any document you could provide would significantly alter the visa officer's decision about your intent."[2] In other words, it is unlikely that a visa applicant could meet this higher burden of proof by supplying more documents.

- **Employment-based petitions**: The higher burden would wreak havoc on the employment-based immigration system. Foreign workers who are receiving green cards in the United States must demonstrate that they fit into intentionally vague categories, such as "extraordinary ability" or "outstanding." Demonstrating that a worker falls into these categories is exceptionally difficult under current law, requiring extensive documentation and supporting evidence. Again, this bill would have the Department of Homeland Security turn away foreign workers who it actually believed did have "extraordinary ability" but could not meet the even higher test of proving it at a much higher evidentiary standard.

- **Asylees and refugees**: The higher burden would exclude most asylees and refugees from protection under U.S. immigration laws. Refugees and asylees who by definition have fled their homes simply lack access to the kind of documents necessary to meet this burden of proof. A Christian refugee, for example, who the Islamic State had tortured could be denied despite physical injuries, if he or she could not prove that it was *significantly* more likely than not that religion motivated the torturers. The absolutely astounding fact is that this bill would force the Department of Homeland Security to deport asylum-seekers who its officers

actually believed were likely to be victims of persecution and violence. This bill fails the Holocaust test: that we never again send back people to persecution.

The committee should not be lulled into a belief that the higher burden will not have dramatic effects on the legal immigration system. When the Obama administration simply clarified that the evidentiary standard for credible fear determinations in asylum proceedings was a significant possibility rather than a mere possibility of a successful claim,[3] the approval rate fell 10 percent.[4] Significant possibility is substantially less than both a preponderance of the evidence and clear and convincing, and the memo only clarified, rather than changed, the standard. This example demonstrates that the committee should expect an even more dramatic increase in refusals under H.R. 5203.

II. H.R. 5203's higher evidentiary standard fails to address the risk of terrorism.

Fear of terrorism simply does not justify these social and economic harms. The sponsors cite the terrorist attack in San Bernardino as a reason to pass their legislation.[5] Yet the issue in this case was a lower standard of proof of eligibility. No one has disputed that the spouse was a bona-fide fiancé and thus eligible for a K-1 visa. Instead, the issue was an inability on the part of various agencies to identify evidence of inadmissibility. Most prominently, it has been asserted that her public social media posts were not reviewed, although this assertion has been disputed.[6]

Likewise, a higher burden of proof would not have prevented the 9/11 terrorist attacks. The 9/11 Commission Report on Foreign Terrorist Travel did not call for a higher evidentiary standard. It noted that the mistakes made prior to 9/11 were failures to utilize the evidence that the agencies had obtained on the applicants. Three of the hijackers were already in intelligence databases. Two others lied about their travel histories that the agencies had recorded. Several used false passports that could have been identified.[7]

Moreover, the belief that the higher standard would target national security threats is likewise misguided. Nefarious actors are often the best-coached and best-prepared applicants to beat a screening process. For example, as the 9/11 Commission found, the 1993 World Trade Center bombers "carried a variety of documents to support their alias identities, including identification cards, bank records, education records, and medical records."[8] In other words, H.R. 5203 is much more likely to injure genuine applicants that lack the resources or access to documents they need to prove their eligibility.

In general, the bill doubles down a flawed approach to combatting terrorism that attempts to dramatically increase the number of inputs into America's security services, rather than improve the methods of evaluating the inputs that it already has.

Finally, there is simply no evidence that the current standard is inappropriate for enforcing the grounds of inadmissibility already in law. In 2015, over 3.3 million applications were denied, based on over 3.4 million determinations of ineligibility grounds.[9] These numbers include hundreds of applicants rejected on terrorist-related grounds. Under the Obama administration from 2009 to 2015, 2,022 visa applicants were rejected on terrorism-related grounds.[10]

The United States has a long tradition of accepting millions of foreign nationals from around the world. It vets each applicant for ties to terrorism, but a higher burden of proof for eligibility for a visa will do nothing more than jam up the system for legitimate applicants, while not addressing the failures that have led to tragic acts of violence.

III. H.R. 5203 requires overly broad regulations that impose unnecessary and burdensome costs on visa applicants and U.S. citizen sponsors

Several provisions of H.R. 5203 would make immigrating or traveling to the United States significantly more expensive without any corresponding benefits. The sum economic costs of each of these provisions will almost certainly be in the billions of dollars, directly or indirectly. Some of these provisions could be narrowed or reworked, while others should simply be eliminated.

- **Higher burden of proof**: More stringent evidentiary requirements will inevitably increase the costs associated with obtaining visas. Higher vetting requirements result in greater staffing requirements. Visa delays are already a major problem for a variety of visa categories, especially family-based green card petitions. Imposing new costs will only lengthen family separation and keep talented foreign workers overseas, costing U.S. businesses productivity.

- **In-Person Interviews**: An in-person interview is a valuable tool for vetting visa applicants. However, Section 2 of H.R. 5203 would require expensive and manpower intensive in-person interviews for "any benefit" under the INA without exception. This provision is completely unnecessary for hundreds of thousands of temporary workers and legal permanent residents who are renewing their statuses in the United States.

In the vast majority of these cases, these applicants would have already been interviewed in the past. H-1B visa holders, for example, must file a new renewal every year after their sixth year as they wait for a green card.[11] Requiring an in-person interview each year would impose enormous costs on the agencies and immigrants without any conceivable national security benefit. Such a broad mandate would ultimately result in huge waits and enormous pressure on officers, creating more mistakes, not fewer.

- **DNA Testing**: DNA tests can be an effective and appropriate measure in order to verify claims of a biological relationship made in support of a visa application, and the Department of Homeland Security currently has the authority to request DNA tests on a case-by-case basis in those cases. Section 2 of H.R. 5203, however, would make DNA testing mandatory in all cases "if the eligibility for the immigration benefit is predicated on the fact that a biological relationship exists." However, there are no such immigration benefits.

  Family-based immigration categories are entirely defined by legal relationships, not biological ones. A father or mother is no less a father or mother for purposes of immigration law of a child who was adopted than one who was conceived naturally. Indeed, the phrase "biological relationship" appears nowhere in the INA. Even in the context of citizenship by birth, biological or genetic connection is not required in statute.[12]

  Moreover, adopting DNA tests in order to verify every purported family relationship would be incredibly costly and time-consuming. The Department of Homeland Security admitted more than 1.7 billion people to the United States from 2005 to 2014.[13] Almost every admission category allows for eligibility for spouses and children, all of whom would have to be DNA-tested for trips to Disney Land or seasonal farm labor—every single time that they entered the United States.

  DNA testing can cost as much as $600 for laboratory results, and it takes weeks to complete. Even assuming 100 percent accuracy, the effects of this single provision would be so dramatic as to effectively shutdown the legal immigration system for all derivative beneficiaries.

While some of these costs will be directly borne by American citizens, all of them will ultimately be imposed indirectly on Americans. Employers will pass along higher costs from more expensive visa petitions to American consumers. They will do the same when workers arrive late or not at all. Tourists who fail to visit the United States will

undermine U.S. tourism industries that hire American workers. Fewer foreign entrepreneurs would have the same effect.

IV. H.R. 5203's social media vetting provisions lack safeguards

Section 2 of H.R. 5203 would also require background checks a "review of the alien's publicly available interactions on and posting of material to the Internet (including social media services)." Reviewing publicly available social media activity is a reasonable approach to security vetting on a case-by-case basis. However, this provision lacks any safeguards to prevent the denial of visas based on unverified information supposedly relating to an applicant obtained on the Internet.

With hundreds of millions of applicants, the Department of Homeland Security and the State Department cannot reasonably be expected to verify that any social media postings that it finds are actually related to the individual who is applying for a visa rather than someone with the same name. Requesting the IP addresses of every person with the same name in order to figure out whether a post came from which person would simply be impossible for the agencies and, again, result in a *de facto* ban on legal immigration.

Leaked administration documents already show that individuals can be added to terrorist databases based on a single unverified post to Facebook or Twitter. In order to be added to watch lists that can result in a lifetime of inadmissibility to the United States, agencies may rely upon "single source information, including but not limited to... postings on social media" and "nominate even if that source is uncorroborated."[14] Expanding social media vetting to include every single applicant for a visa holds the potential for the erroneous inclusion of thousands of individuals into terrorist databases based on unverified (and unchallengeable) information.

[1] Bryant M. Bennett, Evidence: Clear and Convincing Proof: Appellate Review, 32 Cal. L. Rev. 74 (1944). Available at: http://scholarship.law.berkeley.edu/californialawreview/vol32/iss1/3.
[2] Embassy of the United States Barbados, the Easter Caribbean, and the OECS. Visas. Available at: http://barbados.usembassy.gov/visa-faq.html.
[3] https://s3.amazonaws.com/s3.documentcloud.org/documents/1115240/credible-fear1.pdf
[4] https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CredibleFear-RF-FY15-Q1.pdf
https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CredibleFear-RF-FY15-Q1.pdf
[5] https://judiciary.house.gov/press-release/forbes-goodlatte-gowdy-introduce-bill-strengthen-visa-security/
[6] https://www.washingtonpost.com/news/fact-checker/wp/2016/03/26/ted-cruzs-false-claim-the-san-bernardino-shooter-posted-publicly-on-social-media-a-call-to-jihad/
[7] P. 139. http://www.9-11commission.gov/staff_statements/911_TerrTrav_Monograph.pdf
[8] P. 47
[9] Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act FY 2015). Available at: https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableXX.pdf. Note: The total number of grounds of ineligibility exceeds the number of applications refused because one applicant may be found ineligible under more than one section of the INA.
[10] https://travel.state.gov/content/visas/en/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2009.html
[11] https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-22204.html
[12] https://www.fas.org/sgp/crs/misc/citpol.pdf
[13] https://www.dhs.gov/yearbook-immigration-statistics-2014-nonimmigrant-admissions
[14] https://books.google.com/books?id=PtZNCwAAQBAJ&pg=PA21&lpg=PA21&dq=uncorroborated+social+media+post+assassination+complex&source=bl&ots=s3Hy32aQHv&sig=NWv77RWboZb-dWo6-_o1WdN57Jk&hl=en&sa=X&ved=0ahUKEwit48C1qPTMAhWMPz4KHZuHAvYQ6AEIJTAB#v=onepage&q=uncorroborated%20social%20media%20post%20assassination%20complex&f=false